

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1982

Volume I

*Summary records
of the meetings
of the thirty-fourth session*

3 May-23 July 1982

UNITED NATIONS



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INTRODUCTORY NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the relevant year (for example, *Yearbook ... 1981*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: Summary records of the meetings of the session

Volume II (Part One): Reports of special rapporteurs and other documents examined during the session

Volume II (Part Two): Report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed text of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the thirty-fourth session of the Commission (A/CN.4/SR.1698-A/CN.4/SR.1752), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Chief Richard Osuolale A. AKINJIDE	Nigeria	Mr. Stephen C. McCAFFREY	United States of America
Mr. Riyadh Mahmoud Sami AL-QAYSI	Iraq	Mr. Zhengyu Ni	China
Mr. Mikuin Leliel BALANDA	Zaire	Mr. Frank X. NJENGA	Kenya
Mr. Julio BARBOZA	Argentina	Mr. Motoo OGISO	Japan
Mr. Boutros BOUTROS GHALI	Egypt	Mr. Syed Sharifuddin PIRZADA	Pakistan
Mr. Carlos CALERO RODRIGUES	Brazil	Mr. Robert Q. QUENTIN-BAXTER	New Zealand
Mr. Jorge CASTAÑEDA	Mexico	Mr. Edilbert RAZAFINDRALAMBO	Madagascar
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Paul REUTER	France
Mr. Khalafalla EL RASHEED MOHAMED AHMED	Sudan	Mr. Willem RIPHAGEN	Netherlands
Mr. Jens EVENSEN	Norway	Sir Ian SINCLAIR	United Kingdom of Great Britain and Northern Ireland
Mr. Constantin FLITAN	Romania	Mr. Constantin A. STAVROPOULOS	Greece
Mr. Laurel B. FRANCIS	Jamaica	Mr. Sompong SUCHARITKUL	Thailand
Mr. Jorge E. ILLUECA	Panama	Mr. Doudou THIAM	Senegal
Mr. Andreas J. JACOVIDES	Cyprus	Mr. Nikolai A. USHAKOV	Union of Soviet Socialist Republics
Mr. S. P. JAGOTA	India	Mr. Alexander YANKOV	Bulgaria
Mr. Abdul G. KOROMA	Sierra Leone		
Mr. José Manuel LACLETA MUÑOZ	Spain		
Mr. Ahmed MAHIU	Algeria		
Mr. Chafic MALEK	Lebanon		

OFFICERS

<i>Chairman:</i>	Mr. Paul REUTER
<i>First Vice-Chairman:</i>	Mr. Leonardo DÍAZ GONZÁLEZ
<i>Second Vice-Chairman:</i>	Mr. Constantin FLITAN
<i>Chairman of the Drafting Committee:</i>	Mr. Sompong SUCHARITKUL
<i>Rapporteur:</i>	Mr. Frank X. NJENGA

Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

LIST OF MEMBERS PRESENT AT THE MEETINGS OF THE COMMISSION

The decision taken by the Commission concerning the listing in the summary record of each meeting of the names of Commission members present at that meeting appears in paragraph 272 of its report on its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two)).

AGENDA

The Commission adopted the following agenda at its 1698th meeting, held on 3 May 1982:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Question of treaties concluded between States and international organizations or between two or more international organizations
3. State responsibility
4. International liability for injurious consequences arising out of acts not prohibited by international law
5. The law of the non-navigational uses of international watercourses
6. Jurisdictional immunities of States and their property
7. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
8. Draft Code of Offences against the Peace and Security of Mankind (paragraphs 1 and 2 of General Assembly resolution 36/106 of 10 December 1981)
9. Relations between States and international organizations (second part of the topic)
10. Programme and methods of work, including the question of documentation of the Commission
11. Co-operation with other bodies
12. Date and place of the thirty-fifth session
13. Other business

ABBREVIATIONS

ACP (States)	African, Caribbean and Pacific States
ASEAN	Association of South-East Asian Nations
CENTO	Central Treaty Organization
CMEA	Council for Mutual Economic Assistance
ECAFE	Economic Commission for Asia and the Far East (now ESCAP)
ECE	Economic Commission for Europe
EEC	European Economic Community
ECOWAS	Economic Community of West African States
ECWA	Economic Commission for Western Asia
ESCAP	Economic and Social Commission for Asia and the Pacific
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OUA	Organization of African Unity
PCIJ	Permanent Court of International Justice
WHO	World Health Organization
World Bank	International Bank for Reconstruction and Development
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24, up to and including 1930)

PRINCIPAL CONVENTIONS
cited in the present volume

- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)
(United Nations, *Treaty Series*, vol. 500, p. 95)
- Vienna Convention on Consular Relations (Vienna, 24 April 1963)
(United Nations, *Treaty Series*, vol. 596, p. 261)
- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)
(*Official Records of the United Nations Conference on the Law of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287)
- Convention on Special Missions (New York, 8 December 1969)
(General Assembly Resolution 2530 (XXIV), annex)
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)
(*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207)
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)
(*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185)

CHECK-LIST OF DOCUMENTS OF THE THIRTY-FOURTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/348 [and Corr.1]	Third report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	Reproduced in <i>Yearbook ... 1982</i> , vol. II (Part One)
A/CN.4/349/Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see p. viii above
A/CN.4/350 and Add.1-6 [and Add.6/Corr.1] and Add.7-11	Question of treaties concluded between States and international organizations or between two or more international organizations: comments and observations of Governments and principal international organizations on draft articles 61 to 80 and annex	Reproduced as annex to the Commission's report (<i>Yearbook ... 1982</i> , vol. II (Part Two))
A/CN.4/351 and Add.1 and 2 [and Add.2/Corr.1] and Add.3 [and Add.3/Corr.1]	Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts	Reproduced in <i>Yearbook ... 1982</i> , vol. II (Part One)
A/CN.4/352 and Add.1	The law of the non-navigational uses of international watercourses: Replies of Governments to the Commission's questionnaire	<i>Idem</i>
A/CN.4/353	Eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur	<i>Idem</i>
A/CN.4/354 [and Corr.1] and Add.1 and 2	Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	<i>Idem</i>
A/CN.4/355	Filling of casual vacancies: note by the Secretariat	<i>Idem</i>
A/CN.4/355/Add.1 and 2	<i>Idem</i> . Addendum to note by the Secretariat: list of candidates and biographical data	Mimeographed
A/CN.4/356 and Add.1 [and Add.1/Corr.1] and Add.2 and 3	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: information received from Governments	Reproduced in <i>Yearbook ... 1982</i> , vol. II (Part One)
A/CN.4/357 [and Corr.1]	Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem</i>
A/CN.4/358 and Add.1-4	Draft Code of Offences against the Peace and Security of Mankind: comments and observations received from Governments pursuant to General Assembly resolution 36/106	<i>Idem</i>
A/CN.4/359 [and Corr.1-4] and Add.1	Third report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem</i>
A/CN.4/360 [and Corr.1]	Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	<i>Idem</i>
A/CN.4/L.339	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly	Mimeographed
A/CN.4/L.340	Statement by the Legal Counsel at the opening of the thirty-fourth session of the Commission	See summary record of the 1698th meeting, paras. 7-26
A/CN.4/L.341	Draft articles on the law of treaties between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: article 2, para. 1 (<i>c bis</i>) and (<i>h</i>), article 5, article 7, para. 4, article 20, para. 3, articles 27 to 36, 36 <i>bis</i> , 37 to 80 and annex	Texts reproduced in summary record of the 1740th meeting, para. 2

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.342	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: article 1, article 2, para. 1 (a), and articles 7 to 9	Texts reproduced in summary records of the 1749th meeting, paras. 26 and 47, and 1750th meeting, paras. 3 and 9
A/CN.4/L.343	Draft report of the International Law Commission on the work of its thirty-fourth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10 (A/37/10)</i> . The final text appears in <i>Yearbook... 1982</i> , vol. II (Part Two)
A/CN.4/L.344 and Add.1-6	<i>Idem</i> : chapter II (Question of treaties concluded between States and international organizations or between two or more international organizations)	<i>Idem</i>
A/CN.4/L.345 and Add.1	<i>Idem</i> : chapter V (Jurisdictional immunities of States and their property)	<i>Idem</i>
A/CN.4/L.346	<i>Idem</i> : chapter III (State responsibility)	<i>Idem</i>
A/CN.4/L.347 and Add.1	<i>Idem</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i>
A/CN.4/L.348	<i>Idem</i> : chapter VI (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i>
A/CN.4/L.349 and Add.1 and 2	<i>Idem</i> : chapter VII (Other decisions and conclusions of the Commission)	<i>Idem</i>
A/CN.4/L.350	<i>Idem</i> : annex (Comments and observations of Governments and principal international organizations on articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-second session)	<i>Idem</i>
A/CN.4/L.351	Jurisdictional immunities of States and their property: revised texts of articles 11 and 12 submitted by the Special Rapporteur	Mimeographed
A/CN.4/SR.1698-SR.1752	Provisional summary records of the 1698th to 1752nd meetings of the International Law Commission	Mimeographed. The final text appears in the present volume

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE THIRTY-FOURTH SESSION

Held at Geneva from 3 May to 23 July 1982

1698th MEETING

Monday, 3 May 1982, at 3.15 p.m.

Outgoing Chairman: Mr. Doudou THIAM

Chairman: Mr. Paul REUTER

Opening of the session

1. The OUTGOING CHAIRMAN declared open the thirty-fourth session of the International Law Commission.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN welcomed old and new members of the Commission and said that the increase in the membership further to the decision by the General Assembly¹ attested to the international community's growing interest in the Commission. That interest was also apparent in the discussions in the Sixth Committee, in the course of which the Commission's work had been the subject of careful scrutiny. In its resolution 36/114 of 10 December 1981, the General Assembly displayed its concern that there should be an improvement in the Commission's methods of work. At the thirty-sixth session of the General Assembly, in the Sixth Committee, he had underlined the special character of the Commission and, consequently, the special features of its methods of work.² The Commission should none the less seek out new methods whenever the effectiveness of its work so required.

3. In resolution 36/114, the General Assembly accorded priority to the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations and to the preparation of part 2 of the draft articles on responsibility of States for internationally wrongful acts, without prejudice to the work on the other subjects currently under consideration. The Assembly also stressed that it would be desirable for the Commission to appoint, at the commencement of its present session, a new special rapporteur on the topic of the law of the non-navigational uses of international watercourses. He hoped that, during their five-year term of office, the

members of the Commission would accomplish fruitful work.

4. Over the past year, the Commission had been represented at sessions of the European Committee on Legal Co-operation and the Inter-American Juridical Committee, two bodies which hoped to enter into closer co-operation with the Commission. In addition, the European Committee on Legal Co-operation would like the representatives of the various bodies that co-operated with the Commission to meet in Geneva, with a view to establishing multilateral contacts.

5. Lastly, on behalf of the Commission, he conveyed all good wishes to Mr. Bedjaoui, a former member of the Commission who had now been elected a Judge of the International Court of Justice.

Tribute to the memory of Sir Humphrey Waldock, Mr. Abdullah El-Erian, Mr. Mustapha Kamil Yasseen and Mr. Shushi Hsu

6. The OUTGOING CHAIRMAN paid tribute to the memory of four former members of the Commission who had recently died: Sir Humphrey Waldock, Mr. El-Erian, Mr. Yasseen and Mr. Hsu.

At the invitation of the outgoing Chairman, the members of the Commission observed a minute of silence in tribute to their memory.

Statement by the Under-Secretary-General for Legal Affairs, the Legal Counsel

7. Mr. SUY (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that, by increasing the number of the Commission's members to 34 in accordance with an agreed set pattern of regional distribution of seats, the General Assembly had sought to achieve more faithful compliance, in the light of present-day conditions, with article 8 of the Commission's Statute. Thus, it had once again assured representation in the Commission of the main forms of civilization, which were now defined not only on political and cultural grounds but also in economic and social terms and in terms of the principal legal systems of the world. All of the outgoing members who had stood for election had indeed been re-elected, but the Commission now consisted in the main of members who had been elected for the first time. On behalf of the Secretary-General, he welcomed them and wished them every success in the performance of their important duties.

¹ General Assembly resolution 36/39 of 18 November 1981.

² *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 50th meeting, paras. 50-55.*

8. The recent election of M. Bedjaoui, a former member of the Commission, to the International Court of Justice was extremely gratifying. As a result of that election, the majority of the Court still consisted of former members of the Commission, something which was renewed proof of the great value which the representatives of sovereign States attached to the fact of membership in the Commission.

9. He shared in the sorrow felt by the international legal community at the recent loss of several former members of the Commission. Their valuable contributions to the noble goals of legal science already occupied their rightful place in contemporary public international law.

10. The Commission was meeting for the first time in its expanded form, and it might therefore be appropriate to recall that in 1975 the Commission had considered a set of proposals for completing, by the end of the Commission's five-year term of office in 1981, the first or second readings of draft articles on the topics then included in its programme of work.³ Those objectives, reaffirmed in 1977 at the start of the last five-year term of office of the Commission,⁴ had been largely achieved. In 1980, at its thirty-second session, the Commission had completed the first reading of the draft articles on treaties concluded between States and international organizations or between international organizations and also the articles constituting Part 1 of the draft on State responsibility. Furthermore, at its thirtieth session, in 1978, and its thirty-third session, in 1981, the Commission had concluded the second reading of the draft articles on the most-favoured-nation clause and the draft articles on succession of States in respect of State property, archives and debts. Those two drafts were now before the General Assembly and, at its thirty-sixth session, the Assembly had decided to convene early in 1983 a conference of plenipotentiaries to consider the draft on succession of States with a view to concluding a convention that would develop and codify the law on those aspects of the subject covered by the draft.⁵ The adoption of such a convention would undoubtedly constitute a notable addition to the already long list of legal instruments based on the work done by the Commission.

11. As the Commission itself had acknowledged at its thirty-third session:

The establishment, in conformity with relevant General Assembly resolutions, of general objectives and priorities guiding the programme of work to be undertaken by the Commission during a term of its membership, or for a longer period if appropriate, appears to be an efficient and practical method for the planning and timely carrying out of the work programme of the Commission.⁶

Thus, the Commission had then anticipated establishing such general objectives and priorities at its thirty-fourth session, so as to guide its study of the topics on its cur-

rent programme of work for forthcoming sessions in the light of the relevant General Assembly recommendations.⁷ The conclusion reached by the Commission in that regard had been specifically endorsed by the General Assembly in paragraph 4 of resolution 36/114 of 10 December 1981.

12. At its thirty-third session, the Commission, emphasizing its essential character as a permanent body and without wishing to prejudice the freedom of action of its membership as newly constituted in 1982, had reached some conclusions regarding the work to be carried out at the thirty-fourth session with a view to ensuring the continuity of the work on the topics on its current programme of work. In so doing, the Commission had once again reaffirmed its decision that a special rapporteur re-elected by the General Assembly as a member of the Commission should continue his work on his topic unless and until the Commission, as newly constituted, decided otherwise.⁸

13. At the close of the Commission's thirty-third session, the current programme of work had consisted of the following seven topics: (1) Question of treaties concluded between States and international organizations or between two or more international organizations; (2) State responsibility; (3) International liability for injurious consequences arising out of acts not prohibited by international law; (4) Jurisdictional immunities of States and their property; (5) Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; (6) Relations between States and international organizations (second part of the topic); and (7) The law of the non-navigational uses of international watercourses. Except in the case of the special rapporteur for the last-mentioned topic, the members of the Commission who had previously been chosen as special rapporteurs for the other topics had all been re-elected by the General Assembly. They had thus been in a position to continue their work on their respective topics, and their new reports had already been or would be submitted to the Commission at the present session.

14. As far as the law of the non-navigational uses of international watercourses was concerned, due to the resignation of the Special Rapporteur, Mr. Schwebel, because of his election to the International Court of Justice, the Commission had not taken up the topic at its thirty-third session, but had stated that it intended to appoint a new special rapporteur. The General Assembly had noted that intention in resolution 36/114 and had stressed that it was desirable for the Commission to appoint a new special rapporteur at the commencement of the present session, thereby ensuring the continuity of the work on the topic. Despite the lack of a special rapporteur, the Commission had before it a third report on the topic submitted by the former Special Rapporteur (A/CN.4/348), who had begun the preparation of that report before he had resigned from the Commission.

³ *Yearbook ... 1975*, vol. II, p. 184, document A/10010/Rev. 1, chap. VI, sect. B, paras. 139-147.

⁴ *Yearbook ... 1977*, vol. II (Part Two), pp. 127-129, paras. 98-106.

⁵ General Assembly resolution 36/113 of 10 December 1981.

⁶ *Yearbook ... 1981*, vol. II (Part Two), p.164, para. 258.

⁷ *Ibid.*, p.163, para. 254.

⁸ *Ibid.*, para. 253.

15. In considering in 1981 the question of the programme of work for the present session, the Commission had also taken into account the general objectives and priorities which, with the approval of the General Assembly, it had established at previous sessions and the recommendations contained in General Assembly resolution 35/163, of 15 December 1980, as well as the progress achieved so far in the study of the topics considered at the thirty-third session. It had reached conclusions regarding its work on each of the seven topics constituting its current programme of work. The Commission had nevertheless indicated that, in the time available, it might not be able to take up all of those topics at the present session and had also expressed the belief that it could do better work and, in the long run, achieve greater results by concentrating its attention on a smaller number of topics at any one session.⁹

16. The Commission's conclusions had been generally supported in the Sixth Committee at the thirty-sixth session of the General Assembly and endorsed by the Assembly in resolution 36/114. Thus, the General Assembly had recommended that, as the first priority for the thirty-fourth session, the Commission should complete the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations. As members were aware, the Commission had already adopted on second reading articles 1 to 26 of that draft. In resolution 36/114, the Assembly, taking into account the progress of work on other topics, had also differentiated between its recommendations concerning the second part of the topic of relations between States and international organizations, on the one hand, and the remaining five topics on its programme of work, on the other. It had indicated that the Commission should continue its study of that second part of the aforementioned topic, and should continue its work on the preparation of draft articles on the other five topics. In that connection, it should be borne in mind that the General Assembly had recommended that the Commission should continue with the preparation of draft articles on part 2 of the draft on responsibility of States for internationally wrongful acts and bear in mind the need for the second reading of the draft articles constituting part 1; the first reading of part 1 had been completed at the thirty-second session, in 1980. The Commission now had before it the comments and observations on the five chapters comprising part 1 that Governments had been invited to submit by 1 March 1982 (A/CN.4/351 and Add.1-3).

17. By its resolution 36/106 of 10 December 1981, the General Assembly had also invited the Commission "to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law." The Assembly had further re-

quested the Commission to consider at its present session the question of the draft Code in the context of its five-year programme and to report to the General Assembly at its thirty-seventh session on the degree of priority it deemed advisable to accord to the draft Code, and the possibility of presenting to the Assembly at its thirty-eighth session a preliminary report on, *inter alia*, the scope and the structure of the draft Code. In adopting those decisions, the General Assembly had indicated that, because the Commission had just accomplished an important part of its work on succession of States, its programme of work was now lighter; it had also taken into consideration the Commission's increase in size and the new five-year mandate of its membership.

18. In dwelling at some length on the current situation, and endeavouring to portray it as clearly as possible, he had sought to facilitate the Commission's consideration of its programme and its methods of work from the standpoint of both the session that was now beginning and the new five-year term of office, which was to end on 31 December 1986. Members would have noted that, in carefully working its recommendations on the Commission's current programme of work in resolution 36/114, subparagraph 3 (b), and resolution 36/106, the General Assembly had allowed for the necessary flexibility and had encouraged the Commission to arrange its future work, thereby giving effect to the conclusions of an organizational character arrived at by the Commission itself and echoed in the discussions in the Sixth Committee. The Commission should thus be in a position to proceed effectively by establishing a specific and viable programme for the five-year term of office of its present members.

19. In determining its general objectives and priorities concerning the current programme of work, the Commission might find it opportune to consider a review of its long-term programme. As members were well aware, at its first session, in 1949, the Commission had examined, pursuant to the relevant provisions of its Statute, 25 matters for possible inclusion in a list of topics for study and had drawn up a provisional list of 14 topics selected for codification. Those topics, together with additional topics or items referred to the Commission by the General Assembly, had constituted the Commission's long-term programme of work. However, the inclusion of a particular topic or item in that programme did not necessarily mean that it was immediately considered by the Commission. It was the General Assembly and the Commission that decided whether or not active work on the topic or item in question should be undertaken at a given time. The topics or items on the long-term programme that were selected for active consideration constituted, while under study, the "current programme of work".

20. The Commission had from time to time reviewed its long-term programme of work with a view to bringing its current programme up to date in the light of recommendations by the General Assembly and the present needs of the international community and dis-

⁹ *Ibid.*, paras. 253-257.

carding the topics that were no longer suitable for treatment. In recent years, it had done so on the recommendation of the Enlarged Bureau of the Commission and of the Planning Group. Thus, two of the topics now under active consideration had been included in the Commission's current programme in 1977 by a decision of the Commission which had been endorsed by the General Assembly in resolution 32/151 of 19 December 1977. The Commission had concluded that it was advisable to place in its current programme the topic found in the 1949 list entitled "Jurisdictional immunities of States and their property", and also the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", which had been added in 1974 to the Commission's long-term programme pursuant to General Assembly resolution 3071 (XXVIII) of 30 November 1973. The Commission had also agreed that two other topics on its long-term programme, namely, the "Right of asylum", which had appeared in the 1949 list, and the "Juridical regime of historic waters, including historic bays", which had been added later, would not require active consideration by the Commission in the near future.¹⁰

21. Bearing in mind that, at its thirty-third session, the Commission had completed its work on succession of States in respect of State property, archives and debts and that, at the thirty-fourth session, it was expected to complete its draft on treaties concluded between States and international organizations or between international organizations, the Commission might wish to activate one or more of the topics remaining in its long-term programme. However, the Commission was not necessarily limited by the programme in its present form. It might take the view that, as most of the topics included in the programme had been or were in the process of being studied, it was now time to consider, for possible recommendation to the General Assembly, what new items might be added for future study. In carrying out such an assessment, the Commission should bear in mind the fact that it had nearly completed its long-term programme, at a time when it was starting its new term of office with an expanded membership and when far-reaching events were having an impact on the development of international law. The near-completion of the decolonization process, the institutionalization of the international community through a growing number of international organizations, the awareness of the need to establish a new international economic order, the new dimensions in the position of the individual in the international legal system and the rapid advances of science and technology in such areas as energy, outer space and the sea-bed were some of the factors in an ever-expanding international law-making effort.

22. Activities previously regarded as falling squarely within the sovereign discretion of States were now being brought within the ambit of international law. Moreover, the present needs of the international com-

munity and their novelty and magnitude were such that States were now readier than before to seek legal settlement of problems and more inclined towards the progressive development of international law as a concerted and continuous diplomatic activity being undertaken in a growing number of specialized bodies. As the General Assembly had reaffirmed as far back as its resolution 1505 (XV) of 12 December 1960:

the conditions prevailing in the world today give increased importance to the role of international law—and its strict and undeviating observance by all Governments—in strengthening international peace, developing friendly and co-operative relations among the nations, settling disputes by peaceful means and advancing economic and social progress throughout the world.

23. In resolution 36/114, the General Assembly had emphasized the need for the progressive development of international law and its codification,

in order to make it a more effective means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and to give increased importance to its role in relations among States.

The International Law Commission was the principal subsidiary organ established by the General Assembly to discharge its Charter mandate, in Article 13, paragraph 1, "encouraging the progressive development of international law and its codification". Throughout the thirty-four years of its existence, the Commission had amply demonstrated that it played the central role in the development and codification of international law under the auspices of the United Nations. Within the comprehensive framework of its Statute, the Commission could not but continue to play the pivotal role accorded to it by Article 13 of the Charter. As part of that role, the Commission should serve as the focal point for the co-ordination of all United Nations activities of an international law-making character. The Commission's present composition was the best guarantee that that would prove to be the case.

24. The Office of Legal Affairs, and particularly the Codification Division, which acted as the secretariat of the Commission, stood ready to continue to render the Commission all the substantive assistance it required. He was certain that he also spoke for the Geneva Office of the United Nations, which had always been effective in providing the Commission with all the necessary conference facilities and services to facilitate its task.

25. Before he had left New York, he had held several meetings with some members of the Commission who had been prevented by circumstances from attending the present meeting. Thus, Mr. Lacleta Muñoz, Mr. Koroma, Mr. Jagota and Mr. Illueca had requested him to ask the Chairman to excuse their absence and had assured him that they would try to be present as soon as the international situation and their duties permitted.

26. He wished the Commission every success in its endeavours.

¹⁰ *Yearbook ... 1977*, vol. II (Part Two), pp. 129-130, paras. 108-110.

Election of officers

Mr. Reuter was elected Chairman by acclamation.

Mr. Reuter took the Chair.

27. The CHAIRMAN thanked the members of the Commission for electing him Chairman. After paying tribute to his predecessor, he extended a welcome to the new members of the Commission. As now constituted, the Commission was more representative of the international community and, with all the means that were available to it, it should be in a position to fulfil the many tasks that lay ahead.

Mr. Díaz González was elected first Vice-Chairman by acclamation.

Mr. Flitan was elected second Vice-Chairman by acclamation.

Mr. Sucharitkul was elected Chairman of the Drafting Committee by acclamation.

Mr. Njenga was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/349/Rev.1)

28. Mr. NI said that, as a new member of the Commission, he would like to ask two questions concerning agenda item 10, on the "Programme and methods of work", two terms that, in his view, were highly specific. However, General Assembly resolution 36/114, referred to by the Legal Counsel, endorsed the establishment of "general objectives and priorities" which would guide the Commission's study of the topics on its programme of work. Those were, in fact, guidelines, a much broader concept. He would also like to know whether the thirteen items on the provisional agenda had to be considered in their numerical order. If that was so, he believed that item 10 should be brought forward.

29. The CHAIRMAN said, in reply, that the adoption of the agenda did not prejudice the order in which the items were to be considered. With regard to the Commission's programme and methods of work, it was precisely the task of the Planning Group, under the chairmanship of the first Vice-Chairman, to prepare for a very general exchange of views on that extremely important point, which would certainly not be defined until the end of the session. The members of the Commission would thus be required to take a decision on the matter, without any restriction on their right to make proposals or to participate in the discussion. But they must also take certain decisions, forthwith, regarding their immediate work.

The provisional agenda (A/CN.4/349/Rev.1) was adopted.

Organization of work

The Commission decided to start its work with item 2 of the agenda (Question of treaties concluded between States and international organizations or between two or more international organizations)

30. Mr. ROMANOV (Secretary to the Commission) said that, in accordance with established practice,

the Secretariat had prepared two conference room documents concerning item 2 of the agenda. The first (ILC(XXXIV)/Conf. Room Doc. 1) set out articles 1 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations, as adopted on second reading at the Commission's thirty-third session. The second (ILC(XXXIV)/Conf. Room Doc. 2) contained the text of article 2, subpara. 1 (h), and articles 27-80 of the draft, adopted on first reading. Those documents would be circulated at the following meeting.

The meeting rose at 5.35 p.m.

1699th MEETING

Tuesday, 4 May 1982, at 11 a.m.

Chairman: Mr. Paul REUTER

Organization of work (continued)

1. The CHAIRMAN, reporting briefly on the outcome of the Enlarged Bureau's discussion regarding the Commission's work for the immediate future, said the Bureau took the view that the Commission should allot two weeks to consideration of agenda item 2 (Question of treaties concluded between States and international organizations or between two or more international organizations), beginning at the present meeting. It should then proceed to consider agenda item 6 (Jurisdictional immunities of States and their property) for a further two weeks, and afterwards revert to agenda item 2 with a view to completing it in the first week of June.

2. If there were no objections, he would take it that the Commission agreed to that proposal.

It was so decided.

APPOINTMENT OF SPECIAL RAPPORTEURS

3. Mr. CALERO RODRIGUES said that at its previous session the Commission, despite strong criticism, had decided to postpone the appointment of a new special rapporteur on the topic of the law of the non-navigational uses of international water courses. It had had good reasons for that decision. However, in resolution 36/114 the General Assembly had stressed the desirability of the Commission's appointing a special rapporteur at the commencement of the thirty-fourth session. He feared that if that was not done, the Commission could expect further criticism in the General Assembly. Again, prompt appointment of a special rapporteur would allow him time to become familiar with Mr. Schwebel's report (A/CN.4/348).

4. The CHAIRMAN said the Enlarged Bureau's view was that the Commission should not delay in appointing

a new special rapporteur. However, the appointment called for consultations between the Chairman and the members of the Commission and also among the members themselves.

5. Mr. FRANCIS said he agreed that a new special rapporteur should be appointed at the earliest opportunity. However, some members were unable to attend the opening meetings, and the Commission should therefore wait until the following week before discussing the appointment.

6. Mr. DÍAZ GONZÁLEZ said events had shown that the Commission's decision to postpone the appointment of a new special rapporteur had been correct. The appointment was indeed a matter of great importance, but he agreed with the Chairman that the necessary time must be set aside to learn the opinion of the majority of the members of the Commission. He therefore believed that the appointment would be best left until the beginning of June. In any case, no rapporteur, however qualified, would be in a position to submit a report by the end of the session.

7. Mr. PIRZADA agreed that the new special rapporteur should be appointed after consultations between the Chairman and the largest number of members possible. If that process could not be completed in the course of the week, he would suggest that the Commission should appoint the special rapporteur on 10 or 11 May.

8. Sir Ian SINCLAIR said that Mr. Calero Rodrigues' point was well taken. For his part, he would be content if the Chairman embarked on private consultations with the members present and, after obtaining a broad spectrum of opinion, suggested an appropriate date for appointing the special rapporteur. He did not believe the matter ought to be left to the beginning of June, but he was willing to leave the date to the discretion of the Chairman.

9. Mr. CALERO RODRIGUES explained that he had not suggested that the special rapporteur should be designated immediately; he had simply wished to call attention to the General Assembly's request that the appointment should be made at the commencement of the session. He agreed with Sir Ian Sinclair that it would be unfortunate to delay the appointment an entire month, and that the date for taking the decision should be left to the Chairman's discretion.

10. Mr. USHAKOV said that, despite the General Assembly's recommendation, the Commission did not have to take a hasty decision, since the new special rapporteur would not be able to begin his work until the Commission's session was over. Furthermore, the Commission had always preferred to appoint its special rapporteurs by consensus rather than a vote and, in order to achieve a consensus, consultations and exchanges of views were required between the Chairman and the members of the Commission and between the members themselves.

11. Mr. NJENGA pointed out that the decision to postpone the appointment of a new special rapporteur had been taken because of factors beyond the Commission's control. He agreed with Sir Ian Sinclair that a new special rapporteur should be appointed rapidly, but that the Commission should first engage in the appropriate consultations. A prompt decision would have the additional benefit of allowing the new special rapporteur to consult with members of the Commission during the present session. He was confident that the Chairman would be able to secure a consensus on the matter well before the beginning of June.

12. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that consultations should be held on the appointment of a new special rapporteur, on the understanding that a consensus would be reached as soon as possible.

It was so decided.

Filling of casual vacancies in the Commission (article 11 of the Statute) (A/CN.4/355 and Add.1 and 2)

[Agenda item 1]

13. The CHAIRMAN pointed out that the Commission had to fill the casual vacancy caused by Mr. Bedjaoui's election to the International Court of Justice. That could be done at the end of the week or the beginning of the following week. There were four candidates, and their *curriculum vitae* had been distributed to the Commission (A/CN.4/355/Add.1 and 2).

14. Mr. BOUTROS GHALI noted that the four candidates were well known among international jurists and said that the Commission could move to fill the vacancy very quickly.

15. Sir Ian SINCLAIR said that he endorsed Mr. Boutros Ghali's statement. The information needed to fill the vacancy was already available to members and it was desirable to reach a decision rapidly.

16. Chief AKINJIDE said he agreed with that view. The election should be held on the following Thursday at the latest, for the Commission stood in need of the contribution that would be made by the person who was elected.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to fill the vacancy on Thursday, 6 May.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING

18. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that before introducing his eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/353), he wished briefly to summarize the work carried out on that topic.

19. The first reading of the draft articles had been completed in 1980,² and in his tenth report (A/CN.4/341 and Add.1), submitted to the Commission in 1981, he had submitted observations on articles 1 to 41, tying in the elements of the very general articles, such as article 2, to each of the other articles concerned. All those articles had been considered on second reading and referred to the Drafting Committee, which had only been able to consider articles 1 to 26.³ At the present session, the Commission could send articles 27 to 41 direct to the Drafting Committee and consider them when they were returned; but out of consideration for the new members, he felt that the Commission could proceed to at least a brief review of articles 27 to 41 before referring them to the Drafting Committee.

20. The Commission had before it a number of documents concerning the item under consideration: the eleventh report of the Special Rapporteur (A/CN.4/353) and the section of the tenth report (A/CN.4/341 and Add.1, paras. 86 *et seq.*) that related to articles 27 to 41; the comments submitted in 1981 by Governments and the principal international organizations (A/CN.4/339 and Add.1-8); the summary of the discussion of the item in the Sixth Committee at the thirty-sixth session of the General Assembly (A/CN.4/L.339); and the comments received from Governments and the principal international organizations following the thirty-sixth session of the General Assembly (A/CN.4/350 and Add.1-11). In preparing his eleventh report, he had not been in a position to take into account the comments of the Governments of Canada, Denmark and the German Democratic Republic, or those of the EEC, the United Nations and the IAEA. Nor had he been able to take into account the most recent work of the Third United Nations Conference on the Law of the Sea, which some of the members present would be able to enlarge upon.

21. It was obvious from the comments of Governments and international organizations that the draft articles must closely follow the text of the 1969 Vienna Convention on the Law of Treaties⁴ and take into account the specific problems of international organiza-

tions, but at the same time be simple and clear, yet precise.

22. In two instances, the Commission would doubtless have to reconsider draft articles that had already been adopted: article 7, when it came to consider article 47; and one of the provisions of article 20, following the introduction on second reading of article 5, at the initiative of Mr. Ushakov. It was understood that if the Commission completed the second reading of all the draft articles, the Drafting Committee would have to "clean up" the text as a whole and make any necessary minor drafting changes.

23. The question of the final form that the draft articles were to take would undoubtedly be settled by the General Assembly, but the Commission had undertaken to make a suggestion in that regard. It would obviously have been helpful to know from the outset whether the draft was to form a convention separate from the Vienna Convention; whether it was to be incorporated in that instrument, which would then be revised; or whether it was simply to be the subject of a declaration that the General Assembly would recommend for application by Governments and international organizations. In its drafting work, the Commission had taken the broadest view, which called for the most comprehensive text, and had elaborated a draft that could become a convention separate from the Vienna Convention. In doing so, it had not, for all that, taken up a position, and the fate of the draft would have to be decided at the present session. Hence, it would doubtless be better to wait until the Commission had a comprehensive view of the articles. For the time being, the form the Commission had given to its draft had an obvious advantage. If the General Assembly decided on a declaration, it would be sufficient to simplify the text, and if it opted for a convention, all the necessary provisions would have been prepared.

24. Mr. MALEK said that, although he was a new member of the Commission, he had always followed the Commission's work on the item under consideration with great interest, first as an officer in the Codification Division of the Office of Legal Affairs up until 1979, and later as his country's representative in the Sixth Committee of the General Assembly. It was gratifying that in preparing the draft articles the Commission was endeavouring to follow very closely the rules of the Vienna Convention, rules that it wished to see applied as far as possible to the situations covered by the draft. As to the form of the draft, the Commission had also been right to prepare a text which could become a convention that was independent of the Vienna Convention.

25. Although he had no specific comments to make for the time being on articles 27 to 41, he would none the less like to point out that article 36 *bis* appeared to be one of the most controversial provisions and had given rise to widely differing comments by members of the Commission at the previous session. In view of the cases in which article 36 *bis* could be applied, some members had considered that the article might raise

² For the text of the articles adopted on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*

³ For the text of draft articles 1-26 and commentaries thereto, adopted on second reading, see *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

⁴ Hereinafter called Vienna Convention.

more problems than it solved. Some had expressed doubts about the *raison d'être* of the provision. In his opinion, article 36 *bis* was not entirely devoid of interest, because it tried to settle a confused legal point, namely, the position of the member States of an organization with regard to the treaties concluded by that organization.

26. Sir Ian SINCLAIR said it was clear that the time had not arrived for the Commission to decide on its final recommendation to the General Assembly regarding the ultimate form of the draft. Nevertheless, during its discussion of the draft articles the Commission should bear in mind that, if it recommended that they should take the form of a convention, serious problems would arise in connection with the participation of international organizations in the convention and the manner in which such organizations would express their consent to be bound by it.

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

27. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that article 27 was one of the provisions to which the Commission, Governments and international organizations had given the most attention. It did not appear to pose them any really substantive difficulties, but it caused some concern because of a drafting problem. The corresponding article of the Vienna Convention had not given rise to any difficulty, either in the Commission or at the United Nations Conference on the Law of Treaties; it set forth the obvious principle that a State could not invoke the provisions of its internal law as justification for its failure to perform a treaty to which it was a party, a rule that was without prejudice to article 46, which covered the possibility of the unconstitutionality of the treaty. An unconstitutional treaty could not, indeed, be invoked against the State that had concluded it. It was plain that the situation of a State party to a treaty and that of an international organization party to a treaty must be the subject of two separate paragraphs in the article now under consideration. If it was agreed that the reservation in article 46 applied to both situations, a third paragraph would have to be envisaged to allow for the application of that reservation to paragraphs 1 and 2. The disadvantage of such a solution, which he had proposed initially, was that it placed the reservation in a third paragraph, something which could give rise to some concern on reading the first two paragraphs. That was why he had gone on to propose, in his tenth report (A/CN.4/341 and Add.1, para. 88), that the reservation relating to article 46 should be inserted at the beginning of paragraphs 1 and 2, so that article 27 would read as follows:

Article 27. Internal law of a State, rules of an international organization and observance of treaties

1. Without prejudice to article 46, a State Party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. Without prejudice to articles 46 and 73, an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

28. Other concerns had arisen because of the exception contained in paragraph 2, since members of the Commission had had in mind a case in which an organization concluded an agreement with a State in order to implement a decision taken by one of its organs, yet reserved its freedom to modify that decision. Such a case arose when the Security Council adopted a resolution concerning the conditions of a cease-fire and the United Nations concluded an agreement with one or more States with a view to implementing the resolution. The role of an agreement of that kind was to facilitate the implementation of the organization's decision, as long as that decision remained operative. In fact, a prudent organization would set a time-limit for the implementation of its decision and would reserve the right to review it. As a matter of principle, there was no doubt that an agreement concluded in implementation of a Security Council decision became void if the decision was rescinded. However, practical difficulties had sometimes arisen. For that reason, some people considered that the article under consideration should be more precise. At the previous session, a member of the Commission had pointed out that the same situation could occur in the case of treaties concluded between States, if the purpose of the treaties was to apply a national law.⁵ International agreements concluded for the purpose of implementing measures under a national law that granted international assistance loans were obviously subject to the law itself remaining in force. While the situation might seem clear in theory, it was frequently complicated in practice.

29. In order to take account of the concerns expressed, even though the case in point did not appear to him to arise more frequently with regard to international organizations than it did with regard to States, he had proposed, in his tenth report, that article 27, paragraph 2, should specify that an international organization party to a treaty might not invoke the rules of the organization as justification for its failure to perform the treaty, "unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization". However, the criterion of the intention of the parties had been judged subjective and the notion of the exercise of the functions and powers of the organization had been considered vague. Consequently, he was proposing in his eleventh report (A/CN.4/353, para. 17) either that the exception in para. 2 be deleted, as follows:

"2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty."

⁵ Yearbook ... 1981, vol. I, p. 164, 1674th meeting, para. 16 (Mr. Aldrich).

and the problems considered by the Commission should be reflected in the commentary to the article, or that the exception should be redrafted in the following way:

“2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless the latter [the treaty], by reason of its subject, depends on the adoption or maintenance of a decision of the organization.”

30. In their comments and observations, Governments and organizations wondered what happened to a treaty properly concluded by an international organization if that organization changed, either because it had altered its structure, revised its constituent instrument or lost a large proportion of its members. In that respect, he would point out that draft article 73 expressly referred to cases that fell outside the scope of the draft. However, at the previous session, the members of the Commission had decided that it was not necessary for article 27 to include a *renvoi* to article 73.⁶

31. Lastly, to round out his comments, he wished to refer to the Convention recently adopted by the Third United Nations Conference on the Law of the Sea, which had decided that the Convention would be open to signature by some international organizations. Consequently, the Conference had established the conditions for their participation, more particularly in annex IX, article 4, paragraph 7, according to which:

7. In the event of conflict between the obligations of an international organization under this Convention and its obligations arising under the terms of the agreement establishing the organization or any acts relating to it, the obligations under the present Convention shall prevail.⁷

It was a provision which reflected a trend that would have to be borne in mind in considering the pros and cons of the two solutions for article 27, paragraph 2, proposed in the eleventh report on the topic under consideration.

The meeting rose at 12.50 p.m.

⁶ *Ibid.*, pp. 159 *et seq.*, 1673rd meeting, paras. 23, 35, 36 and 42; 1674th meeting, paras. 4, 10 and 26.

⁷ The Convention on the Law of the Sea was adopted on 30 April 1982 at the eleventh session of the Third United Nations Conference on the Law of the Sea. For the text, see A/CONF.62/122 and Corr.3 and 8.

1700th MEETING

Wednesday, 5 May 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and

Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)³ (concluded)

1. Mr. NI said that, although the ultimate decision concerning the final form of the draft articles would be taken by the General Assembly, the draft already seemed to have assumed the shape of a convention that would be a counterpart of the Vienna Convention and would be a very useful instrument in view of the growing number of international organizations.

2. It was perhaps the content that would determine the structure of article 27, rather than the reverse. In fact, article 27 was intended to prevent a State or an international organization from invoking its internal law or its constituent rules as justification for failure to perform treaty obligations, whereas article 46 was intended to prevent a State or an international organization from invoking its internal law or its constituent rules as grounds for invalidating consent already given. The two articles thus covered two different situations. However, in order to mirror the corresponding provision of the Vienna Convention, a *renvoi* to article 46 might be retained in article 27. Article 73 was an entirely different matter, since it related to subsequent events that bore no relation to what was provided for in article 27. Moreover, article 73 also applied in the case of States, as rightly pointed out by the Special Rapporteur.⁴ It was therefore perplexing to find a *renvoi* to article 73 in paragraph 2 of article 27 and not in paragraph 1.

3. As far as the structure of the article was concerned, it might be preferable to revert to the three-paragraph formula adopted on first reading and to refer to article 46 in paragraph 3. With regard to paragraph 2, the second alternative proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 17)⁵ called for further reflection. The exception contained therein might not be necessary at all, but if it was, some drafting changes would be required. He suggested that the word “latter” should be replaced by “treaty” and that the words “by reason of its subject” should be replaced by “by the nature of its subject-matter”. The problem was one that would have to be referred to the Drafting

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1 to 80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1699th meeting, para. 27.

⁴ *Yearbook ... 1981*, vol. I, p. 165, 1674th meeting, para. 20.

⁵ For the text, see 1699th meeting, para. 29.

Committee if the Commission opted for that alternative.

4. Sir Ian SINCLAIR said that article 27 gave rise to problems mainly because of the exception provided for in paragraph 2. In his view, there was no need to retain the exception, which covered the case in which an international organization might be unable to perform a treaty because a competent organ of the organization had failed to adopt or maintain a decision on the basis of which the treaty had been concluded. The problem could also arise in connection with treaties concluded by States, but in his country, for example, there was a constitutional convention that any treaty whose performance required expenditure of public funds needed the approval of Parliament, and it was thus customary to include in the text of treaties a provision making payment of funds contingent on parliamentary approval.

5. Any treaty concluded by an international organization should allow for failure by the competent organ of the organization to adopt or maintain the decision on the basis of which the treaty was concluded. Since treaty drafting was a flexible exercise, international organizations could always protect themselves against that kind of contingency, for instance, by negotiating a clause arranging for automatic termination of the treaty in the event of such a contingency. The solution, therefore, was to delete the exception contained in paragraph 2, as suggested by the Special Rapporteur in the first alternative he had proposed (*ibid.*).

6. Another question that would have to be answered when article 27 came to be drafted in its final form was whether the reference to article 46 should appear in paragraphs 1 and 2, as was now the case, or in a separate paragraph. The question was essentially one of presentation, but he would prefer that a new paragraph 3 be added.

7. Mr. RAZAFINDRALAMBO said that, as it was for the General Assembly, and not the Commission, to take the final decision on the future of the draft articles, the best course was to give them the form of a convention, since it would be easier to turn a draft convention into a straightforward declaration than to do the opposite.

8. In the article under consideration, it seemed necessary to retain paragraph 2, concerning international organizations, if only for reasons of symmetry with paragraph 1, concerning States. The Special Rapporteur had spoken of the concern caused by the peremptory formulation of the principle stated in the two paragraphs. The exception to the principle was relegated to a third paragraph, whereas both the rule and the exception were contained in a single paragraph in the corresponding article of the Vienna Convention. It would perhaps be preferable if the draft article were formulated along the lines proposed by the Special Rapporteur in his tenth report (A/CN.4/341 and Add.1, para. 88⁶), even if it meant shifting the exception to the

end of each paragraph, so that the rule preceded the exception.

9. In the new wording he was proposing for paragraph 2 of article 27, the Special Rapporteur had been right to delete the reference to the intention of the parties, which was a difficult concept to grasp and interpret, and had properly dispensed with the reference to the exercise of the functions and powers of the organization, since the term "powers" was particularly vague. The proposed new wording tempered the rule and appeared to be a significant improvement.

10. Lastly, the reference to article 73 might prove to be a useful clarification, since that article, like article 46, was an exception to the rule enunciated in paragraph 2 of article 27. However, the reference was not absolutely essential.

11. Mr. CALERO RODRIGUES said that article 27, which was intended to adapt the provisions of the Vienna Convention to the situation of international organizations parties to treaties, made the basic and certainly sound statement that failure to perform a treaty could not be justified, in the case of a State, by invoking the provisions of its internal law, or in the case of an international organization, by invoking the rules of the organization, without prejudice, in either instance, to article 46, which referred to a manifest violation of a provision regarding competence to conclude treaties as a cause for invalidity.

12. There were, however, two questions that had to be answered in connection with article 27. The first was whether or not to retain, in the case of international organizations, the exception adopted on first reading: "unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization". In his eleventh report (A/CN.4/353, para. 17), the Special Rapporteur was proposing either to delete or to recast the exception. His own view was that the exception in paragraph 2 could be deleted, for if a problem arose on that account between two international organizations, it could be solved through interpretation of the provisions relating to the application, validity and termination of the treaty. Deletion of the exception would, moreover, add to the clarity of the paragraph.

13. The second question to be resolved was whether there should be an exception not only with regard to article 46 but also with regard to article 73. In that connection, he agreed with the view expressed by the Special Rapporteur in his eleventh report that there was no point in including a *renvoi* to article 73, which would add nothing to the text of article 27, paragraph 2 (*ibid.*, para. 14).

14. He was therefore in favour of the text of article 27 adopted on first reading, provided the words "according to the intention of the parties" in paragraph 2 were deleted and the formulation of paragraph 1 was simplified by deleting the words "between one or more States and one or more international organizations".

⁶ For the text, *ibid.*, para. 27.

15. Chief AKINJIDE said that he fully agreed with Sir Ian Sinclair's views on the problem relating to the exception in article 27, paragraph 2. Indeed, the constitutional convention mentioned by Sir Ian was part and parcel of the practice followed in his own country, where no treaty had the force of law unless it had been ratified by the legislature and where the performance of any treaty providing for an expenditure of funds was contingent on legislative approval.

16. Mr. FRANCIS said that he shared the views expressed in the Special Rapporteur's eleventh report (*ibid.*, para. 14). It was agreed that a reference in article 27 to article 73 would be pointless, but he wished to suggest that a *renvoi* could be made to article 46 in an introductory phrase that would read "Without prejudice to article 46," and would apply to both paragraph 1 and paragraph 2 of article 27.

17. Mr. FLITAN said that, in the main, he concurred with Mr. Calero-Rodriguez. The Vienna Convention should be followed as closely as possible, which meant taking the text of article 27 of the Vienna Convention as the point of departure and transposing it to the draft articles. The simplest solution would seem to be the best.

18. Article 27 should, as the Special Rapporteur proposed, consist of three paragraphs (*ibid.*, para. 17). In the case of paragraphs 1 and 3, the wording adopted on first reading could be retained. For paragraph 2, the Special Rapporteur appeared to prefer the first of the two alternatives he proposed, which was also the simpler. The second alternative, which sought to be more precise, posed two difficulties. First, the formulation used and the clarification made departed from the Vienna Convention. Second, the proposed wording did not seem to meet the repeated demands for clarity made not only in the Commission and in the Sixth Committee but also in the comments of Governments and international organizations. The phrase "maintenance of a decision of the organization" was particularly vague. In addition, no reference to article 73 was necessary.

19. As to any difficulties connected with internal law, to which some members of the Commission had alluded, the same difficulties existed in the case of treaties concluded between States; yet a straightforward solution had been adopted in article 27 of the Vienna Convention.

20. Mr. EL RASHEED MOHAMED AHMED said that, although the exception in article 27, paragraph 2, sought to protect international organizations against any violation of their rules, he thought, as did Sir Ian Sinclair, that it should be deleted. The concern it endeavoured to allay was unfounded. Moreover, a fine distinction had been drawn between articles 27 and 46, but those provisions were in fact quite different, because article 27 related to failure to perform a treaty, whereas article 46 related to consent.

21. He therefore preferred the first of the alternatives proposed by the Special Rapporteur (*ibid.*), for it would strike the necessary balance between the obligations of

States vis-à-vis international organizations and the obligations of international organizations vis-à-vis States.

22. Mr. USHAKOV said that he had always advocated the inclusion of a paragraph 2 dealing with international organizations, in view of the enormous differences between the position of a State and that of an international organization in the matter under discussion. What was the significance of article 27 of the Vienna Convention from the standpoint of the internal law of a State concluding a treaty with another State? It meant that the State was master of its internal law and that, if it concluded a treaty contrary to the provisions of its internal law, it must modify those provisions in the light of the obligations which it had assumed under the treaty. The situation could not be otherwise, and the State could not invoke its internal law as justification for failure to perform the treaty, unless it had inserted in the treaty a clause whereby performance of the treaty was subordinated to its internal law. Similarly, when a State undertook by treaty to perform a financial obligation requiring the authorization of its parliament and then failed to obtain such authorization, it could not invoke that fact unless, at the time when the treaty was concluded, it had made its commitment subject to that condition.

23. The situation was quite different in the case of international organizations. In principle, although an international organization was master of its constituent instrument, the organ of the organization which concluded a treaty was not. If the Security Council concluded a treaty entailing an amendment to the Charter, it could not make the amendment itself, since such action was the prerogative of the Member States. It was that fundamental difference between States and international organizations that had to be taken into account in order to protect organizations against an obligation requiring an amendment of its rules or of its constituent instrument. Unlike States, international organizations were not obligated to amend their constituent instruments when one of their organs assumed an obligation involving a change to that instrument and did not take the precaution of making performance of the obligation subject to the rules of the organization. It was necessary either for international organizations to stipulate a restriction in every case or for a rule to be established in order to protect them in the event of omission.

24. The text of paragraph 2 adopted on first reading included a reference to the intention of the parties, a concept which he had consistently argued against, for it was unnecessary. Such a reference added nothing when the intention of the parties, duly expressed, had been to formulate a reservation to the application of the treaty, in which case it was for the international organization concerned to make that intention clear. Consequently, in order to protect international organizations it was sufficient to state the rule in the following terms: "unless performance of the treaty is subject to the exercise of the functions and powers of the organization". It

would be advisable, however, to replace the words "the exercise of the functions and powers of the organization" by a clearer and more precise phrase.

25. The other solution proposed by the Special Rapporteur, namely, to temper the rule with the words "unless the latter [the treaty], by reason of its subject, depends on the adoption or maintenance of a decision of the organization", was not entirely satisfactory, since the conclusion of a treaty by an international organization was always dependent on the adoption or maintenance of a decision of an organ of the organization. Moreover, the proposed wording could give rise to problems of interpretation. Could an organization, after taking a decision to conclude a treaty, take a decision to the contrary? In the final analysis, the wording proposed by the Special Rapporteur in his tenth report (see 1699th meeting, para. 27) seemed more felicitous, although it was open to improvement. Within the limits of the exercise of the functions and powers of the organization, it enabled a decision to be taken to revoke the decision to conclude the treaty and justify failure to perform it.

26. Lastly, it was unnecessary to include a *renvoi* to article 73, which was a straightforward safeguard clause that did not establish any rule calling for a reservation.

27. Mr. THIAM noted that the discussion seemed to centre mainly on paragraph 2, which stated a principle and an exception. There could be no objection to the principle, which was none other than the fundamental principle of *pacta sunt servanda*. However, unlike Mr. Ushakov, he doubted whether it was really necessary to provide for an exception in the case of international organizations. Clearly, when a treaty was signed, a State could make all kinds of reservations, including reservations of ratification. However, international organizations, as legal entities, had the same scope for limiting the extent of their commitments and making the performance of a treaty subject to certain conditions. Hence, in that respect there was no reason to treat organizations differently from States. In general, the exception to the principle would be invoked only in the event of a dispute, in which case the treaty must be interpreted in accordance with clearly defined rules governing interpretation. Article 31 of the draft contained provisions for that precise purpose, and if an international organization was unable to perform a treaty, those provisions would doubtless make it possible to determine whether there was a genuine legal impediment. Consequently, he would prefer that the text of paragraph 2 should contain no exception. The differences between States and international organizations should be taken into account only when they were quite evident, which did not appear to be the case in the present instance.

28. The *renvoi* to article 46 would be better placed in a third paragraph, rather than at the beginning of each of the first two paragraphs.

29. Mr. OGISO, referring to paragraph 14 of the Special Rapporteur's eleventh report (A/CN.4/353),

said he too agreed that the use of the words "the intention of the parties" in article 27, paragraph 2, was open to criticism. In his view, the provisions of the draft articles should be as close as possible to those of the Vienna Convention, and the words "the intention of the parties" would make article 27 unnecessarily ambiguous and arbitrary.

30. Again, the example of the Security Council given in the eleventh report (*ibid.*, para. 15), did not seem to him to justify the exception included in article 27, paragraph 2. Certainly, after the Security Council adopted a resolution concerning the conditions of a cease-fire and the United Nations concluded an agreement with one or more States to implement that resolution, if the Security Council were then to revise the resolution or adopt another, the United Nations might no longer be in a position to fulfil its obligation under the agreement. Account should then be taken of two possibilities. First, if, after the conclusion by the United Nations of an agreement with one or more States, the international situation changed and the cease-fire became unnecessary, the United Nations would, even without the exception provided for in article 27, paragraph 2, automatically cease to perform the agreement it had concluded for the purpose of implementing the Security Council resolution. Secondly, the Security Council might adopt a resolution and the United Nations might conclude an agreement with a State to implement that resolution, but the Security Council's membership might alter subsequently and the United Nations might no longer be in a position to continue to perform the agreement. The exception provided for in article 27, paragraph 2, might then give excessive protection to international organizations vis-à-vis States, and he was not sure that that should be the case since States, under article 27, paragraph 1, could not invoke a change in their internal law as justification for failure to perform a treaty.

31. He therefore preferred the first alternative proposed by the Special Rapporteur (*ibid.*, para. 17). The problem caused by the exception provided for in article 27, paragraph 2, could be avoided altogether if it were clearly stipulated in any agreement concluded between the United Nations and one or more States with a view to implementing a Security Council resolution that any change in the resolution would make it difficult for the United Nations to fulfil its obligations under the agreement.

32. Mr. PIRZADA said he too considered that it was unnecessary for article 27 to contain a reference to article 73. As for the *renvoi* to article 46, it should be noted that in the Vienna Convention article 46 ruled out the case of treaties concluded in violation of a provision of a State's internal law if the violation was manifest and concerned a rule of its internal law of fundamental importance, for such treaties were void *ab initio*. Accordingly, the question of the internal law of the States parties would not normally arise, and he saw no justification for drawing a distinction, in that regard, between international organizations and States. Hence,

the exception contained in article 27, paragraph 2, should be deleted.

33. Mr. McCAFFREY said he thought that the same formula should be used in paragraph 1 and paragraph 2 of article 27, especially in the light of the clear analogy between changes in the internal law of a State and changes in the rules of an international organization. If no exception was included in paragraph 1, there was no reason to insert one in paragraph 2. Either a State or an international organization would be free to negotiate the inclusion in a treaty of a clause providing that there would be no obligation under the treaty in the absence of the requisite internal acts. Deletion of the exception also would have the advantage of dispensing with the somewhat troublesome “unless” clause, including the open-ended “intention test”.

34. With regard to the cross-reference to article 46, he favoured a three-paragraph structure, since it was a more streamlined presentation than the inclusion of a proviso clause in each of the two paragraphs concerning States and international organizations respectively.

35. There was no reason to mention article 73, since it did not relate to the subject-matter of article 27.

36. Lastly, he was of the opinion that the draft should take the form of a convention, rather than a declaration.

37. Mr. QUENTIN-BAXTER said he agreed with the general sentiment that there was no need for article 27 to include a reference to article 73, and he was in favour of the three-paragraph approach.

38. The Commission’s aim was not to improve on the Vienna Convention in relation to treaties between States, but to introduce differences in treatment that were warranted in the case of international organizations. For that reason, Mr. Ushakov had been entirely right to point out essential differences in the competence of States and of international organizations. However, in the particular context of article 27, the question remained of whether it was necessary to include a special exception in favour, so to speak, of international organizations. Certainly, everyone agreed that the purpose of such an exception would not be to allow an international organization to escape freely accepted obligations. In the case of a change in policy by the organization, there was no reason to give more latitude to international organizations than to States. In his view, the question hinged on the point evaluated by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 18): Was article 46 sufficient to preserve the essential interests of an international organization? In fact, there were no adequate grounds for disagreeing with the view expressed in that paragraph; in all cases of application of article 27, treaties to which organizations were parties would be covered by article 46. He therefore considered that the Commission could take a step towards simplification by deleting the proposed exception in paragraph 2, especially in view of the difficulty of formulating it.

39. As to the final form of the draft articles, he noted that the Commission had begun by placing great emphasis on even formal differences between States and international organizations, but it now tended to move towards narrowing the real range of differences between the draft articles and the Vienna Convention.

40. Mr. SUCHARITKUL said that he shared the views of the Special Rapporteur and agreed with the preference the Special Rapporteur had expressed for one of the alternatives proposed in his eleventh report (*ibid.*, para. 17).

41. In order to dispel the concern, mentioned in paragraph 18 of the report, that the protection afforded by article 46 would not be sufficient for international organizations, the Commission could broaden the scope of article 46, although the content need not be altered. The proviso that the terms of article 27 were without prejudice to article 46 should be retained. Such a solution, while satisfactory, would not be sufficient to allay the concern expressed by Mr. Ushakov. The question was, therefore, whether the Commission could create middle ground between observance of the obligation entered into and the invalidity of treaties.

42. By way of information, he wished to cite the most recent version of article 4, paragraph 7, of annex IX to the Convention on the Law of the Sea:

7. In the event of a conflict between the obligations of an international organization under this Convention and its obligations arising under the terms of the agreement establishing the organization or any acts relating to it, the obligations under the present Convention shall prevail.⁷

He stressed that the parties to a treaty, whether States or international organizations, were always at liberty to seek solutions to conflicts arising between two types or two sorts of obligation.

43. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that the discussion could be reduced to a number of very simple points. In general, the members of the Commission had expressed their views on a fairly large number of questions, some of which, while relating to questions of principle, were not closely linked to the substance of the matter. The overall opinion in the Commission was that the *renvoi* to article 73 should be deleted—a possible solution that was not difficult to accept.

44. The value of the discussion lay in some questions of principle raised in connection with article 27, paragraph 2. The Commission had expressed an almost unanimous preference for a simple wording, largely for two reasons. First, if a reservation of the type proposed in the paragraph was called for in the case of international organizations, it would also be necessary in the case of States. However, no such proviso was contained in the Vienna Convention, and the members of the Commission had consistently refrained, in respect of States, from going beyond the provisions of that Convention, even though some of them could be further clarified in certain instances. Secondly, such a reserva-

⁷ See 1699th meeting, footnote 7.

tion was conceivable, for a number of reasons, but it was extremely difficult to formulate it clearly. In the circumstances, it would be preferable to dispense with such an exercise, since it was unnecessary.

45. Among the members of the Commission who had spoken, Mr. Ushakov alone had called for a special reference to be made to international organizations. Clearly, as many members had noted, international organizations must be afforded protection. A rule did exist for that purpose, namely, the one laid down in article 46, and there could be no others. It could not be stated as a general principle that, where the powers and functions of an international organization were involved—which was always the case—that organization could withdraw from an obligation, or that, where its powers and functions were involved, all of its obligations were entered into subject to a basic proviso, namely, that the organization could regard its functions and powers as compelling it to withdraw from its obligations. Such a condition was provided for in French law under the name ‘potestative condition’: one whereby a person entering into a commitment reserved the right to free himself from that commitment at his discretion. To incorporate it into the draft articles—and he did not believe that that was the intention of Mr. Ushakov, who did not consider that international organizations were unable to enter into an irrevocable commitment—would be tantamount to saying that the rule of *pacta sunt servanda*, stated in article 46, was not applicable to international organizations. It was Mr. Ushakov’s view that, in the case of the Security Council, for example, the real question was whether the Council, if it so desired, could sign an agreement which froze and immobilized a resolution. In Mr. Ushakov’s opinion, it could not do so and that was why he wished the principle in question to be reiterated. It might be pointed out that that was no absolute answer to the questions raised, since it was possible to say—although the Commission was not competent to do so—that the Security Council, acting under the provisions of Chapters VI or VII of the Charter, could never, even by the insertion of a clause in an agreement, freeze its competence, and that if it did so, the agreement was unconstitutional. Consequently, protection was afforded by article 46, and it was not necessary to include a special reference in the article under consideration. Either article 46 was applicable, or it was not.

46. Nevertheless, there remained the question of whether the article under consideration could include a reference to some sort of exception, one which, logically speaking, was not absolutely necessary but would nevertheless meet the concern expressed by Mr. Ushakov.

47. Consequently, he proposed that the article should be referred to the Drafting Committee, which should, in particular, take into account the criticisms expressed on the alternatives proposed in the eleventh report and find satisfactory formulations.

*It was so decided.*⁸

⁸ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2, 13 and 14.

48. Mr. USHAKOV said he agreed that the article should be referred to the Drafting Committee. He reserved the right to reply, at the following meeting, to the Special Rapporteur’s interpretation of his statement at the beginning of the meeting.

The meeting rose at 1 p.m.

1701st MEETING

Thursday, 6 May 1982, at 11.20 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Filling of casual vacancies in the Commission (article 11 of the Statute) (*concluded*)* (A/CN.4/355 and Add.1 and 2)

[Agenda item 1]

1. The CHAIRMAN announced that at a private meeting, Mr. Ahmed Mahiou had been elected to fill the casual vacancy in the Commission caused by the election of Mr. Bedjaoui to the International Court of Justice. He read out a telegram which had been sent to Mr. Mahiou congratulating him and inviting him to join the Commission at Geneva.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1, A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (*continued*)

ARTICLE 28 (Non-retroactivity of treaties)

2. The CHAIRMAN invited the Commission to consider draft article 28, which read:

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

3. Mr. USHAKOV said that article 28 had not given rise to any difficulties in the Commission and was ab-

* Resumed from the 1699th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

solutely identical to the corresponding article in the Vienna Convention on the Law of Treaties. The rule of non-retroactivity of international obligations, and particularly treaties, was well-established in international law, and it was obvious that it applied to treaties to which international organizations were parties. In practice, it might be necessary to provide for the retroactive application of a treaty or convention. The question had arisen with regard to the 1978 Vienna Convention on Succession of States in Respect of Treaties. Since that Convention concerned new States, and particularly newly-independent States, it had been necessary to provide for them to become parties to the instrument and obtain its retroactive application. Under article 7 of that Convention, a successor State might make a declaration that it would apply the Convention in respect of its own succession of States, which had occurred before the entry into force of the Convention, in relation to any other State Party to the Convention that accepted its declaration. But that was, of course, an exception to the general rule set out in the article under consideration. As drafted, the latter provision presented no difficulty.

4. Sir Ian SINCLAIR said that Mr. Ushakov had been correct to draw attention to the significance of article 28. Similarly, he perceived no difficulties in establishing the general principle of non-retroactivity of treaties, subject, of course, to the qualifying clause at the beginning of the article: "Unless a different intention appears from the treaty or is otherwise established". He had participated in the United Nations Conference on Succession of States in Respect of Treaties, where, as Mr. Ushakov had pointed out, it had been necessary to find a particular solution to take account of the desire of certain newly-independent States to have the benefit of the Convention adopted there in respect of their own succession. Such a solution had been found in article 7, which represented, in his view, an application of the qualifying clause in the present draft article 28. That clause was essential to provide the flexibility needed to deal with situations such as that which had arisen concerning the Vienna Convention on Succession of States in Respect of Treaties. Accordingly, he shared Mr. Ushakov's view that article 28 presented no problems, and he would be happy to see it referred to the Drafting Committee.

5. Chief AKINJIDE said that he would like an explanation of the qualifying clause at the beginning of article 28. He feared that it could be interpreted as binding for newly-independent States, in which case they would not enjoy the necessary protection.

6. Sir Ian SINCLAIR observed that the rule followed in the Vienna Convention on Succession of States in Respect of Treaties was that of the "clean slate", meaning that there was no obligation upon any newly-independent State to accept a treaty which had been applied to its territory before independence by the metropolitan Power. The problem that had arisen in Vienna had been that a number of newly-independent States had wished to have the benefit of the Convention in respect of their own successions, which had occurred

before the drawing-up of that instrument. Article 7 of the Convention therefore permitted a limited degree of retroactivity, provided that there were consensual declarations by the newly-independent State and the predecessor State. However, had article 28 of the Vienna Convention on the Law of Treaties not contained its opening clause, it would not have been possible to construct that limited degree of retroactivity. He therefore attached considerable importance to having a degree of flexibility written into article 28 of the current draft, in case a similar problem should arise in the future.

7. Mr. USHAKOV pointed out that the question raised concerned the succession of States in respect of treaties rather than the non-retroactivity of treaties with regard to acts or facts which took place before the date of entry into force of a treaty for a particular State. Article 73 of the Vienna Convention on the Law of Treaties and article 73 of the draft articles under consideration contained a reservation on questions that might arise in regard to a treaty because of a succession of States. However, the question whether a newly-independent State should honour a treaty concluded by an administering Power came within the scope of the succession of States in respect of treaties. When a newly-independent State accepted such a treaty, the treaty was applicable to it as of that moment. On the other hand, should that State wish the treaty to apply to an act which had occurred prior to the entry into force of the instrument for itself, a unilateral act would not be enough: the successor State must declare that it was prepared to apply the treaty from the date of succession, and the other States parties concerned must give their consent to such application. The application of a treaty from the moment it was accepted by the newly-independent State was therefore not to be confused with its application to the advent of the newly-independent State, if that State so wished and the other interested States so agreed. It therefore followed that a newly-independent State was in no way obliged to take over treaties concluded by its predecessor State. If it accepted them, it did so of its own free will, whether the treaties applied from the date on which the new State came into being or the date on which it accepted them.

8. Mr. NJENGA said he trusted that the explanations by Sir Ian Sinclair and Mr. Ushakov had allayed Chief Akinjide's fears concerning the opening words of article 28. There would be many cases in which a newly-independent State would desire the continuance of the obligations and benefits deriving from a treaty concluded before its independence. For example, many newly-independent States had agreements with international organizations, such as loan agreements with the World Bank; it would hardly be in their interest to apply the "clean slate" principle. That remark could also apply to agreements concerning customs unions, such as the one which had been concluded in East Africa. The first part of article 28, then, provided a flexibility that was necessary with regard to certain treaties. In his view, the article could be referred to the Drafting Committee.

9. Chief AKINJIDE said that he would like to see how the article would apply to boundary disputes in Africa. For the moment, however, he was satisfied with the explanations of his colleagues.

10. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that article 28 should be referred to the Drafting Committee.

*It was so decided.*³

ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations)

11. The CHAIRMAN invited the Commission to consider draft article 29, which read:

Article 29. Territorial scope of treaties between one or more States and one or more international organizations

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

12. Mr. EL RASHEED MOHAMED AHMED observed that article 29, like article 28, was a reproduction of the corresponding position of the Vienna Convention on the Law of Treaties. However, the idea of territory did not apply both to States and to international organizations, but only to States. He therefore wondered whether article 29 of the Vienna Convention was not sufficient to guarantee that a treaty would be binding on a State in the whole of its territory, in which case draft article 29 was redundant.

13. Mr. FRANCIS said that he believed that draft article 29 should be retained for two reasons. First, the Commission had taken a decision to maintain a parallel between the draft convention and the parent instrument, the Vienna Convention. Omitting article 29 would therefore create a vacuum in the draft. Second, article 29 of the Vienna Convention had established a general rule regarding treaties between States. However, a State party could conceivably claim that a treaty between a State and an international organization was a different treaty entirely, and it would be wise to maintain article 29 in the draft to cater for that eventuality.

14. Mr. FLITAN recognized that the fact that article 29 of the Vienna Convention and draft article 29 led to exactly the same conclusion might raise doubts as to the usefulness of the latter provision. However, unlike article 29 of the Vienna Convention, draft article 29 did not concern treaties between States but treaties between one or more States and one or more international organizations. Although the conclusion was bound to be the same in both cases, since it was a question of the territorial scope of treaties and the concept of territory was valid only for States, it was absolutely essential to maintain the rule set out in the draft on treaties concluded between States and international

organizations, since the Vienna Convention applied only to treaties concluded between States.

15. Mr. NJENGA said that, in his view, article 29 was necessary. Indeed, the Commission had agreed that it should work on the basis of a text that could stand on its own, so that reference would not have to be made to the Vienna Convention. If article 29 were left out, there would be a gap in the draft articles. He was, however, uncertain whether article 29 would apply in the case of treaties concluded between international organizations.

16. Sir Ian SINCLAIR said that there might be certain categories of treaties that did not necessarily have a territorial scope, and that treaties between international organizations might be classified in that category. Such treaties might be "personal", without any territorial consequences.

17. He agreed with preceding speakers that article 29 should be included in the draft under discussion. As an illustration of the type of problem with which it coped, he referred to the case in which the United Nations concluded an agreement with State X concerning privileges and immunities for the participants in a symposium to be held in the territory of State X under United Nations auspices. In such a case, a rule of the kind embodied in article 29 was essential in order to indicate to State X the territorial scope of its obligations under its agreement with the United Nations. That rule must be expressly stated in article 29. Otherwise, there might be some implication that a different rule applied, whereas, in fact, the Commission was seeking to apply the same rule in respect of treaties between States and international organizations and in respect of treaties between States alone.

18. Mr. NI said that at first glance he had been inclined to think that article 29 was not necessary, because article 29 of the Vienna Convention clearly related to the territorial scope of treaties and it was difficult to see how treaties between States and international organizations could involve questions of territory.

19. On second thought, however, he had decided that article 29 should be retained, because the Commission was in the process of drafting articles which had already taken the shape of a convention that would be a counterpart or a mirror of the Vienna Convention. If the Commission omitted article 29, it might, as Sir Ian Sinclair had said, give the impression either that the rule in question did not apply or that a different rule applied to treaties between States and international organizations. In fact, however, the rule embodied in article 29 did apply to such treaties. If it was ultimately decided that the draft articles should take the form of a mere declaration, provisions such as article 29, which might not be considered applicable in all cases, could be deleted.

20. Mr. SUCHARITKUL agreed that it was necessary for article 29 to be included in the draft under consideration. With regard to the point raised by

³ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 *et seq.*

Mr. Njenga concerning treaties concluded by international organizations, he pointed out that, while it was quite correct to say that an international organization had no territory as such, many intergovernmental organizations did have responsibilities and powers over what could be described as "treaty areas", a term that had been used by OAS, NATO, CENTO and other collective defense organizations. The United Nations, an organization of a universal character, had, for example, responsibility for matters relating to outer space, and it could conclude agreements and treaties binding it in respect of that "treaty area".

21. The CHAIRMAN suggested that the text of article 29 should be referred to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

22. The CHAIRMAN invited the Commission to consider article 30, which read:

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41] [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

23. Mr. USHAKOV said that while article 30, which the Commission had approved on first reading, gave rise to no substantive comment, the wording of paragraph 4 was not entirely satisfactory. Its inelegance, which was particularly marked in subparagraph (b),

arose from the fact that, as the draft articles concerned treaties concluded between States and international organizations or between international organizations, reference had to be made to the various types of relations possible, namely "as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties", whereas article 30, subparagraph 4 (b), of the Vienna Convention on the Law of Treaties, on which the provision in question was based, spoke only of relations "as between a State party to both treaties and a State party to only one of the treaties", for the very good reason that that Convention governed only treaties between States.

24. The Special Rapporteur had endeavoured to render the wording of paragraph 4 less cumbersome. Unfortunately, the text proposed in his eleventh report (A/CN.4/353, para. 19) did not cover all the possibilities and was not sufficiently precise. In subparagraph (a), it would be better to use the wording of the Vienna Convention, namely "as between [the] parties to both treaties", rather than "as between two parties, which are each parties to both treaties". There were also difficulties with regard to subparagraph (b). Since the parties to the treaties covered in the draft articles under consideration could be either States or international organizations, to refer to relations "as between two parties, of which one is a party to both treaties and the other to only one of the treaties" was too vague. It was also clumsy. Once again, taking the Vienna Convention as the model, it should be stated what those two parties were (States or international organizations) and—as in the text adopted at the first reading—which was a party to both treaties and which a party to only one of the treaties. Despite its inelegance, the earlier text was more satisfactory than that proposed by the Special Rapporteur, because it gave all the necessary information. He none the less hoped that the Drafting Committee would be able to improve on the text adopted on first reading by proposing a formula that was more elegant but equally precise.

25. Mr. FLITAN did not think that the text of paragraph 4 as proposed by the Special Rapporteur posed any problems of understanding. It was quite clear from the title of article 30 and the text of paragraph 1 that the treaties referred to in paragraph 4 were not limited in number. Paragraph 4 referred to "both treaties" because there were usually two successive treaties, and it was normal to take into account the commonest situation.

26. There was, however, a serious flaw in subparagraphs (a) and (b) proposed by the Special Rapporteur. The use of the words "as between two parties" could be understood to mean that the parties in question were only States and that the subparagraphs therefore

⁴ *Idem.*

applied only to treaties concluded between States. However, the case of such treaties, which was governed by the Vienna Convention, did not come within the scope of the draft articles under consideration. It would therefore be preferable to retain for paragraph 4 the text adopted on first reading, in which international organizations were specifically mentioned among the parties to the treaties.

27. With regard to paragraph 5, he favoured maintaining the words in square brackets, which also appeared in the corresponding provision of the Vienna Convention (art. 30, para. 5). Rather than trying to improve the provisions of that Convention, it would be better at the present stage to ensure the greatest possible uniformity between the two texts.

28. Mr. McCaffrey suggested that, since the Commission's aim was to follow the provisions of the Vienna Convention as closely as possible, paragraph 1 of article 30, an introductory provision which applied to the remainder of the article, should be brought into line with the corresponding provision of the Vienna Convention. Paragraph 1 would thus open with the words "Subject to Article 103 of the Charter of the United Nations ...". Paragraph 6 of draft article 30, which had no counterpart in the Vienna Convention, could then be deleted.

29. He appreciated the Special Rapporteur's efforts to render the wording of article 30, paragraph 4, less cumbersome. If possible, the Commission should adopt the version that had been proposed in the Special Rapporteur's eleventh report (A/CN.4/353, para. 19), for it represented a definite linguistic improvement over the longer version.

30. The words "as between two parties" proposed in the Special Rapporteur's simplified version of subparagraphs 4 (a) and (b) nevertheless seemed to have given rise to difficulties. Since treaty provisions were often quoted out of context, it should be made clear that those subparagraphs referred to treaties between States and international organizations. It might therefore be helpful for the subparagraphs to begin with the words "as between a State and an international organization ...". This assumes it is not necessary to refer to those bodies as "parties" in the opening clause. That would not seem necessary, since they are described as such in the balance of each subparagraph.

31. He also suggested that, as a point of grammar, the words "which are each parties to both treaties" in the simplified version of subparagraph 4 (a) should be amended to read "each of which is a party to both treaties".

32. He fully agreed with Mr. Flitan that the words in square brackets in article 30, paragraph 5, should be retained in order to ensure conformity with the corresponding provision of the Vienna Convention.

The meeting rose at 1 p.m.

1702nd MEETING

Friday, 7 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 1]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)³ (concluded)

1. Sir Ian SINCLAIR said that article 30 of the Vienna Convention, on which article 30 of the draft was closely modelled, had been one of the most difficult provisions to draft at the United Nations Conference on the Law of Treaties. Even in the case of treaties between States, the application of successive treaties relating to the same subject-matter gave rise to problems which did not yield to easy solutions. Most legal advisers to ministries of foreign affairs had, at one time or another, been confronted with difficult technical and legal issues arising out of successive treaties, particularly in the area of industrial or intellectual property rights.

2. Although it was obviously right that draft article 30 should be modelled on article 30 of the Vienna Convention, questions had been raised at the preceding meeting with regard to the scope and wording of paragraph 4. Mr. Flitan had, for example, expressed concern about the fact that article 30 as it now stood seemed to regulate the consequences for States of successive treaties relating to the same subject-matter, even though that question was already governed by article 30 of the Vienna Convention.

3. He continued to be puzzled by Mr. Flitan's comment. As he understood the position, article 1 stated that the draft articles applied to: "(a) treaties concluded between one or more States and one or more international organizations, and (b) treaties concluded between international organizations". The definition of the term "treaty" in article 2, subparagraph 1 (a), faithfully reflected the scope of the draft articles as defined in article 1. Article 30 thus applied only to successive treaties relating to the same subject-matter and concluded between one or more States and one or more international

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1701st meeting, para. 22.

organizations or between international organizations. In other words, the scope of article 30 could not exceed the scope of the draft articles as a whole. It therefore determined only the rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter and concluded between one or more States and one or more international organizations or between international organizations, and it did not overlap with article 30 of the Vienna Convention, which determined only the rights and obligations of States parties to successive treaties relating to the same subject-matter and concluded between States.

4. If his analysis was correct, he could see no problem with the simplified version of paragraph 4 of article 30 proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 19). Indeed, article 30, paragraph 3, referred to the case in which "all the parties to the earlier treaty" were "parties also to the later treaty". That reference to "parties" clearly covered States and international organizations in the case of treaties between States and international organizations, and international organizations in the case of treaties between international organizations. It would therefore be unnecessary, in drafting article 30, paragraph 4, to go into all the detail contained in the text adopted on first reading. In any event, he found it difficult, except as an abstract and largely theoretical exercise, to envisage "chains" of successive treaties relating to the same subject-matter and concluded between States and international organizations or between international organizations. Indeed, in many instances, the participation of an international organization in a treaty would be the essential condition for the participation of the States parties. What he had in mind was, for example, the category of trilateral safeguards agreements concluded between two States with the active participation of the IAEA. Although the situation envisaged in article 30, paragraph 4, would apply to such agreements only in very rare cases, he freely conceded that that situation had to be covered, and to that end he would have a marked preference for wording along the lines of the simplified text of paragraph 4 proposed by the Special Rapporteur. That was not to say that he was entirely satisfied with the wording of that simplified text, but he thought that the finer points of drafting could be dealt with by the Drafting Committee, to which article 30 should be referred.

5. Mr. THIAM said that he supported the Special Rapporteur's proposed new wording of article 30, paragraph 4 (*ibid.*), which was much less cumbersome than that adopted on first reading. Although he understood the reservations expressed in that connection by some members of the Commission and, in particular, by Mr. Flitan, who considered that it would be better to use the terms "State party" and "international organization party" rather than the term "parties", which, in his view, was too vague, he did not think that those reservations were justified, because the title of the draft articles made it quite clear that the treaties to which the provisions of the draft applied were treaties

concluded between States and international organizations or between international organizations. It was obvious, therefore, that when the word "parties" was used in the body of the text it referred to at least one international organization. Any further clarification was unnecessary.

6. Since most of the observations on article 30 related to form rather than substance, he proposed that the article should be referred to the Drafting Committee, which could, if necessary, improve on the text of paragraph 4 proposed by the Special Rapporteur in paragraph 19 of his eleventh report.

7. Mr. CALERO RODRIGUES said that article 30 of the Vienna Convention and article 30 of the draft articles were intended, not to state the principle of *lex posterior derogat anterior*, something that would be quite unnecessary, but rather to enunciate some exceptions to the application of that principle. Those exceptions were set out in paragraph 2. Paragraph 3 dealt with the normal situation in which all the parties to both treaties were the same, while paragraph 4 dealt with the special situation in which the parties to the earlier treaty were not all parties to the later treaty. In such a case, the solution adopted in the Vienna Convention and in the draft articles was to apply the general rule of paragraph 3 as between any two parties, whether two States, two international organizations or one State and one international organization, which were parties to both treaties.

8. Nevertheless, the simplified version of subparagraph 4 (a) which the Special Rapporteur had proposed in his eleventh report and which referred simply to "two parties, which are each parties to both treaties" was fully justified, as was the Special Rapporteur's proposed simplified version of subparagraph 4 (b), which did not refer separately to the different types of relations between a State party to both treaties and a State party to only one of the treaties, a State party to both treaties and an international organization party to only one of the treaties, an international organization party to both treaties and an international organization party to only one of the treaties and an international organization party to both treaties and a State party to only one of the treaties, but simply stated that, as between two parties, of which one was a party to both treaties and the other to only one of the treaties, the treaty which bound the two parties in question governed their mutual rights and obligations.

9. The point raised by Mr. Flitan in that connection (1701st meeting) had undoubtedly been the result of concern that the Commission might be dealing in article 30, paragraph 4, with relations between States only. In his own view, however, article 30 dealt only with treaties to which at least one international organization was a party and, in such a case, even the relations between two States parties to such treaties were governed by the draft articles, not by the Vienna Convention.

10. Although he was in favour of the adoption of the simplified version of paragraph 4, he would go one step further than the Special Rapporteur and suggest the following wording:

“4. When the parties to the later treaty do not include all the parties to the earlier one:

“(a) as between parties to both treaties, the same rule applies as in paragraph 3;

“(b) as between a party to both treaties and a party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.”

That suggestion was, of course, a matter to be considered by the Drafting Committee.

11. In reply to Mr. McCaffrey's suggestion (*ibid.*), he said that the reference to Article 103 of the Charter of the United Nations had probably been included in a separate paragraph 6 and not at the beginning of paragraph 1, as in article 30 of the Vienna Convention, because of the doubts that had been expressed about the possibility of applying Article 103 of the Charter, which referred specifically to the Members of the United Nations and not to other subjects of international law.

12. Mr. JACOVIDES, referring to article 30, paragraph 6, said that the provisions of the draft articles followed those of the Vienna Convention as closely as possible, subject, of course, to any adaptations that might be necessary to take account of the situation of international organizations. The United Nations Charter, which was a treaty between the Member States of the United Nations, was of a special nature in that its provisions were, as stated in its Article 103, hierarchically superior to those of any other treaty, whether earlier or later and whether between States, between States and international organizations or between international organizations. It would therefore seem logical to follow the order of the Vienna Convention and place the reference to Article 103 of the Charter in article 30, paragraph 1, as Mr. McCaffrey had suggested (*ibid.*). Moreover, the words “without prejudice to Article 103 ...” used in article 30, paragraph 6, were perhaps weaker than the words “Subject to Article 103 ...” used in article 30, paragraph 1, of the Vienna Convention. It would therefore be better to use the wording of the Vienna Convention.

13. Mr. MALEK said he was afraid that the Drafting Committee, to which the Commission would no doubt refer draft article 30, might give too much weight to the rather severe criticism expressed with regard to the new text of paragraph 4 proposed by the Special Rapporteur. To counterbalance that criticism, he wished to state that, in his view, the text was simple, sufficiently explicit and technically well-conceived. There was absolutely no need to reiterate in paragraph 4 terms already used in the title and in paragraph 1 of article 30. In any event, the text of paragraph 4 adopted on first reading could not be retained in its present form. As it now stood, it could not be incorporated in a treaty or even in a declaration or a resolution. Its major defect

was that it did not just define a rule, but sought to explain it.

14. Mr. USHAKOV proposed that the wording of paragraph 5 should be improved on by replacing the words at the end of the paragraph, “its obligations towards a State or an international organization not party to that treaty, under another treaty”, which were incorrect, by the following words, which were based on the Vienna Convention: “its obligations towards another State or an international organization or, where applicable, towards another international organization or a State under another treaty”.

15. Mr. NI said that the text proposed by the Special Rapporteur would do much to make paragraph 4 less cumbersome. Furthermore, since the word “treaty” was clearly defined in article 2, there was no doubt that the word “parties” used in paragraph 4 referred both to an international organization and to a State. That word was therefore entirely relevant and devoid of any ambiguity.

16. The simplified version proposed by the Special Rapporteur offered a further advantage: the use of the general formula “as between two parties” did away with the problem raised by the wording of the first part of subparagraph (a) of the text adopted on first reading (“as between two States ... parties to both treaties”) and the wording of the first part of subparagraph (b) (“as between a State party to both treaties and a State party to only one of the treaties”), which suggested that the treaties in question were treaties between States and therefore did not come within the scope of the draft articles under consideration. Consequently, the text proposed by the Special Rapporteur was more satisfactory than the text adopted on first reading.

17. Mr. SUCHARITKUL said that the drafting problems to which article 30, paragraph 4, gave rise had been sufficiently debated, and that the time had come to refer the article to the Drafting Committee. In his view, the Special Rapporteur's proposed text would, perhaps, provide an acceptable solution.

18. A number of substantive questions had still not been settled. For instance, it had not been decided how to distinguish between treaties concluded between States, which were covered by the Vienna Convention, and treaties concluded between States and international organizations or between international organizations, which were dealt with in the draft articles now being elaborated. It had not even been decided whether it was possible to draw a distinction between those two kinds of treaties and whether the rules governing the contractual relations between two States parties to a treaty of the first kind differed from those governing the relations between two States parties to a treaty of the second kind.

19. Furthermore, the term “international organization” was not very narrowly defined in the draft articles, since article 2, subparagraph 1 (i), simply stated that the term “international organization” meant an

“intergovernmental organization”. That lack of precision could be a source of difficulties. For instance, there was little doubt that the Conventions on the Law of the Sea signed at Geneva in 1958 were treaties between States, despite the fact that the signatories included the Holy See, which had been identified as a sovereign State but one without a separate territory. The same did not, however, apply in the case of the recently adopted Convention on the Law of the Sea,⁴ to which there were several parties that were not actually States. In such circumstances, it was therefore difficult to say whether that Convention was an international agreement between States or an international agreement between States and international organizations. It was perhaps dangerous to use the word “treaty” in reference both to international agreements concluded between States and to international agreements concluded between States and international organizations or between international organizations.

20. In that connection, he said that it might also be possible to envisage a third kind of international agreement, namely, one concluded between non-governmental organizations in consultative status (category II) such as the ICRC with the Economic and Social Council.

21. Mr. FLITAN said he considered that, in order to follow the text of the Vienna Convention as closely as possible, the square brackets in article 30, paragraph 5, should be deleted, as proposed by the Special Rapporteur in his tenth report (A/CN.4/341 and Add. I, para. 89).

22. To those members who considered that there was no need to state in paragraph 4 that the treaties referred to in that paragraph were treaties concluded between States and international organizations or between international organizations, since, in their view, article 30, paragraph 1, did not leave the matter in any doubt, he would point out that in several other draft articles, and particularly in article 27, the need for such a clarification had none the less been felt.

23. For his own part, he preferred the text of paragraph 4 adopted on first reading to the one proposed by the Special Rapporteur, but he recognized that there were flaws in the former which the Drafting Committee would have to eliminate. The wording of the beginning of subparagraph (a) would, for example, have to be re-examined, since the phrase “between two States ... parties to both treaties” was no more satisfactory than the corresponding wording proposed by the Special Rapporteur, namely, “between two parties, which are each parties to both treaties”.

24. Mr. QUENTIN-BAXTER, referring to the comments made by Mr. Sucharitkul, said that at a very early stage in the Commission’s discussion of the draft articles, the specific case of the ICRC had been cited as an example of an institution which played a very important role in international affairs but whose treaties were not

mentioned in the definition of the scope of the draft articles given in article 1.⁵ It had in fact been agreed that certain categories of treaties or agreements would remain outside the scope of the draft articles and of the Vienna Convention. That was, of course, the reason for the rather complicated wording of article 3 of the draft.

25. The question which Mr. Flitan had raised (1701st meeting, para. 26) and which had also caused him some concern was whether, in treaties to which States and international organizations were parties, the relations between the States parties were governed by the Vienna Convention or by the draft articles. In other words, if such relations were governed by the Vienna Convention, they should not be dealt with in the draft articles. After some reflection, he had come to the conclusion that such relations were not governed by the Vienna Convention, as was made clear in article 3 of that Convention, which began with the words: “The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ...”. The drafters of the Vienna Convention had thus considered that the treaties now under discussion did not fall within the scope of that Convention, even in so far as relations between States parties were concerned. That matter had been left to be governed by the draft articles under consideration. There was thus no reason for concern that the scope of the draft articles would extend to relations between States themselves. The governing consideration was that the treaty in question was one concluded between States and at least one international organization.

26. A further point in support of that conclusion was that the draft articles frequently did not simply use the term “treaty”, but, rather, spelled out the type of treaty in question. In that connection, Mr. Flitan had cited the example of article 27, which began with the words “A State party to a treaty between one or more States and one or more international organizations ...”. The reason for that particular wording was that article 27 referred to treaties concluded between States and international organizations, but not to treaties concluded between international organizations only. In that article, the specification was necessary, but it seemed to him that, when the Commission was referring generically to all the kinds of treaties with which the draft articles were concerned, it could simply rely on article 1 and use only the term “treaty”, as defined in article 2, subparagraph 1 (a).

27. Mr. LACLETA MUNOZ said he agreed with the members of the Commission who thought that the simplified version of article 30, paragraph 4, was preferable to the cumbersome text adopted on first reading.

28. In his view, the interpretation of article 30 gave rise to problems mainly because it was not clear whether

⁴ See 1699th meeting, footnote 7.

⁵ See *Yearbook ... 1972*, vol. II, p. 193, document A/CN.4/258, para. 69 and footnote 172, and *Yearbook ... 1974*, vol. II (Part One), para. 297, document A/9610/Rev.1, chap. IV, sect. B, para. (1) of the commentary to article 3.

paragraphs 3 and 4 were provisions that explained paragraph 2 or whether they stood on their own. The words in paragraph 2 "When a treaty specifies that it is subject to ... an earlier or later treaty" had caused some confusion, particularly in relation to the rule *lex posterior derogat anterior*. It might therefore be better to place paragraph 2, which embodied a specific provision, after paragraphs 3 and 4, which were provisions of a general nature.

29. The CHAIRMAN suggested that the Commission should refer article 30, as well as the amendments to paragraph 4 proposed by the Special Rapporteur (A/CN.4/353, para. 19), to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 31 (General rule of interpretation)

30. The CHAIRMAN invited the members of the Commission to consider, in turn, articles 31 to 33, which made up section 3 entitled "Interpretation of treaties". Those three articles, which were identical to the corresponding provisions of the Vienna Convention, had not been the subject of any comment. They had not given rise to any objection at the preceding session of the Commission, which had referred them to the Drafting Committee. Article 31, as adopted on first reading, read:

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

31. Mr. USHAKOV said that there was no need for the rules of interpretation of treaties to which one or more organizations were parties to be any different from the rules of the Vienna Convention relating to the interpretation of treaties between States. The reason why the Commission had not simply incorporated in the draft a *renvoi* to the corresponding articles of the Vienna Convention was that the ultimate fate of the draft was still unknown, and such a solution would not be satisfactory if the draft were to serve as a basis for an

⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 15.

independent convention. The parties to such a convention might not be the same as the parties to the Vienna Convention, and they would therefore not be bound by the provisions of the latter instrument.

32. Sir Ian SINCLAIR, commenting on Mr. Ushakov's statement, recalled that, in the Sixth Committee, he had himself suggested⁷ total simplification of the draft by means of a system of *renvois* whenever draft articles simply reproduced the corresponding articles of the Vienna Convention. After considering the Commission's report on its thirty-third session, however, he understood why the Commission had not wanted to adopt such a procedure. He was satisfied that the best solution, at least at the stage of the second reading, was to retain articles unaltered even where they were identical with the articles of the Vienna Convention.

33. The CHAIRMAN suggested that the Commission should refer article 31 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 32 (Supplementary means of interpretation)

34. The CHAIRMAN invited the Commission to consider article 32, which read:

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

35. In the absence of any observations, the CHAIRMAN suggested that the Commission should refer article 32 to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

36. The CHAIRMAN invited the Commission to consider article 33, which read:

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

⁷ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 45th meeting, paras. 22-23, and ibid., Thirty-sixth Session, Sixth Committee, 40th meeting, para. 7.*

⁸ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 *et seq.*

⁹ *Idem.*

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

37. In the absence of any observations, the CHAIRMAN suggested that the Commission should refer article 33 to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 34 (General rule regarding third States and third international organizations) and ARTICLE 2, subpara. 1 (h) (Use of terms: “third State” or “third international organization”)

38. The CHAIRMAN invited the Commission to consider the articles which made up section 4 entitled “Treaties and third States or third international organizations”, starting with article 34. He also invited it to consider, simultaneously, article 2, subparagraph 1 (h), which was closely related to article 34. Those provisions, as adopted on first reading, read:

Article 34. General rule regarding third States and third international organizations

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 2. Use of terms

1. For the purpose of the present articles:

...

(h) “third State” or “third international organization” means a State or an international organization not a party to the treaty.

39. Mr. USHAKOV, stressing the cardinal importance of article 34, said that it laid down a basic principle of international law which applied to international organizations and States alike and was set forth in the corresponding article of the Vienna Convention—namely, that a treaty could bind only the parties to that treaty. According to article 2, subparagraph 1 (g), the term “party” meant a State or an international organization which had consented to be bound by the treaty and for which the treaty was in force. Other articles and, in particular, article 11, specified how a State or an international organization could become a party to a treaty. Article 34 was the first draft provision to use the terms “third State” and “third organization”. As defined in article 2, subparagraph 1 (h), those terms meant a State or an organization that was not party to the treaty or, in other words, a State or an organization that had not performed the acts provided for in articles such as article 11, which defined the conditions under which a State or an international organization could

become a party to a treaty. Article 34, taken together with the definitions given in article 2, subparagraph 1 (h), meant that the member States of an organization which concluded a treaty were third States; in such a case, the organization acted as a subject of international law independently of its members. It bound only itself and did not bind its members, which remained third States in relation to the treaty it had concluded. Naturally, an international organization could conclude an agreement with another organization or with a State, whether or not it was a member of that organization, and it could provide that rights and obligations would derive therefrom for its members. However, the latter remained third States in relation to the treaty, whatever the rights and obligations that might derive for them from that treaty. It was the subsequent articles that specified how third States and, in particular, the member States of an organization could assume such obligations and enjoy such rights. In the case of obligations, the express consent of such third States was required.

40. There were, however, organizations that differed from ordinary international organizations and that could be regarded as supranational organizations. There was at least one organization which had, in some respects, the appearance of an ordinary international organization, and in others, that of a supranational organization which could bind its member States at the same time as it bound itself. Such a situation called for special rules.

41. With regard to drafting, the two definitions under consideration were satisfactory, but it might be preferable to retain the two paragraphs of article 34, which dealt with quite separate kinds of treaties.

42. Mr. McCAFFREY, referring to the proposals made by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 24), said that, if the single paragraph form of draft article 34 was less precise than the text adopted on first reading, it was because the word “treaty” could be interpreted to mean a treaty between two States. However, since, according to article 1, the draft articles did not apply to treaties between States and the definition of the term “treaty” in article 2, subparagraph 1 (a), excluded treaties to which States alone were parties, there did not appear to be any overlap with the Vienna Convention. Furthermore, any ambiguity which might result from reading draft article 34 in isolation was outweighed by the benefits of simplicity and clarity afforded by the proposed amendment. He also endorsed the Special Rapporteur’s proposal that the word “international” should be inserted between the words “third” and “organization”, as the Commission had suggested.¹¹

43. Mr. FLITAN, referring to Mr. Ushakov’s comments, suggested that members should refrain for the time being from discussing matters arising out of article 36 *bis* and deal solely with the provisions under consideration.

¹⁰ *Idem.*

¹¹ *Yearbook ... 1981*, vol. I, p. 173, 1675th meeting, para. 32.

44. While he preferred the wording of article 34 adopted on first reading, he would not rule out simplified wording such as that proposed by the Special Rapporteur.

45. Sir Ian SINCLAIR said that, in considering section 4 of the draft articles, the Commission would be confronting some rather serious problems. Since Mr. Ushakov's remarks might prefigure a more extensive debate at a later stage, he believed that it would be unwise to refer article 34, together with the definition of a third State, to the Drafting Committee before the completion of the discussion of articles 35, 36 and 36 *bis*.

46. With all due respect, he said that he was slightly troubled by Mr. Ushakov's somewhat formalistic attitude towards the concept of a third party within the context of the current draft. As a general rule of the law of treaties applicable to treaties between States, the *pacta tertiis* rule presented no difficulties: a "third State" meant a State which was entirely outside the treaty-making process. In a case involving an international organization and its member States, however, those States might not be complete strangers to the treaty-making process. Although he accepted the fact that an international organization was an entity separate from its member States, such an organization might none the less be negotiating on the basis of a mandate conferred upon it by its member States. The problem had to be approached from a different angle, and it was not sufficient to enunciate the *pacta tertiis* rule contained in the Vienna Convention. For that reason, the definition of a third State in the current draft was of crucial importance. It would be unwise for the Commission to take any hasty decisions on draft article 34 without first reviewing all the articles in section 4 and considering the overall approach to relations between member States and international organizations.

47. Mr. NJENGA said that, in his view, article 34 was quite straightforward. He endorsed the Commission's suggestion that the word "international" should be inserted between the words "third" and "organization". If some members preferred the original version of the draft article, he would have no objection to referring both versions to the Drafting Committee. He did not believe that article 34 should be held in abeyance until the discussion of other articles had been completed.

48. Mr. FLITAN, endorsing Mr. Njenga's viewpoint, said that there was no need to defer the decision on article 34, which was independent of the three articles that followed. The retention or deletion of article 36 *bis* related to articles 35 and 36, but had no connection with article 34.

49. Sir Ian SINCLAIR said that it had not been his intention to delay the Commission's work. The problem lay not with article 34, but, rather, with the definition of a third State. Perhaps the Commission could refer article 34 to the Drafting Committee and take a final decision on the definition of a third State only after the articles posing problems similar to those raised by article

36 *bis* had been thoroughly discussed. It would, moreover, be extremely helpful to have the benefit of the Special Rapporteur's views during the discussion of articles 35, 36 and, in particular, 36 *bis*.

50. Mr. CALERO RODRIGUES said that he approved of the simplification of article 34 proposed by the Special Rapporteur.

51. As for the procedure proposed by Sir Ian Sinclair, he said that he had no doubt that article 34 as it now stood, together with the definition of a third State, would be accepted. He nevertheless saw some merit in Sir Ian Sinclair's view that article 34 did not have to be referred to the Drafting Committee immediately. The Commission had nothing to lose by deferring its final decision on article 34 until it had completed its discussion of the other draft articles in section 4.

The meeting rose at 1 p.m.

1703rd MEETING

Monday, 10 May 1982, at 3 p.m.

Chairman: Mr. Paul REUTER
later: Mr. Leonardo DÍAZ GONZÁLEZ

Welcome to the participants in the International Law Seminar

1. The CHAIRMAN welcomed the participants in the International Law Seminar, a hallowed institution of long standing which the Commission valued highly. For a jurist, it was always an adventure and a necessity to learn law from sources other than books. In that respect, the Commission's work, which was characterized by simplicity and a spirit of mutual understanding, should be of great interest to the participants in the Seminar.

Mr. Díaz González, first Vice-Chairman, took the Chair.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

DRAFT ARTICLES ADOPTED BY THE COMMISSION
SECOND READING² (continued)

ARTICLE 34 (General rule regarding third States and third international organizations) and Article 2, sub-para. 1 (h) (Use of terms: "third State" or "third international organization")³ (concluded)

2. Mr. KOROMA said that, although the *pacta tertiis* rule applied to international organizations as well as to States, in the case of the former it raised some problems. Referring to the recently adopted Convention on the Law of the Sea and its annexes, he noted that annex IX of the Convention contained a provision, in para. 4, allowing an international organization to become a party to it, with ensuing rights and obligations for its membership.⁴ Since the text of the Convention had not yet been issued, the Special Rapporteur might want to study it carefully before article 34 was referred to the Drafting Committee. If that procedure would cause undue delay, perhaps the Drafting Committee itself could examine the text of the Convention and its annexes.

3. Mr. LACLETA MUNOZ said that he preferred the simpler and more elegant wording of article 34 proposed by the Special Rapporteur (A/CN.4/353, para. 24). It had been stated that the word "treaty" might be interpreted as signifying a treaty between States, but, in order to avoid confusion, it would be sufficient to apply the rules of interpretation enunciated in article 2, paragraphs 1 and 2, of the draft articles.

4. A second problem connected with article 34 was more difficult and could determine whether that article should be referred to the Drafting Committee immediately or not. Certain types of international organizations possessed supranational competence or substituted, in certain areas, for the competence of their member States. The member States could therefore be qualified as third States in relation to the treaties concluded by the organization within the sphere of competence transferred to it by its member States. That could influence not only the drafting, but also the contents of article 2, subparagraph 1 (h). Subject to that problem, he would have no objection if the text was referred to the Drafting Committee. It should, however, be emphasized that some of the difficulties mentioned in connection with article 36 *bis* could be avoided if article 2, subparagraph 1 (h), was drafted appropriately.

5. Mr. RAZAFINDRALAMBO said that he was in favour of referring article 34 to the Drafting Committee, which should examine it in the light of the observations made by Mr. Koroma. Article 2, subparagraph 1 (h), should also be referred to the Drafting Committee because it was difficult to see how there could be any

departure from the concise and general definition contained in the Vienna Convention. Although he preferred the simplified wording of article 34, which better emphasized the peremptory nature of the principle of the relativity of treaties, he believed that the division of article 34 into two paragraphs could be justified to the extent that each paragraph served as an introduction to the provisions contained in the following articles. If that division was retained, however, the order of paragraphs 1 and 2 should be reversed, since treaties between one or more States and one or more international organizations were systematically mentioned before treaties between international organizations, not only in the other provisions of the draft, but also in the title of the topic under consideration.

6. Mr. REUTER (Special Rapporteur), summing up the debate, said that the provisions under discussion had given rise to drafting suggestions and had raised doubts about whether they should immediately be referred to the Drafting Committee. Some members of the Commission believed that it was not article 34, but rather the definitions contained in article 2, subparagraph 1(h), that might raise the most important question of principle. To reassure them, the Commission might refer both provisions to the Drafting Committee and request it to consider them in the context of the set of provisions constituting section 4, relating to the interpretation of treaties. As to substance, the articles contained in section 4 were obviously some of the most difficult in the draft and it was quite normal that they should cause some members of the Commission problems, which were in fact linked to article 36 *bis* and would be considered only in connection with that article.

7. Replying to the observations made by Mr. Koroma, who thought that account should henceforth be taken of the work of the Third United Nations Conference on the Law of the Sea having a bearing on the articles in section 4, he would, as a member of the Commission rather than as Special Rapporteur, say that the question of the effects of treaties with respect to entities which were not parties to those treaties was different from the question of the conditions under which an international organization could become a party to a multilateral treaty and the effects of such participation. Some interesting aspects of the matter had, admittedly, been introduced at the Conference on the Law of the Sea, but, in the course of its work the Commission had often noted that there were few open multilateral treaties—that is, treaties intended for a wide accession—to which international organizations were parties. There were at present many treaties which had allowed a specific international organization, regarded as a special international organization, to become party, but such treaties laid down all sorts of conditions and provided for all sorts of effects. All the other requests that had been made in the past, such as the suggestion that the United Nations itself should participate in the conferences on humanitarian law, had always been rejected.

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For texts, see 1702nd meeting, para. 38.

⁴ See 1699th meeting, footnote 7.

8. It could be asked whether the Commission wished to draw distinctions between international organizations and define a special category of international organizations for whose sake some of the articles in section 4 would be drafted. To his mind, it would not *a priori* be advisable to try to formulate rules that would be valid for categories that were too specific. Thus, if the sole aim of article 36 *bis* was to take account of a special case, it should not be included in the draft articles. It was to be noted that the Vienna Convention had drawn no distinction between treaties, despite the suggestions made by certain States.

9. It should also be noted that the Vienna Convention enunciated very general rules, which remained valid, even if they were attenuated to some extent, as in the draft under consideration. The principle enunciated in article 34, namely, that treaties did not have effects with respect to third States, was thus absolute. During the Commission's debates on the corresponding draft articles, the proposed exceptions to that principle had been rejected because the rule seemed important enough to be stated generally and virtually absolutely. Exceptions did, however, exist and they had been reflected in subsequent conventions, such as the 1978 Vienna Convention on Succession of States in Respect of Treaties which provided that territorial or dispositive treaties could have effects with respect to third States.

10. The real problem raised by article 34 was whether the member States of an international organization could actually be regarded as third States in relation to agreements concluded by that organization. From the very beginning, he had attempted to introduce the new concept that there was a position falling between that of a third State and that of a State party, but the Commission had rejected that concept. With article 5 of the draft, and on Mr. Ushakov's initiative, the Commission had now taken a position that no longer ruled out the possibility that the constituent instruments of international organizations, which were chiefly treaties between States, might also be treaties that would come within the scope of the draft articles under consideration, if it was acknowledged, as article 5 tended to do, that an international organization could be a member of another international organization. An absurd question would then have to be asked: was an international organization a third party in relation to the instrument which had created it? Was the United Nations a third party in relation to the Charter? That was, in any event, precisely what would have to be argued if article 34 of the Vienna Convention was taken literally. In that connection, it was interesting to note that, when Mr. Stavropoulos had been the United Nations Under-Secretary-General of Legal Affairs, he had always affirmed, as Legal Counsel, that the United Nations was a party not to the Charter—that was not necessary—but, rather, to the treaty concluded between States in respect of the privileges and immunities of the United Nations.⁵

⁵ Convention on the Privileges and Immunities of the United Nations, of 13 February 1946 (United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1)).

In all systems of internal law, it was acknowledged that a corporation was not a third party in relation to the contract establishing it. He had given all that information by way of example and to point out that the logical consequences of a definition should perhaps not be taken too far. The principle of article 34 as it now stood was a sound one, and the Commission had never doubted that that general principle should be retained as it was.

11. It would subsequently have to be decided whether the provisions of the Vienna Convention which enabled third parties to enjoy the rights and assume the obligations provided for by a treaty should be made more flexible. It should not be forgotten that, in drafts such as the one being prepared, the Commission could not deal with the subject-matter exhaustively; sometimes, it even deliberately left aside certain questions that were too complicated. For example, draft article 73 did not deal with a number of problems concerning international organizations. His position was therefore that, although article 34 might be redrafted, its general tenor should be retained.

12. As for the definitions contained in article 2, subparagraph 1 (*h*), consideration of the following articles would show whether they should be retained as they now stood or supplemented by a definition that applied to special cases.

13. The CHAIRMAN suggested that article 34 and article 2, subparagraph 1 (*h*), should be referred to the Drafting Committee, on the understanding that it would consider those provisions together with all the articles in section 4.

*It was so decided.*⁶

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations)

14. The CHAIRMAN invited the members of the Commission to consider article 35, which read:

Article 35. Treaties providing for obligations for third States or third international organizations

1. [Subject to article 36 *bis*,] an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

15. Mr. REUTER (Special Rapporteur) said that he was not proposing any amendments to article 35. He pointed out that the words "Subject to article 36 *bis*" had been placed in square brackets at the beginning of

⁶ For consideration of the texts proposed by the Drafting Committee, see 1740th meeting, paras. 2, 16 and 18.

paragraph 1 because the Commission had not adopted article 36 *bis*. The retention or deletion of those words would depend on the position the Commission would adopt concerning that article.

16. Article 35 differed from article 35 of the Vienna Convention in two respects, and that was a result of the fact that it was sometimes useful to include in an article a reference which, although not absolutely necessary, offered the advantage of stating a rule which existed elsewhere and whose application was particularly important in the case in question. It had, for example, always been considered essential for an international organization not to go beyond the bounds of its competence. Draft article 6 embodied the rule relating to the capacity of organizations to conclude treaties. It was, accordingly, specified in paragraph 2 of the article under consideration that the parties to a treaty could establish an obligation for an international organization which was not a party to that treaty and that that organization could accept that obligation if the treaty came within the sphere of the organization's activities. That was a frequent but bold technique. Thus, an international convention could assign the Security Council functions and obligations that were new in relation to those provided for in the Charter of the United Nations, and the Security Council could accept them if they came within the sphere of its activities. Paragraph 3 as a whole was, moreover, a new provision which was not absolutely necessary, but was intended to state that any legal activity by an international organization was governed by its statute and its rules. An international organization could accept an obligation deriving from a treaty to which it was not a party by means of what had been called a collateral agreement; such an agreement, which established the obligation, supplemented the principal agreement.

17. Mr. USHAKOV said that, in his opinion, the rule enunciated in article 34, namely that no State or international organization could be bound without its consent, was an inflexible one; it formed the basis of every treaty. The aim of article 35 was to explain how a State or an international organization could, without being a party to a treaty, consent to obligations deriving from that treaty. Paragraph 1 provided that the third State must expressly accept the obligation in writing. Written consent was, however, not absolutely necessary; the provision in which that requirement was laid down was of a residual nature. Paragraph 2 stated that, in order for an obligation deriving from a provision of a treaty to arise for a third international organization, the obligation that the parties to that treaty intended to establish must be within the sphere of activities of that organization and the organization must expressly accept the obligation. According to paragraph 3, such acceptance was governed by the relevant rules of the organization and the consent of the organization, like that of the State, must be given in writing. That rule was also residual.

18. The reference to article 36 *bis* at the beginning of article 35, paragraph 1, raised some difficulties and

made it necessary to look into article 36 *bis*. Since the consent of the third State was absolutely necessary under article 34, he did not think that it was possible to provide for another way of expressing such consent. According to article 36 *bis*, the third States which were members of an international organization must observe the obligations arising for them from the provisions of a treaty to which that organization was a party if the States and organizations participating in the negotiation of the treaty as well as the member States of the organization had acknowledged that the application of the treaty necessarily entailed such effects. It followed, then, that, by participating in the negotiation of a treaty, a State consented to be bound by the obligations deriving from a treaty in relation to which it was a third State—something that was impossible. The Vienna Convention made it quite clear that a State which participated in the elaboration of a treaty but did not become a party to that treaty was not bound by the obligations deriving from it. Its participation in the negotiation in no way implied consent to be bound by those obligations; it continued to be a third State. Those obligations were established for it only if it expressly consented to them in writing. It was quite contrary to the rule of express consent enunciated in paragraph 1 of the article under consideration for article 36 *bis* to stipulate that the member States of the organization could acknowledge, by participating in the negotiation of the treaty, that the treaty created obligations which bound them. It was impossible to derogate from the requirement of express consent, and participation in the negotiation of the treaty could not be construed as such consent.

19. According to another provision of article 36 *bis*, there would also be anticipated consent when the relevant rules of the organization applicable at the moment of the conclusion of the treaty provided that the member States of the organization were bound by the treaties concluded by it. He wondered whether a member State of a supranational organization, which, by acceding to the constituent instrument of that organization, had given its consent to be bound by the treaties that the organization might conclude and which subsequently left that organization, would be bound by the obligations deriving from those treaties. That question, like many others, had not been settled. It could also be asked whether a State which became a member of a supranational organization whose relevant rules provided, at the moment of the conclusion of the treaty, that the member States of that organization were bound by the treaties concluded by it was bound by that treaty, even though it had become a member after the conclusion of the treaty. Similarly, since the member States of a supranational organization surrendered to the organization their competence to conclude treaties in certain areas, it could be asked what would happen in the case of a treaty which a member State might none the less conclude on its own behalf.

20. although all those questions related to article 36 *bis*, they could be asked in connection with article 35 as

well. In his view, the various forms of consent referred to in article 36 *bis* were contrary to the basic principle of article 35, which must be in conformity with the corresponding provision of the Vienna Convention.

21. A distinction had to be made between a normal international organization, which bound only itself and not its members when it concluded a contract, and the very special case of a supranational organization, which bound its members when it concluded treaties in an area in which the members had surrendered their treaty-making power. The EEC was a new and quite exceptional phenomenon that could not be taken into consideration in a draft relating to traditional international organizations. The member States of an organization were always third States in relation to the treaties it concluded. If the organization provided for obligations for them, as third States, in the treaties it concluded, they must expressly accept those obligations. Furthermore, such treaties often provided more for rights than for obligations for the member States, in which case the consent of the member States was presumed. The consent of the member States must be express, in writing and special. According to the Vienna Convention, anticipated consent to a treaty was not possible. Yet article 36 *bis* provided specifically that the member States of a supranational organization gave anticipated and general consent; they accepted in advance the obligations deriving for them from the treaties which the organization would conclude in certain areas. Those States would, of course, participate in the elaboration of those treaties, but they would never have veto power. The two-thirds majority rule usually applied to the adoption of the text of a treaty, with the result that a member State which voted against the adoption of a certain treaty would nevertheless be bound by it if the majority prevailed. Such a procedure was obviously unacceptable, except in the very special case of a supranational international organization, which did not, for the time being, require the elaboration of general rules. Perhaps such rules could eventually be incorporated in draft articles devoted especially to organizations of that kind.

22. Mr. FLITAN pointed out that, in article 36, the words "Subject to article 36 *bis*" in square brackets were not justified, because article 36 *bis* dealt with the consent of the member States of an international organization to obligations deriving from a treaty concluded by that organization, whereas article 36 dealt with the rights that arose for a third State or a third international organization from a provision of a treaty. Moreover, article 36 itself provided for more flexible means of consent, since the last sentence of paragraph 1 stated that "Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides".

23. Referring to article 36 *bis*, he said that, in his view, subparagraph (a) was the one that gave rise to the greatest number of difficulties. Some members had stated, in support of that subparagraph and the means of expressing consent for which it provided, that, in some cases, States which decided to establish, or to

become members of, an international organization undertook, in so doing, to be bound by the treaties which that organization might subsequently conclude. To his mind, however, those cases were still few in number. In fact, in the present-day world, where, despite the proclamation of the principle of *de jure* equality of States, States did not all have the same influence in international life, small and medium-sized countries which were members of an international organization could hardly be asked to consent, *ex ante* and without formulating the least reservation, to the obligations deriving from the treaties concluded by that organization. The principle of the *bona fide* participation of States in the activities of international organizations and the obligation to co-operate to which reference had been made in support of subparagraph (a) were not sufficient to justify the inclusion in the draft articles of a rule that was not generally applicable.

24. He agreed that the rule enunciated in article 36 *bis*, subparagraph (b), to which he reserved the right to refer again at a later stage, applied to international organizations whose express purpose was to conclude agreements establishing rights and obligations for their member States. The Commission might therefore consider the possibility of retaining that provision, which should, however, be drafted in more precise terms in order to avoid any ambiguity.

25. Mr. THIAM said that the question at issue was whether or not the member States of an international organization should be regarded as third States in relation to treaties concluded by that organization. According to articles 35 and 36 *bis* proposed by the Special Rapporteur, the member States of an international organization were not exactly in the same position as third States, since the means of expressing consent provided for the former differed from that provided for the latter. Whereas third States must expressly accept in writing the obligation arising for them from a provision of a treaty, the consent of the member States of an international organization to be bound by the obligations deriving from a treaty concluded by that organization was the result either of the relevant rules of the organization applicable at the moment of the conclusion of the treaty or of the acknowledgement by the member States of the organization that the application of the treaty necessarily entailed such an effect.

26. He was of the opinion that those two rules, which were embodied in article 36 *bis*, subparagraphs (a) and (b), respectively, did have a place in the draft articles. There were enough examples of treaties which had been concluded by international organizations and whose application necessarily implied the consent of the member States of those organizations to be bound by the obligations deriving from those treaties to justify the inclusion of subparagraph (b) in the draft articles. Subparagraph (a) was also fully justified. The member States of certain international organizations surrendered part of their competence to those organizations and accepted the rules of those organizations providing that the member States were bound by the

treaties which the organizations concluded. The member States of a customs union thus surrendered their sovereignty in tariff matters to the union.

27. Organizations of that kind were, moreover, not as few in number as some had claimed and they were even tending to increase. In Africa and Latin America, in particular, many small States, which were concerned because their territories were small, wanted to form large economic entities and, to that end, establish organizations of the kind to which he had just referred. The rule enunciated in article 36 *bis*, subparagraph (a), was therefore quite satisfactory. It would, moreover, only promote the progressive development of international law.

28. Mr. McCaffrey said that he agreed with the substance of article 35, but wished to raise two points, one relating to the words “in the sphere of its activities” in paragraph 2 and the other relating to the treatment of third international organizations in two separate paragraphs.

29. Although the Special Rapporteur had clearly explained why the words “in the sphere of its activities” had been included in paragraph 2, he (Mr. McCaffrey) wondered whether those words were really necessary. They did not appear in the corresponding provision of the Vienna Convention, where they would, of course, be inappropriate, but they had apparently been considered necessary in article 35, paragraph 2, of the draft because of the involvement of an international organization. Those words were, moreover, part of two requirements laid down in paragraph 2, namely that the parties to the treaty intended a provision of the treaty to be the means of establishing the obligation for the third international organization in the sphere of its activities; and that the third organization expressly accepted that obligation.

30. The purport of the first requirement seemed to be that the parties to the treaty must intend not only that a particular provision should be the means of establishing the obligation in question, but also that the obligation should be within the sphere of the third organization’s activities. It could then be asked to what extent an international organization would be competent to accept an obligation not within the sphere of its activities. It seemed to him, at least at first glance, that, as soon as it appeared that the parties to the treaty intended the provision to be the means of establishing the obligation, the question whether or not the obligation arose for the third international organization, assuming that the organization accepted it, was a matter of that organization’s competence to accept the obligation and had little if anything to do with the question whether the parties to the treaty intended the obligation to be within the sphere of the organization’s activities.

31. As a means of testing that hypothesis, he noted that there were two possible situations: the parties to the treaty either did or did not intend the obligation to be within the sphere of the organization’s activities. In the first case, if they did intend the obligation to be within

that sphere, no ulterior motives could be imputed to them and the organization would presumably be competent to accept the obligation, provided that such acceptance was otherwise consistent with its rules. In the second, where the parties did not intend the obligation to be within the sphere of the organization’s activities but did intend the provision to be the means of establishing the obligation, there would be some hint of ulterior motives, but the organization would clearly be protected by article 46 of the draft, since, by definition, acceptance of such an obligation would be a patently *ultra vires* act amounting to a “manifest violation” of the organization’s rules and therefore constituting grounds for invalidating the organization’s consent under article 46. In that connection, he noted that the commentary to article 35 suggested precisely that result. Paragraph (2) of that commentary read:

...an organization could not accept an obligation that was not “in the sphere of its activities”. All organizations pursued their activities in a sphere whose extent was determinable externally, and it was logical that the parties to a treaty would not intend to create an obligation for an international organization outside that sphere of activity.⁷

That reinforced the view that, under such circumstances, the third organization would be protected by article 46.

32. It would thus appear that the only conditions that had to be included in article 35, paragraph 2, were that the parties to the treaty intended that the particular provision should be the means of establishing the obligation in question; and that the third international organization expressly accepted that obligation. Those were the only conditions applicable to third States, and there did not seem to be any good reason to lay down an additional requirement for international organizations, which were adequately protected by article 46. The words “in the sphere of its activities” in paragraph 2 therefore seemed unnecessary.

33. Referring to the treatment of third international organizations in two separate paragraphs, paragraphs 2 and 3, he said that, in his view, the structure of article 35 would be much cleaner if it were divided into two paragraphs, one for third States and one for third international organizations. The existing paragraphs 2 and 3 could therefore be merged. Paragraph 3 as it now stood contained two substantive rules: that the third international organization’s acceptance of the obligation in question should be given in writing, and that such acceptance was governed by the organization’s rules. The first rule could easily be included in paragraph 2 by adding the words “in writing” after the words “expressly accepts that obligation”. That formulation would correspond to that of paragraph 1, which was based on the Vienna Convention, and it would avoid the rather clumsy phrase “Acceptance... shall be given in writing”. The second rule relating to the organization’s internal rules could be enunciated in a second sentence to be added to paragraph 2. That second sentence could be based on the existing paragraph 3, with a few minor changes. As reformulated, the last part of paragraph 2 would read:

⁷ *Yearbook... 1978*, vol. II (Part Two), p. 133.

"... and the third organization expressly accepts that obligation in writing. Acceptance by the third international organization of such an obligation shall be governed by the relevant rules of that organization".

34. Mr. CALERO RODRIGUES said that article 35, which embodied an exception to the *pacta tertiis* rule set out in article 34, did not give rise to any substantive problems. All members of the Commission seemed to agree that, even if a State or an international organization was not a party to a treaty, it could assume an obligation if the treaty itself so provided and it expressly accepted that obligation in writing, under what the Special Rapporteur had called a kind of collateral agreement.

35. He nevertheless shared Mr. McCaffrey's view that it was not necessary to refer in article 35, paragraph 2, to the sphere of the third international organization's activities because it was clear that no obligation outside the sphere of that organization's activities was to be contemplated. In any case, the organization had to accept the obligation, and would probably not do so if it was outside the sphere of its activities. It was also unnecessary to state in article 35, paragraph 3, that "Acceptance ... shall be governed by the relevant rules of that organization" because, when the organization expressed its assent to an obligation, it would necessarily act in accordance with its relevant rules.

36. If the references to the organization's sphere of activities and its relevant rules were deleted, article 35 could be simplified and reduced to a single paragraph, which might read:

"[Subject to article 36 *bis*,] an obligation arises for a third State or a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or third international organization expressly accepts that obligation in writing."

37. Mr. MALEK said that articles 34 to 38, which the Commission was now considering, were closely related and that it was difficult to discuss them separately. As the Special Rapporteur had pointed out in his eleventh report, article 36 *bis* had caused much controversy, whereas articles 34 to 36 had given rise to only a few observations (A/CN.4/353, paras. 25-26).

38. Article 34 applied to international organizations the irrefutable rule of international law enunciated in the corresponding article of the Vienna Convention whereby a treaty created neither obligations nor rights for a third State without its consent. The simplified version of that article which had been adopted on first reading and proposed by the Special Rapporteur in his eleventh report (*ibid.*, para. 24) did not appear to call for any comments either as to substance or to wording.

39. The principle of consent had been stated in article 34 and the modalities of the expression of consent had been defined in articles 35 and 36, which also reproduced the provisions of the corresponding articles of the

Vienna Convention, adapting them to the case of international organizations.

40. Article 35, which applied to treaties providing for obligations for third States or third international organizations, should not give rise to many substantive problems unless the Commission wanted, in that article, to relax the means of expressing consent to the obligations deriving for a third State or a third international organization from a provision of a treaty. That did, however, not appear to be the case, because the Commission planned to adopt a separate article for that purpose, namely, article 36 *bis*. With regard to the wording of article 35, he said that it was open to question whether the words "in the sphere of its activities" in paragraph 2 were really necessary.

41. There also appeared to be general agreement in the Commission concerning article 36. However, the reference to article 36 *bis* at the beginning of that article was questionable because the new version proposed by the Special Rapporteur in his eleventh report (*ibid.*, para. 26) dealt only with consent to obligations deriving from a treaty. It was obvious that, if the Commission decided to adopt the new version of article 36 *bis*, the reference to that article at the beginning of article 36 would no longer be justified. If article 36 *bis* was retained, it would, moreover, be preferable to place it immediately after article 35, to which it was closely linked.

42. As for the principle set forth in article 36 *bis*, he feared that the controversy it had caused and the doubts expressed about the need for it would prevent the Commission from reaching general agreement on it. Yet that article might turn out to be very useful in practice because its purpose was to shed a bit more light on a confused legal situation, namely, the situation of the member States of an international organization in relation to the treaties concluded by that organization. With regard to the new version of article 36 *bis* proposed by the Special Rapporteur, he would simply point out that the text of subparagraph (b) was rather obscure.

43. Mr. LACLETA MUÑOZ said he agreed with Mr. McCaffrey and Mr. Carelo Rodrigues that there was no real need for the words "in the sphere of its activities" in article 35, paragraph 2.

44. In view of the Special Rapporteur's reference to collateral agreements account should be taken of the fact that the term "treaty" in article 35, paragraph 2, might be interpreted as signifying not only treaties between States and international organizations or between international organizations, but also treaties which were concluded between States only and which gave rise to obligations for third international organizations. In order to avoid such an interpretation, it might be necessary to specify that, for the purpose of paragraph 2, the term "treaty" meant the type of treaty defined in article 2, subparagraph 1 (a), of the draft.

45. Mr. FRANCIS said that the fact that the initial phrase of article 35 and article 36 *bis* in its entirety had

been placed in square brackets indicated that the Commission had not been able to agree on those provisions.

46. In relation to international organizations, a distinction had to be made between a treaty concluded by an international organization and having consequences for its States members and a treaty concluded by an international organization and intended to bind its States members in a treaty relationship, as indicated in article 36 *bis*.

47. He had been impressed by Mr. Ushakov's argument that, if article 35 was made subject to article 36 *bis*, the draft articles would be substantially different from the Vienna Convention. Indeed, if it was agreed that article 36 *bis* contemplated a course of action that had an immediate binding effect on the member States of an international organization, it must also be agreed that article 36 *bis* constituted an exception to article 35. Article 36 *bis* would thus affect in a major way the balance of article 35, and the Commission therefore had to decide whether the content of article 36 *bis* was justified by the trends to which Mr. Flitan had referred and whether the draft articles should contain an element of progressive development based on those trends. In his view, however, it would be difficult to say that article 36 *bis* was of such general application in relation to States that it definitely had a place in the draft articles.

48. If the Drafting Committee so agreed, the Special Rapporteur might suggest indicating in the commentary to article 36 *bis* that the provisions of that article would be without prejudice to any other arrangement an international organization might wish to make in respect of its members, in accordance with its relevant rules.

49. Mr. KOROMA said he thought that it would be helpful to retain the words "in the sphere of its activities" in article 35, paragraph 2. Those words had probably been included in that provision in order to take account of so-called "collateral agreements" by which, as the Special Rapporteur had indicated, an international organization could accept obligations deriving from a treaty to which it was not a party, and particularly since the possibility of such agreements was not expressly mentioned in article 46, to which Mr. McCafrey had referred.

The meeting rose at 6.00 p.m.

1704th MEETING

Tuesday, 11 May 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and

Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations)³ (concluded)

1. Mr. SUCHARITKUL said first of all there might be a situation falling between that of States or organizations which were parties to a treaty and that of third States or third organizations. In other words, a State or an international organization which was not a party to an international agreement was not necessarily a third State or a third organization. Although it might be considered that the United Nations was not a party to the Charter of the United Nations, it must be recognized there were links between the Organization and the Charter and that the United Nations could not be regarded as a third organization either. It was, in fact, in the in-between situation referred to above.

2. Article 35 could be seen as an exception to the general principle *pacta tertiis nec nocent nec prosunt* enunciated in article 34, but its purpose was in fact simply to specify the conditions in which an obligation could arise for a third State or a third organization from a provision of a treaty and to determine the manner in which the third State or the third organization must express its consent. It thus provided that the third State must accept the obligation expressly and in writing. That means of acceptance was sometimes known as a collateral agreement.

3. It could be asked whether, in practice, it was enough for a State or an international organization to accept expressly and in writing an obligation arising from a treaty to which that State or that organization was not a party and whether it should not also be made clear which parties to the treaty must be notified of such acceptance. The Government of Thailand and other countries of the region had concluded with United Nations specialized agencies agreements relating to Indo-Chinese refugees. Those agreements established obligations for third States, since they provided that the refugees given temporary asylum by the States parties would subsequently have to settle elsewhere. Certain countries, including France, the United States of America, Australia, Canada and Norway, had stated that they agreed to assume the obligations arising for them from those agreements or, in other words, that

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1703rd meeting, para. 14.

they were prepared to receive the refugees and enable them to settle definitely in their territories. Their acceptance, which they had given expressly and in writing or within the framework of a conference, had been communicated to the Governments of the countries of first asylum.

4. The acceptance by a third State or a third organization of rights arising from a provision of a treaty raised fewer difficulties. In the case of a third State, consent was even presumed, as provided in article 36, so long as the contrary was not indicated.

5. Article 36 *bis* was, on the other hand, very controversial. In fact, the issue was not whether the existence of supranational organizations should be recognized, but, rather, whether provisions relating to the treaties concluded by that type of organization could be incorporated in the draft articles. There was no lack of examples of supranational organizations. In addition to customs unions, to which one member of the Commission had already referred (1703rd meeting, para. 26), there were monetary unions. The member States of such unions accepted *ex ante* to be bound by the obligations arising from the treaties which the unions might conclude.

6. In support of the rule enunciated in article 36 *bis*, subparagraph (b), reference could be made to the case of the Headquarters Agreement concluded between Indonesia and ASEAN,⁴ which determined the privileges and immunities of the Association, its States members and their representatives. Since each State member of ASEAN had participated in the negotiation of that Agreement and had recognized that the implementation of the Agreement necessarily meant that it consented to assume the obligations arising therefrom, the provisions of the Agreement bound not only ASEAN, but also all its States members.

7. With regard to articles 35 and 36, he noted that a distinction could not always be drawn between the rights and obligations arising from a provision of a treaty. In some cases, acceptance of an obligation entailed acceptance of the exercise of the corresponding rights. Similarly, consent to exercise the rights arising from a treaty meant that it was sometimes not possible to refuse to assume the obligations arising from that treaty.

8. In article 35, paragraph 2, the words "in the sphere of its activities" were not intended to protect international organizations—that was the purpose of article 46. Those words merely served to define the sphere in which an obligation could be established.

9. Mr. NI said that articles 34 to 36 *bis* formed a unit. Although it had been possible to consider article 34, which embodied a general rule, separately, article 35 and the revised version of article 36 *bis*, which were closely related, should be discussed together.

⁴ "Agreement between the Government of the Republic of Indonesia and the ASEAN relating to the privileges and immunities of the ASEAN Secretariat", signed at Jakarta on 20 January 1979, *ASEAN Documents, 1979* (Jakarta, ASEAN National Secretariat, 1980).

10. The wording of article 35 to that of article 35 corresponded of the Vienna Convention, except that, in paragraph 2, the words "in the sphere of its activities" had been added as a means of limiting the scope of the establishment of obligations for international organizations. Those words raised questions about the nature of the obligations established by the treaties in question, but, in his view, the question whether those obligations were within the sphere of the organization's activities would arise even if those words were not included in paragraph 2. Those words were therefore unnecessary. Moreover, paragraph 3, which merely stated how acceptance was to be effected, might be merged with paragraph 2. Paragraphs 2 and 3 of article 36 could also be merged for the same reason.

11. Article 36 *bis* had given rise to much debate and controversy both in the Commission and in the Sixth Committee. The revised version of that article proposed by the Special Rapporteur in his tenth report (A/CN.4/341 and Add.1, para. 104) had been based on the assumptions that it would deal only with the obligations, not with the rights, that might arise for the member States of an international organization; that those member States were not regarded as third States; and that the conditions for the acknowledgement of obligations should be less rigid than those provided for in the text of article 36 *bis* adopted by the Commission on first reading.

12. The most important question which the Commission had to answer was whether or not article 36 *bis* should have a place in the draft articles as a whole. Opinions were divided on that point. He had been impressed by Mr. Ushakov's argument (1703rd meeting) that obligations undertaken by an international organization bound only the organization itself. However, article 36 *bis* had the effect of establishing a direct obligation for the member States of the organization, even if they were not parties to the treaty in question, when the relevant rules of the organization provided that they would be bound or when they expressed their assent to be bound.

13. What made the situation quite delicate was that the Special Rapporteur and Mr. Ushakov had both expressed concern for the interests of third world countries and, indeed, it was quite right that the interests of the majority of the peoples of the world should be taken into account. In that connection, he said he thought, like Mr. Ushakov, that, since under article 36 *bis* consent was given in advance, a resolution adopted by a majority of the members of an organization might involve the conclusion of a treaty by which the organization would undertake certain obligations. He nevertheless thought that account also had to be taken of the position of the minority that had voted against such a resolution.

14. During the Commission's discussions, it had been suggested that, in practice, the application of treaties concluded between States and international organizations or between international organizations would often depend on the fulfilment of treaty obligations by

the member States of such organizations; that the reduction of formalistic requirements would represent a progressive development of international law; and that, although the number of international organizations could be expected to increase, they would not be given extensive treaty-making powers to bind their member States, whose obligations would derive from the relevant rules, resolutions and decisions of the organization, based on the organization's constituent instrument accepted by the member States *ex ante*. In his own view, those were terminological and psychological problems of academic interest.

15. At the preceding meeting, Mr. Thiam had referred to African and Latin American economic integration programmes whose implementation seemed to require great flexibility and, at the current meeting, Mr. Sucharitkul had referred to monetary and headquarters agreements, which also required such flexibility. In view of such programmes and agreements, those two members had considered that article 36 *bis* would serve a useful purpose. Because of the growing number of international organizations and the need for certainty in international transactions, their view was no doubt correct.

16. Account must, however, also be taken of the fact that all States and, in particular, the newly independent States of the third world, should be adequately protected from the possibility of having to assume unexpected obligations when they became members of international organizations. It would therefore be better to provide safeguards beforehand in a provision such as article 36 *bis*, rather than leaving a gap in the draft articles.

17. In that connection, the Special Rapporteur had pointed out at the Commission's previous session that the original version of article 36 *bis* had referred to the constituent instruments of the international organization and not to its relevant rules.⁵ To protect member States against the effects of ill-considered or *ultra vires* decisions or resolutions, he (Mr. Ni) thought that it might be advisable to revert to the text of article 36 *bis* adopted on first reading. In any event, in ordinary cases of participation in an international organization, a member State's acceptance of the organization's constituent instrument would authorize the organization to conclude treaties on specific subjects and could not be regarded as a surrender of sovereignty.

18. He had great difficulty with the question of the reduction of formalities relating to the acknowledgement of treaty obligations by member States of international organizations. In his view, the word "acknowledged" in article 36 *bis*, subparagraph (b), was too weak, and the words "that the application of the treaty necessarily entails such effects" in the same subparagraph were not precise enough. The alternative text of article 36 *bis*, subparagraph (b) that had been proposed by the Special Rapporteur (A/CN.4/341 and

Add.1, par. 104), which provided that assent would derive from "any unequivocal manifestation of such assent", would also not offer adequate protection to the member States of international organizations.

19. In drafting article 36 *bis*, the Commission should therefore avoid placing direct responsibility on member States vis-à-vis the party or parties to a treaty concluded by the international organization. The wording of that provision should be limited to the effects of such a treaty on the member States of the organization.

20. Since the member States of international organizations should not be bound by unwarranted obligations and international organizations should not be hampered in their efforts to promote international cooperation and the mutual benefits it afforded, on the basis of equality, through the normal exercise of their treaty-making powers, he suggested that the Commission might consider the following wording for article 36 *bis*:

"Obligations arising from a treaty concluded by an international organization shall have effects on the States members of that organization if:

"(a) the constituent instrument of the organization applicable at the moment of the conclusion of the treaty expressly provides that the States members of the organization are bound by such a treaty; or

"(b) the States members of the organization expressly undertake to assume those obligations."

21. Mr. EL RASHEED MOHAMED AHMED said that the *pact tertiis* rule embodied in article 35 seemed to have been generally accepted and that the apparent intention of article 36 *bis* was to state an exception to that rule. In article 36 *bis* as it now stood, however, the question of express consent loomed large.

22. Indeed, Mr. Ushakov and Mr. Flitan (1703rd meeting) had stressed the fact that no State or international organization could be bound by any agreement unless it was a party to that agreement. Careful consideration of article 35 showed that it laid down no obligation for any State except with the express consent of that State. In article 36, no rights arose for third parties except with their express assent. Article 36 *bis* referred to rights and obligations conferred either under the relevant rules of the organization applicable at the moment of the conclusion of the treaty in question or as a result of participation in the negotiation of the treaty or acknowledgement of those rights or obligations. Participation and acknowledgement were, moreover, both positive acts that implied consent. Although he agreed with Mr. Ni that the term "acknowledged" was weak, acknowledgement was a positive act and it was sufficient as far as consent was concerned.

23. He had been impressed by Mr. Sucharitkul's comment that the concept of a "third party" did not apply in the strict sense to the relationship between an international organization and its member States. In view of the special situation to which that relationship gave rise, article 36 *bis* was amply warranted. He therefore shared

⁵ *Yearbook ... 1981*, vol. I, p. 188, 1678th meeting, para. 33.

Mr. Flitan's view (*ibid.*) that article 36 *bis* should be retained, although he thought that its wording could be improved.

24. Mr. AL-QAYSI said that article 35 dealt with the question of treaties providing for obligations for third States or third international organizations. It had been stated that the words "in the sphere of its activities" in paragraph 2 of that article were unnecessary because of the existence of article 46 and because they implied that a third international organization could accept an obligation not within its sphere of activity. In his view, however, those words were absolutely essential because they could be regarded as a means of preventing the parties to a treaty from thrusting obligations on third international organizations. Moreover, article 46 dealt with the invalidity of consent on the grounds of competence to conclude treaties, not with the question of the means by which a third international organization could accept an obligation created by the parties to a treaty. Despite the words "in the sphere of its activities" in article 35, the idea that a third international organization could accept an obligation not within its sphere of activity was implied more in article 46 relating to competence than in article 35.

25. Although article 35 and article 36 *bis* were obviously related, they differed in that article 35 dealt with third States and third international organizations, whereas article 36 *bis* dealt with the member States of an international organization. The means of assuming an obligation created by a treaty was different in those two articles. Article 35 required the express consent of the third State or third international organization, whereas article 36 *bis* referred to consent in terms of the constituent instrument of the organization. The obvious conclusion was that, when referring to the member States of an international organization, the constituent instrument of that organization had to be borne in mind.

26. He agreed with the members of the Commission who considered that article 36 *bis* was a useful provision that reflected a growing trend. He nevertheless thought that its wording might be brought into line with that of article 35 and that its subparagraph (*b*), in particular, could be made clearer and more precise.

27. Mr. REUTER (Special Rapporteur) said that, during the discussion of article 35, several members of the Commission had also dealt with articles 36 and 36 *bis*, but, in accordance with the Chairman's request, he himself would refer only to article 35. With regard to the form of that article, he was of the opinion that it would be possible to amend the wording by merging paragraphs 2 and 3, as certain members had suggested. As to substance, some members of the Commission had objected to the words "in the sphere of its activities" in paragraph 2 and to the reference to the "relevant rules of that organization" in paragraph 3. Others, however, had stated that they were in favour of retaining those two formulations.

28. Although it was quite true that, logically, any provisions of the draft articles which were not absolutely necessary should be eliminated, it would be wrong to approach the elaboration of the draft from a purely logical point of view. Whenever a problem arose, in fact, an attempt should be made to find a solution which, while not necessarily the most logical, would make it possible to reconcile the two quite different attitudes of jurists towards the draft articles. Thus, some jurists were of the opinion that the draft should make it possible to put some order in the practice of international organizations and to protect the member States of those organizations. That position, which was, moreover, quite legitimate, was the one which the Commission had been defending until now. Other jurists, who were far fewer in number, considered that international organizations had a mission to accomplish—their primary task being to promote the development of the third world—and that the draft articles should help them to carry out that task satisfactorily or, at least, make their practice more flexible. It was therefore necessary to strike a balance between those two equally legitimate approaches, and one way of doing so was to include in the draft articles provisions which, from a purely logical point of view, might not be justified. In any event, the few differences of opinion that the members of the Commission might have in that connection were not very serious, and the Drafting Committee could therefore try to settle them.

29. Another very important problem had been raised during the discussions. That problem, which related to the form the draft articles would ultimately take, was the following: if, as envisaged, the draft articles were to become a convention, there would, on the one hand, be the Vienna Convention on the Law of Treaties and, on the other, the convention on the law of treaties concluded between States and international organizations or between international organizations, and the two instruments would use different terminology. For example, the word "treaty" did not have the same meaning in the Vienna Convention and in the draft articles. That problem was obviously outside the Commission's competence and would have to be settled within the framework of a conference of representatives of States, but the Commission was none the less justified in ensuring that there were no gaps in the two texts and that, since they complemented one another, they covered all matters relating to the law of treaties between States and the law of treaties between States and international organizations or between international organizations. Yet, as Mr. Laclea Muñoz (1703rd meeting) had pointed out, that did not seem to be the case.

30. It was, for example, conceivable that States might conclude a treaty establishing obligations for an international organization. Now, that case would probably not be covered by the Vienna Convention, since international organizations were excluded from the scope of that Convention, and it would only be partially covered by the draft articles under consideration, which would govern the situation created by the consent of the inter-

national organization in question, if it was agreed that such consent constituted a collateral agreement. In no case, however, would the draft articles apply to treaties concluded between States, since that type of treaty did not come within their scope. He proposed that that problem should be briefly mentioned in the commentary to article 35 and considered in the Drafting Committee. He would have no objection if article 35 was referred to the Drafting Committee for consideration together with article 36 and article 36 *bis*.

31. The CHAIRMAN suggested that the Commission should refer article 35 to the Drafting Committee, on the understanding that the articles of section 4, which were closely related, would be considered together.

*It was so decided.*⁶

ARTICLE 36 (Treaties providing for rights for third States or third international organizations)

32. The CHAIRMAN invited the Commission to consider article 36, which read:

Article 36. Treaties providing for rights for third States or third international organizations

1. [Subject to article 36 *bis*,] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

33. Mr. REUTER (Special Rapporteur) pointed out that, although draft article 36 was very closely modelled on the text of the corresponding article of the Vienna Convention, it did not enunciate exactly the same rule. Whereas article 36 of the Vienna Convention provided that a right arose for a third State from a provision of a treaty if the third State assented thereto, such assent being presumed, article 36, paragraph 2, of the draft stated only that a right arose for a third international organization, if the organization assented thereto. The Commission had, as a matter of fact, been of the opinion that the assent of entities such as international organizations could not be presumed, since their competence was always more or less limited, in accordance with article 6. Such organizations must themselves be able to determine whether they were competent to exercise the rights arising from a treaty to which they were

not parties, but they could, of course, express their assent in any way they liked. Such assent was, as stated in paragraph 3, governed by the relevant rules of the organization. The provisions of article 36 did not, moreover, seem to have given rise to any difficulties.

34. However, the consideration of the provisions which were to become article 36 of the Vienna Convention and, in particular, the legal machinery by which a third State acquired a right had given rise to an extremely interesting discussion in the Commission. Half of the members had been of the opinion that the arising of such a right was the result of a collateral agreement, and the other half that it resulted from a "*stipulation pour autrui*".⁷ Article 36 of the Vienna Convention had thus been very carefully drafted in order to reflect those two points of view. He referred to that episode because, in his view, it was not a bad thing for the Commission to deal from time to time with purely legal questions, as it had done in the past.

35. With regard to the words "Subject to article 36 *bis*" which had been placed in square brackets at the beginning of paragraph 1, several members of the Commission had rightly pointed out that, if the Commission decided to adopt the new text of article 36 *bis* which he had proposed (A/CN.4/341 and Add.1, para. 104) and which made no reference to the rights which arose for the member States of an international organization from the provisions of a treaty to which that organization was a party, those words would no longer be needed in article 36.

36. Mr. USHAKOV said that the consideration of article 36 prompted him to make some comments on article 36 *bis*. Article 36 *bis* as adopted by the Commission on first reading and article 36 *bis* as proposed by the Special Rapporteur dealt with the consent of the member States of a supranational organization to obligations arising from a treaty concluded by that organization, but that article said nothing of the consent of the member States of a supranational organization to obligations arising from a treaty concluded not by that supranational organization, but, rather, by States and other international organizations or by other international organizations in spheres of activity within the competence of the supranational organization.

37. He was, however, convinced that, in such a case, the member States of the supranational organization could not, on their own authority and without the agreement of the supranational organization, agree to assume the obligations arising for them from such a treaty, since they had surrendered their right to conclude treaties in spheres within the competence of the supranational organization of which they were

⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 18.

⁷ See the discussion in the Commission, at its sixteenth session of article 62 of the draft articles on the law of treaties: *Yearbook ... 1964*, vol. 1, pp. 66-99, 734th to 738th meetings, and pp. 173-183, 750th and 751st meetings; and at its eighteenth session, of the same provision, which had become draft article 60: *Yearbook ... 1966*, vol. 1 (Part II), pp. 73-82, 854th and 855th meetings, and pp. 171 *et seq.*, 868th meeting.

members. In his view, they could also not assent to exercise the rights arising from such a treaty.

38. Thus, if the Commission wanted to adopt rules expressly governing the consent of the member States of a supranational organization, it would not only have to review the text of article 36 *bis*, which dealt with only one aspect of the question, but it would also have to redraft the texts of articles 35 and 36. Indeed, as it now stood, article 35, for example, dealt not only with the specific case covered in article 36 *bis*, namely, that of the obligations which arose for the member States of a supranational organization from a treaty concluded by that organization, but also with all possible cases and, in particular, the obligations which arose for a member State of an international organization from a treaty concluded by another international organization of which it was not a member.

39. Supranational organizations were in fact special cases that should be considered separately. It was therefore impossible to include in the draft articles relating to treaties concluded between States and international organizations or between international organizations, provisions on treaties concluded by the special type of international organizations that were supranational organizations.

40. Mr. McCAFFREY said that, like Mr. Ni, he believed that paragraphs 2 and 3 of article 36 should be combined in order to make the wording of that provision as simple and economic as that of article 35. Such a change would make the treatment of the third international organization similar to the one-paragraph treatment of the third State and would also bring article 36 into closer conformity with the Vienna Convention. Paragraphs 2 and 3 could be combined by adding, at the end of paragraph 2, a sentence which might read: "Such assent shall be governed by the relevant rules of the organization". Paragraph 3 would then be deleted and paragraph 4 would become paragraph 3.

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to refer article 36 to the Drafting Committee, under the same conditions as for articles 34 and 35.

*It was so decided.*⁸

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

42. The CHAIRMAN invited the Commission to consider article 36 *bis* as it had originally been drafted:

[Article 36 *bis*. *Effects of a treaty to which an international organization is party with respect to third States members of that organization*

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.]

43. Mr. REUTER (Special Rapporteur) said that he would not describe the very lengthy process by which article 36 *bis* had taken shape since several of the members who had spoken on the preceding articles had already done so in part. It now seemed to be an established fact that, even in the particular case in which an international organization concluded a treaty which would give rise to obligations for the member States of that organization, their consent was necessary. Such a case did not really give rise to any difficulties that would shake the foundations of the system of consent established for the member States of an organization. For the time being, he would leave aside the very hypothetical case in which an international organization was a member of another organization. He also wished to stress that the Vienna Convention laid down very strict conditions for the arising of obligations for third States. If express and written consent was necessary, it was because such obligations arose from a collateral treaty to a main treaty and because those two conditions were in keeping with the traditional means of expressing willingness to be bound by a treaty. It could then be asked whether that very strict rule or, at least, its formal requirements, could be made more flexible in the particular case in which a third State was a member of an organization which had concluded a treaty giving rise to obligations for that State. In order to solve that problem, three questions had to be answered: Were there reasons for making such consent more flexible? Were there any objections to doing so? How could such flexibility be brought about?

44. It was only the first question that he would try to answer at the current meeting. It first had to be determined who the real beneficiary of such a relaxation of the modalities of consent would be. If the requirement of written consent were eliminated, the treaty partners of the international organization would be the first beneficiaries because, if an organization concluded a treaty giving rise to obligations for its member States and they did not fulfil them, it alone was responsible to its treaty partners. However, if the means by which consent could be given were made more flexible, the treaty partners would enjoy the right directly to require the member States to fulfil the obligations they had undertaken by accepting them. It was actually quite rare for States to empower an organization to conclude treaties that would directly affect them. Usually, an international organization had few means at its disposal and only very little influence for obtaining advantages in favour of its member States. If, in a specific situation, States were to decide to authorize an organization to conclude treaties in an area of common interest, with the result that they would be bound by the commitments thus undertaken, they would have to be certain that the

⁸ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 18.

organization had more bargaining power. In order to see whether such a situation was likely to occur frequently and to speak in less abstract terms, reference had to be made to specific cases.

45. In the case of a customs union managed by an organization to which the member States had entrusted the responsibility of concluding tariff agreements, it was quite obvious that States would not go so far as to empower that organization to implement such agreements. That was, moreover, true in spheres of activity other than those of a customs union. It would be quite unreasonable to assume that, once such a tariff agreement had been concluded by the organization and applied by the member States, a State party to the agreement which complained about its application and raised the matter with a member State would be referred to the international organization on the grounds that it was the organization that had concluded the agreement. Such a case was inconceivable because it was always clearly stated, from the outset, that it was the member States that would apply an agreement of that kind and that they would be bound by its provisions.

46. The case of a headquarters agreement was quite different. An international organization might conclude with the host State, which was not necessarily a member of that organization, an agreement providing primarily for rights, but also for some obligations, for its member States. Could it be said that the member States were entitled to invoke their rights because there was, in such a case, a presumption of acceptance, but that, as far as obligations were concerned, they could claim to be third States in relation to such an agreement?

47. A number of small States, each of which exercised traditional fishing rights in its own waters and in the waters of the other States, might decide to unify their fishing regimes and hold negotiations with a large neighbouring State to grant it fishing rights, and obtain such rights from it. To simplify the negotiations, they might set up an organization whose constituent instrument provided that, by a unanimous resolution of one of the organs of the organization, the member States could authorize the organization to conclude a treaty with that neighbouring State. They might, however, also provide that, in such a case, they would consider themselves bound to apply the rules which the organization would embody in the treaty. Such an example did not imply any transfer of competence or any supranationality. If the agreement in question was concluded with the neighbouring State and the neighbouring State required the agreement to be implemented directly by the member States, on the grounds that the fishing rights it had granted to their nationals derived from the reciprocal rights those States had granted to its own nationals, it would certainly be an exaggeration for those States to refer the neighbouring State to the organization on the grounds that they were third parties in relation to the agreement.

48. He then referred to the case of States in a region requiring a campaign to eradicate a certain disease. To

that end, they might set up an international organization whose constituent instrument provided that the member States could authorize it to conclude a treaty with a State for the purpose of technical assistance and that, if such an agreement was concluded, the technical experts of that State would benefit from a particular status in the territories of each of the member States. If, once the agreement was concluded, one of those experts claimed the benefit of that status, it was difficult to see how the member States could regard themselves as third parties in relation to the agreement.

49. States might also decide to establish an international bank and empower it, under its statutes, to conclude loan agreements. Usually, however, international organizations did not have good credit ratings. For example, when the Danube Commission, for which such competence had been provided, had approached bankers, the latter had required the States which had established that Commission to act as guarantors for the loans. In such circumstances, the statutes of an international organization sometimes specified how the organization could conclude treaties which would bind its member States; that saved time and money, because it was better to act collectively than individually.

50. All the examples to which he had referred showed that it might be in the interest of the member States of an international organization to assent in advance to the undertakings that might arise for them from the conclusion by the organization of treaties in a specific area. In Mr. Ushakov's view, there was no between-solution: a State was either a party to a treaty or a third party in relation to that treaty. That point of view could, of course be defended, but it was open to question whether the members of an international organization were really third parties in relation to the treaties the organization concluded. From a legal point of view, there was no doubt that they were. Indeed, it was an established fact that an international organization had legal personality, without which it could not conclude treaties, and that its members were thus only third States in relation to the treaties it concluded. A point came, however, when account had to be taken of the facts and it was apparent that an international organization was a means whereby States could take collective action. It existed precisely because the States which had established it existed. In the advisory opinion it had delivered in the case *Reparation for Injuries Suffered in the Service of the United Nations*,⁹ the International Court of Justice had expressed both of those ideas. It had stated that, in some respects, an international organization was detached from its members, thus recognizing its international personality. The Court had, however, also stated that the members had a duty of co-operation; they were not strangers to the organization. If they withdrew, the organization would cease to exist. To his mind, the question could be put slightly differently by saying that the member States of an organization were third parties, but special third parties.

⁹ *I.C.J. Reports 1949*, p. 174.

It was in the light of those two aspects of the question that article 36 *bis* had been drafted. If the Commission considered that there was no adequate reason to make the rule of consent more flexible, article 36 *bis* should be rejected.

51. In conclusion, he would say a few words about the situation of the countries of the third world. Those countries seemed to be profoundly aware of the contradiction they faced. On the one hand, they had to find their identities, which had been destroyed by foreign domination, and, on the other, since they were poor, it was essential for them to unite, even at the risk of surrendering part of their sovereignty. That explained the faltering steps they had made in the past century in Latin America and were now making, first in Africa, and then in Asia. It would be easy to dismiss them and regard their efforts as quite unconvincing compared with the model of the European Communities. Yet, those countries' dilemma was that they must not only retain their independence, but also unite their efforts whenever possible and desirable. They had considered the radical solution of the EEC, but had rejected it. As he had stated at the preceding session¹⁰ he did not think that the Commission should use the European Communities as an example. The examples he had given in the past should not have been based mainly on that of the Communities, which indeed, had no need of special provisions. Since the Commission was now composed primarily of members from third world countries, it was for them to say whether a special provision should introduce some flexibility in the strict rule of consent so that the countries of the third world might have a more flexible instrument when they wanted it. If so, the matter must be given further consideration; if not, article 36 *bis* should be abandoned.

Drafting Committee

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to establish a drafting committee composed of the following 14 members: Mr. Sucharitkul (Chairman), Chief Akinjide, Mr. Al-Qaysi, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Laclea Muñoz, Mr. Mc Caffrey, Mr. Ni, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Ushakov and (*ex officio*) Mr. Njenga, Rapporteur of the Commission.

It was so decided.

The meeting rose at 12.55 p.m.

¹⁰ *Yearbook ... 1981*, vol. I, pp. 170-171, 1675th meeting, para. 7, and p. 188, 1678th meeting, para. 31.

1705th MEETING

Wednesday, 12 May 1982, at 10.05 a.m.

Chairman: Mr. leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)³ (*continued*)

1. Mr. REUTER (Special Rapporteur), referring to his comments at the previous meeting concerning the arguments in support of relaxing the procedure for consent by States members of an organization to the obligations arising from a treaty concluded by that organization, recalled that two practical requirements now applied with regard to the relatively limited operational activities which a group of States might wish to undertake through an international organization.

2. Generally speaking, the organization's commitment must be accompanied by a commitment on the part of its member States and those States' consent to their commitment must be given by other means than in the case of the conclusion of a traditional collateral agreement subsequent to the main agreement. Nevertheless, it was not necessary for that commitment to apply to an entire category of treaties in advance. In short, the need was for a way of ensuring the relatively rapid conclusion of agreements that would enable the union which a number of States wished to achieve within the framework of an international organization to become effective. That need was felt especially by small and medium-size States, in connection with the situation that would be created by, say, the Convention on the Law of the Sea⁴ or the Agreement establishing the Common Fund for Commodities.⁵

3. However, what made the identity of the international organization, namely its personality, also made its weakness, inasmuch as, in the modern world, the States members of an international organization were not fully bound by the commitments that organization contracted. It was also a fact that no provision of the draft could prevent a State from participating in an international organization in order not to promote, but to hinder, the organization's development. A possible counter was to say that it was sufficient for the

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1704th meeting, para. 42.

⁴ See 1699th meeting, footnote 7.

⁵ Agreement concluded at Geneva on 27 June 1980 (United Nations publication, Sales No. E.81.II.D.8).

organization to commit itself along with its member States. The practice of such commitment did exist, and was similar to the practice followed by some large transnational corporations in the sphere of private law, but it was not satisfactory, for it was time-consuming and of uncertain outcome.

4. It was because there could be an affirmative answer to the question whether there were reasons for making the means of consent by the States members of an international organization more flexible that he had proposed the inclusion in the draft of a provision such as article 36 *bis*. As for the question whether the idea of such flexibility had given rise to objections, it, too, had to be answered in the affirmative, since opposition, sometimes strong, had been expressed both in the Commission and by Governments. Article 36 *bis* being, in the final analysis, rather modest, the controversy surrounding it was undoubtedly attributable to political considerations—considerations that were, of course, perfectly legitimate in themselves and that he now found partly convincing.

5. On the one hand, the European Communities were a phenomenon which had undeniable political consequences and raised all sorts of important political problems, particularly territorial problems. That could create the impression that, if its purpose was really to deal with a Community question, article 36 *bis* sought in some way to justify or legitimize EEC. His actual intentions as Special Rapporteur—and perhaps he had allowed himself to be influenced by EEC—were of little account; what mattered was that that was how the article appeared to certain Governments. Some States, then, opposed the article, while others, because they were members of EEC, felt that it must be defended at all costs. That was a very bad situation, and it proved that the article under examination was bad: it was not good to have on the table an article that occasioned controversy and might have the effect of putting the representatives of States which had nothing to do with the European Communities in the position of playing referee.

6. On the other hand, as Mr. Ushakov had stressed (1703rd meeting), the case of EEC was altogether special. It followed that the Commission should not deal with such a case, particularly not by presenting it as a general case. Moreover, if it had EEC in mind and referred to it by the term “international organization”, the Commission ran the risk of introducing into the context of international organizations exaggerated ideas and rules that might adversely affect institutions having nothing to do with the European Communities. Those views, as they had been expressed by Mr. Ushakov in particular, led him to feel that article 36 *bis* should perhaps be eliminated, since it seemed to symbolize EEC. Certain parties should, perhaps, accept that sacrifice. There was obviously no question of studying, at the present juncture, all the problems raised by agreements concluded by supranational bodies: for one thing, the Commission was already engaged on its se-

cond reading of the draft, and for another, such matters were outside the sphere of the draft.

7. That led him to the third question to which he had alluded at the previous meeting: how could the procedure for consent be made more flexible? If article 36 *bis* was eliminated, it would still be useful to have a provision providing for an instrument that would enable small and medium-size States to unite effectively and flexibly, with a view to limited operations and in pursuit of specific objectives, from a perspective other than the global perspective of the European Communities. Such a provision, which would not correspond to his own convictions, might appear as a paragraph of article 35 or as a separate article 35 *bis*.

8. A few overtures and a few suggestions had already been made in that direction within the Commission, in particular by Mr. Ni (1704th meeting, para. 20). Member States could establish, through the constituent instrument of an international organization, a mechanism whereby they could give their consent rapidly and simply when they considered that advisable. That idea, which would reinforce the guarantees for the member States, might well prove acceptable if it attracted general support. An international organization's constituent instrument was not, however, the only thing to be taken into account; its practice was also very important, for it allowed the organization to adapt. Finally, attention should be drawn to the great merit of Mr. Ni's suggestion if the guarantees for the partners of the organization were to be strengthened. For a negotiation by an organization to be effective, the member States which had created that organization must throw their weight behind it. It was to be expected that States members of a regional economic group, being desirous to help their union, would be willing to commit themselves together with the organization, so making possible relations between the parties contracting with the organization and those member States themselves. At the preceding session of the Commission, Mr. Aldrich had emphasized the need to inform the parties contracting with the organization that the member States were committing themselves together with it.⁶ Perhaps that was an area to be explored.

9. Mr. RIPHAGEN, referring to section 4 as a whole, said that when two treaties “met”, the question arose whether they were linked in law, for example in such a way that direct legal relationships were created between the States parties to each of them. Article 36 *bis* and article 37, paragraphs 5 and 6, as presented by the Special Rapporteur (A/CN.4/353, para. 30), concerned the case where a treaty to which an international organization was a party “met” the treaty establishing that international organization.

10. Articles 34 to 38 of the Vienna Convention dealt, not with that situation, but only with the position of third States with regard to treaties, irrespective of the legal relationship of a third State with other States

⁶ *Yearbook ... 1981*, vol. I, p. 186, 1678th meeting, para. 20.

under a different treaty. That raised the question, touched upon (1703rd meeting) by Mr. Lacleta Muñoz and Mr. Ushakov, whether the problem facing the Commission was a matter of adaptation of those articles or a separate problem.

11. The approach in the Vienna Convention was of the typical unilateral type, in keeping with the notion of the separate sovereignty of each State. As a result, article 34 referred only to the consent of the third State. However, rights and obligations were always linked in a legal relationship between two or more States, and mutual consent between those States was normally required to create such a relationship. Articles 35 to 37 and, to a certain extent, article 38 deduced the existence of such mutual consent from, on the one hand, the intention of the parties to a treaty and, on the other hand, the subsequent conduct of a third State. Article 37 concerned the termination of the relationship created by that deduced mutual consent. As the Special Rapporteur had pointed out (1704th meeting), the Commission had carefully avoided expressing a preference for either a *stipulation pour autrui* or a "collateral agreement". Nevertheless, the article remained based on the establishment by deduction of mutual consent and of its termination.

12. With regard to that establishment of consent, a somewhat artificial distinction was made between rights and obligations. In the case of rights, the consent of the third State was presumed but in the case of obligations of third States, an express acceptance in writing was required. On the other hand, to exercise a right, a third State must, according to draft article 36, para. 4, "comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty"; in that way, the balance of rights and obligations was restored. Furthermore, the right created for the third State by the mutual consent was not necessarily a right at all, since, unless it was established that the other States involved intended otherwise, it could be revoked or modified by those other States. The impact of the distinction between rights and obligations of the third State was therefore reversed, since the third State could lose only its obligations with its own consent.

13. Articles 34 to 38 of the present draft articles, including article 36 *bis* and article 37, paragraphs 5 and 6, similarly relied on deduction for the establishment of mutual consent. He wondered whether such an elaborate method was really necessary when a third State could simply associate itself with a treaty by accession, a point illustrated by the practice with regard to mixed treaties, to which both an international organization and its member States were parties. However, as the Special Rapporteur had pointed out, that practice was somewhat cumbersome.

14. In reality, articles 35 to 37 of the Vienna Convention had been formulated to cater for special treaties, namely treaties establishing "objective regimes" or "territorial regimes". Since the wording of those articles was general, it did not betray what the drafters had had in mind.

15. The Commission was now faced with the case of treaties of a different type. When an international organization participated in a treaty, the treaty establishing that organization was also involved. Treaties in which international organizations participated could also be, and often were, treaties establishing "objective regimes". Most of the examples given in the course of the discussions had concerned the creation of "objective regimes", such as customs unions, headquarters agreements, or even "communities", such as EEC, to which States had transferred certain competences.

16. An example of a situation in which both the treaty in which an international organization was going to participate and the treaty establishing that organization were "objective regimes" was provided by the Convention on the Law of the Sea, including its clauses on the participation of special international organizations.⁷ That was a very particular situation which could not be generalized and made the subject of rules valid for all treaties and all international organizations.

17. The method used by the Special Rapporteur was perfectly legitimate and not fundamentally different from that employed in the Vienna Convention. He had rightly brought together the rights and obligations which had been artificially separated in the Vienna Convention, as he had also done in his proposals relating to article 37, paragraphs 5 and 6. In article 36 *bis*, subparagraph (a), the Special Rapporteur had concentrated on a very special type of international organization. So far as he himself knew, the Treaty establishing the European Economic Community was the only treaty to include a clause⁸ like that referred to in subparagraph (a). Of course, such a clause might be contained in another "relevant rule of the organization", in which case it might be limited to "a" treaty rather than to "the treaties"; that was a point to be taken into account in the drafting of the article. Such a clause actually embodied the transfer of treaty-making power, a feature that was relatively rare in current international practice.

18. Conversely, in article 36 *bis*, subparagraph (b), the Special Rapporteur had concentrated on the treaty in respect of which the question of third States arose. The very special "character" of such a treaty was indicated by the requirement that "the application of the treaty necessarily entails such effects", that is, the direct legal relationships between the States members of the international organization and the States parties to the treaty to which the international organization was also a party. With regard to his use of the term "character" of a treaty, the expression already appeared in a quite different article of the Vienna Convention, article 60, subparagraph 2 (c).

19. As drafted, article 36 *bis* did not combine the two requirements of a very special international organization and a very special treaty between that international

⁷ Annex IX of the Convention (see 1699th meeting, footnote 7).

⁸ Art. 228, para. 2 of the Treaty (United Nations, *Treaty Series*, vol. 298, p. 90).

organization and other States. Perhaps such a cumulative formulation could still be found, in order to justify the result of direct legal relationships between the member States of the international organization and the other States parties to the treaty in which that organization participated. On the other hand, it might be useful or even necessary to make clear that the conditions for participation by an international organization in a treaty and the effects of such participation might be specifically regulated by the treaty itself. An example was the Convention on the Law of the Sea, in which the idea of a "package deal", as embodied in the preclusion of all reservations, had created a particular situation.

20. His own conclusion was that article 36 *bis* was sufficiently limited to very special treaties and very special international organizations to be acceptable, subject to drafting amendments. It should also be noted, in connection with article 37, paragraphs 5 and 6, that States members of an international organization were not, in principle, required to give their consent to modification of rights and obligations arising from treaties in which the organization participated. That represented a deviation from the Vienna Convention. Similarly, it might be necessary to make clear, as had been done in the Convention on the Law of the Sea, that participation by an international organization in a treaty might be limited to a particular part of that treaty.

21. Nevertheless, he recognized that members of the Commission might feel either that the drafting of article 36 *bis* and article 37, paragraphs 7 and 6, was not sufficiently limited to very special cases or that, owing to the special characteristics of the situations envisaged, those provisions should not appear in the draft articles. Even in the latter case, however, there was no escaping the fact that, with regard to a treaty concluded by an international organization, that organization's member States were not "third" States either in the normal sense of the term or, in particular, in the sense of the Vienna Convention. If the draft articles were to repeat articles 34 to 38 of the Vienna Convention, that fact should be made clear, perhaps in a special article along the following lines:

"The provisions of this section are without prejudice to the question of the rights and obligations of the States members of an international organization which may arise from a treaty concluded by that organization."

That formulation was similar to that of article 73, paragraph 2, of the draft articles.

22. The problem was somewhat similar to that of the direct effects of treaty provisions in the national legal sphere, a matter not dealt with at all in the Vienna Convention. It also resembled the inverse problem of the direct effect of the internal legal order of an international organization on the legal relationships between the international organization and other entities under general international law. The latter problem was, however, dealt with to a certain degree in the draft, in articles 6, 27 and 46, as it had been dealt with in the

Vienna Convention with respect to the internal legal order of States. The issue was one to which the Commission would come when it took up article 46.

23. He agreed with Mr. McCaffrey, Mr. Calero Rodrigues and Mr. Lacleta Muñoz (1703rd meeting) that the words "in the sphere of its activities" in article 35, paragraph 2, were misplaced. In conclusion, he wondered, although he would not press the point, what exactly was meant by a "third" international organization? It could be said that a third international organization having substantially the same membership was in fact even less "third" than a member State.

24. Mr. BALANDA said that, in his view, article 36 *bis* reflected the current situation accurately. On the one hand, there were traditional international organizations, where the consent of the member States was the rule and those States remained sovereign; on the other hand, there had been a change, which had found expression in the European Communities. The latter did not, however, represent a special case: many African constitutions embodied the concept of abandonment of sovereignty. Under article 108 of its Constitution, Zaire gave up part of its sovereignty with a view to building African unity.⁹ Furthermore, in Africa, efforts at integration had already provided opportunities for the practical expression of such a concept. The Commission was therefore right to take into account the twofold reality of international organizations.

25. When considering the concepts of third State and third international organization with regard to the article under examination, account should also be taken of the twofold nature of international organizations. In the case of a traditional organization, the constituent instrument must be consulted to determine whether a third State or third organization was involved. In the case of an integrated or supranational organization, it was more difficult to determine whether the member States were third parties: they parted with their sovereignty in advance and agreed, to a certain extent, that the entity could bind them without their having specifically to express their consent once more. However, it was difficult to maintain that those member States were third parties, since, without their participation, the organization could no longer carry out its activities.

26. Referring to subparagraph (a) of article 36 *bis*, he pointed out that the expression "relevant rules of the organization" implied that there might be non-relevant rules and, therefore, a hierarchy among the rules of the organization. In his view, all the rules of an organization were relevant.

27. With regard to subparagraph (b), he wondered whether it would not be better to provide that States and organizations participating in the negotiating of the treaty as well as the States members of the organization

⁹ See *Constitutions of the Countries of the World*, eds. A. P. Blaustein and G. H. Flanz: *Zaire*, by Jacques Vanderlinden (Dobbs Ferry, N. Y., Oceana, 1979), p. 28.

must have "agreed" that the application of the treaty necessarily entailed the effects in question, or have "consented" to that point, rather than to have "acknowledged" it.

28. In general, article 36 *bis* was justified, for it applied both to traditional international organizations (subparagraph (b)) and to the new organizations towards which the development efforts of States, especially African States, were tending. Since it was one of the Commission's functions progressively to develop international law, it was incumbent on it to take account of that trend. With regard to the wording of the article, Mr. Ni's suggestions (1704th meeting) could be examined to advantage.

29. Mr. USHAKOV said that the only example that could have inspired article 36 *bis* was that of EEC. In his eleventh report (A/CN.4/353, para. 27), the Special Rapporteur indicated that the purpose of article 36 *bis* was to introduce exceptions for which it was easy to furnish examples, in particular, those of tariff agreements concluded by an organization administering a customs union, a headquarters agreement concluded by an organization with a host State and a fisheries agreement between an organization and a State. In his view, all the examples given were either erroneous or imaginary.

30. When the Special Rapporteur had referred to customs or monetary unions (1704th meeting), he had prudently specified that, in order to come under article 36 *bis*, such unions must have created an international organization whose constituent instrument provided that the treaties concluded by the organization were binding on its member States. There was no organization of that kind; for the moment, customs and monetary unions appeared to be agreements rather than international organizations. All the examples given in that connection were, therefore, imaginary. As for the many headquarters agreements in existence, none of them contained any such rule. They were normal agreements which basically laid down rights in favour of member States, rights which were presumed to be accepted. Furthermore, even if EEC had concluded a headquarters agreement, the rule in question had not been applied, for it was valid for other categories of treaties. Headquarters agreements were therefore erroneous examples. As for fisheries agreements, and leaving aside the case of EEC, there were most probably no international organizations in the sphere of fishing which had a rule similar to that referred to in article 36 *bis*. That example, too, was imaginary. Finally, with regard to the African countries, OAU did not in any way appear to be a supranational organization. That was why he had always examined article 36 *bis* with only EEC in mind.

31. Many States had shown a desire for integration, particularly in economic matters. Such integration could take two forms. The western countries members of EEC had asked for economic integration based on the principle of supranationality. In other words, they had given up part of their sovereignty to the Commu-

ity. The mode of integration provided for within the framework of CMEA was entirely different. The socialist countries members of CMEA had decided that economic integration would not be accompanied by the creation of supranational bodies and that each one of them would remain competent to conclude international agreements, especially economic agreements. Nevertheless, the CMEA could, under its charter, conclude with non-member States and with other international organizations treaties providing for obligations for its member States.¹⁰ Those obligations must, however, be accepted expressly and in writing by each of the States members of CMEA.

32. It was impossible to say whether countries wishing to create large integrated economic groups would opt in the future for supranational bodies like EEC or for bodies such as CMEA, for no long-term general conclusions could be drawn from the current tendency to reaffirm the principle of the absolute sovereignty of States. Consequently, the Commission was not able to decide whether it was preferable to draft provisions to regulate international organizations or supranational organizations.

33. Furthermore, the Special Rapporteur had explained at great length that the purpose of article 36 *bis* was to render more flexible the modalities of consent. But that did not mean the modalities of consent in general; it was not a question, for example, of simplifying the procedures whereby a third State or third organization could become a party to a treaty. In fact, in its current formulation, article 36 *bis* strove simply to introduce greater flexibility in the means whereby States members of a supranational organization could consent to be bound by obligations arising from treaties concluded by that organization. In other words, it was not even applicable to international organizations. He doubted whether an article having such a limited field of application could be of any use whatsoever.

34. Turning to the concept of third State or third organization, he said that no reference could be made to a third State or third organization without specifying whether that State or organization was a third party with respect to the treaty or with respect to the organization. A State member of an international organization was a third party with respect to a treaty concluded by that organization—a treaty to which it was not itself a party—but it was certainly not a third party with respect to the organization. On the contrary, it was one of the organization's components.

35. At the beginning of article 36 *bis* as adopted on first reading, the expression "third States" denoted third States with respect to a treaty concluded by the organization of which they were members, whereas, in the first line of subparagraph (b) of the same text, the words "the States and organizations" denoted the third States and third organizations with respect to the international organization. That article was too vaguely

¹⁰ Art. III, para. 2 (b), of the Protocol of 21 June 1974 amending the Statute of CMEA.

drafted. What was needed was not to delete the word “third” before the word “State” at the beginning of the text, but to specify with respect to whom or what the member States of an international organization and the States and organizations participating in the negotiation of the treaty were third parties.

36. In his proposed new version of article 36 *bis* (A/CN.4/353, para. 26) the Special Rapporteur had eliminated the idea of “third States” and referred simply to “States members of an international organization”. He had also refrained from mentioning the rights deriving from a treaty.

37. According to subparagraph (a) of the new draft, the assent of States members of an international organization derived from “the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty”. As it stood, that subparagraph could only apply to supranational organizations, for no other organizations had rules providing that their member States were bound by the treaties which they (the organizations) concluded; the States members of an international organization were always third States in relation to the treaties it concluded. But although it was of extremely limited scope, the subparagraph was incomplete. It was not enough to say that assent derived from the relevant rules of a supranational organization which provided that its member States were bound by the treaties it concluded. Logically, it must be stipulated that the States members of a supranational organization could no longer conclude agreements in spheres of activity within the competence of the organization, for it would otherwise be impossible to determine which treaties (treaties concluded by the States or treaties concluded by the supranational organization) should prevail. But that stipulation would not settle all the problems. There remained the issue of the relationship between the treaties concluded by the supranational organization and the treaties concluded by its member States before its creation.

38. Hence, the elaboration of provisions concerning treaties concluded by supranational organizations, if such was the aim, would require the amendment of article 36 *bis*, which had a number of deficiencies, and the reworking of articles 35 and 36, for States members of a supranational organization, having abandoned to the organization the conclusion of treaties in certain areas, were certainly not free to assume the obligations or to exercise the rights arising from treaties other than those concluded by that organization. In fact, a good many provisions of the draft, including those concerning reservations, would need to be revised.

39. The main reason why he had raised so many points was to show that it was quite impossible to deal with both international organizations and supranational organizations in the same draft articles.

40. As now proposed by the Special Rapporteur, article 36 *bis*, subparagraph (b), was extremely obscure and raised many questions. There was, for example, the

issue of the identity of the “States and organizations participating in the negotiation of the treaty”: did the phrase “States ... participating in the negotiation” mean States members and States not members of the organization? What exactly did the States and organizations in question acknowledge during the negotiation and how was that acknowledgement made? Finally, what was meant by “the acknowledgement by ... the States members of the organizations”; since those States had not necessarily participated in the negotiation, how was the acknowledgement made in their case? If that subparagraph was so vague and difficult to understand, it was undoubtedly because less importance was attached to it than to the preceding one. Presumably it had been thought advisable, once the provisions concerning supranational organizations had been set out in subparagraph (a), to supplement them with a few vague provisions concerning international organizations so as to have a more balanced text.

41. Article 36 *bis*, which, for all the reasons he had invoked, did not belong in the draft articles, should be deleted.

42. Mr. OGISO said that, in his introduction to article 36 *bis*, the Special Rapporteur had raised the question (1704th meeting) whether a State member of an international organization was a third State, in the true sense of the term, in relation to a treaty concluded by that organization with States or with other international organizations. For his own part, he subscribed to the view that the States members of an international organization were not ordinary third States in relation to treaties concluded by that organization. Legally speaking, a State was either a party to a treaty or it was not and it could not, therefore, have any intermediate status in relation to a treaty to which an international organization of which it was a member was a party. For that reason, he was of the opinion that the solution provided for in the definition given in article 2, subparagraph 1 (h), of the draft was the right one.

43. The Special Rapporteur had also asked whether it was appropriate for the States members of international organizations to ease the very strict formal requirements relating to consent which were applicable under the Vienna Convention to third parties that assumed an obligation arising from a treaty. In his own opinion, cases in which an international organization concluded treaties that bound its member States were quite likely to occur; some, indeed, already existed, as shown by the examples given by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 27). The growing number of such examples seemed proof of a trend in international law towards acceptance of the idea that a treaty concluded by an international organization could bind the States members of the organization if the organization’s constituent instrument or other relevant rules so provided. He therefore thought that the strict procedure concerning acceptance by the States members of an international organization of the obligations provided for in a treaty concluded by that organization should be made more flexible, particularly in order to

take account of the future development of international law in that area.

44. In that connection, Mr. Ushakov had referred to CMEA and to EEC, which followed entirely different rules with regard to the effects of treaties to which international organizations were parties with respect to third States members of those organizations. Since those two organizations were very different, Mr. Ushakov might not agree that the direction being taken by one of them provided evidence of a trend, but, in his own view, it would be incorrect to say that such a trend did not exist and that a State member of an international organization was a third State in the strict sense of the term.

45. At the preceding meeting, the Special Rapporteur and several other members of the Commission had implied that article 36 *bis* might jeopardize third world interests. For example, Mr. Sucharitkul had referred to a headquarters agreement between Indonesia and ASEAN in which all the States involved were developing countries, but, in such a case, it was unlikely the concept embodied in article 36 *bis* would have negative implications for the interests of developing countries. Mr. Thiam had cited the example of a customs union composed of developing African countries. The criterion of the interests of third world countries should not, however, be used as a basis for illustrating the merit or demerit of article 36 *bis*.

46. The third question that had been raised by the Special Rapporteur was how the modalities of assent to treaty obligations by the States members of an international organization could be eased. In his own opinion, article 36 *bis* must make it as clear as possible that the States members of an international organization were bound by obligations arising from a treaty concluded by that organization and it must also specify at what moment acceptance was given by those States. If those two requirements were not met, the parties to the treaty other than the organization could not be sure whether the member States were bound by that treaty; such uncertainty might give rise to difficulties in the execution of the treaty.

47. In that connection, he noted that the relevant rules of an international organization, as referred to in article 36 *bis*, subparagraph (a), could be interpreted only by the competent organ of the organization or by the organization's member States. The parties to the treaty other than the organization in question had no part to play in determining what the relevant rules were and what they meant. If, after the conclusion of a treaty by an international organization, the interpretation of the relevant rules of the organization raised doubts about whether the States members of the organization were bound by that treaty, the conflict of interpretation would have to be settled within the international organization, not by the other parties to the treaty; that would place those other parties in a rather insecure position in their treaty relations with the States members of the international organization. Consequently, no treaty could be concluded between States and an international

organization unless it expressly stated that the relevant rules of the organization provided that the treaty would bind the member States of the organization.

48. In view of the need for such a clarification, he proposed that the words "the organization expressly acknowledges that ..." should be added at the beginning of article 36 *bis*, subparagraph (a), as adopted on first reading. That amendment would make it clear that, since the interpretation of the constituent instrument and the relevant rules of the organization depended on the States members of the organization, the other parties to the treaty would have to have express acknowledgement from the organization in order to be protected in their position vis-à-vis the latter's member States. He also suggested that the beginning of article 36 *bis*, subparagraph (a), as proposed by the Special Rapporteur (*ibid.*, para. 26), should be amended to read: "(a) the express acknowledgement by the organization that the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that ...". For the sake of consistency, the word "express" should also be added before the word "acknowledgement" in subparagraph (b) of the revised text proposed by the Special Rapporteur.

49. The wording he had just proposed for subparagraph (a) differed from that proposed by Mr. Ni at the preceding meeting only in that it contained a reference to the relevant rules of the organization, but not to the constituent instrument of the organization. In his view, the words "the relevant rules of the organization" should be retained in that subparagraph to cover the case in which a rule of the organization other than its constituent instrument provided that the member States were bound by obligations established under a treaty concluded by the organization.

The meeting rose at 1.15 p.m.

1706th MEETING

Thursday, 13 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)³ (*continued*)

1. Mr. McCAFFREY said that he experienced no difficulties regarding the basic thrust of article 36 *bis* and he agreed with the well-substantiated view taken by the Special Rapporteur and other members of the Commission that there was ample justification for such an article, independently of its application to EEC. He also agreed with the basic principle that, in certain exceptional and well-defined circumstances, an international organization might, by entering into a treaty, create rights and obligations for its member States. Hence the Commission's task was to define those circumstances in such a way as to ensure adequate protection of the interests of the three categories of parties, or more properly speaking, "actors", potentially affected by the article, namely, international organizations, the member States of those organizations and States parties to treaties with international organizations.

2. The Special Rapporteur had clearly explained who the beneficiaries of article 36 *bis* would be, but it still had to be determined whether the benefits would create a correlative detriment for one or more of those three categories of actors and whether it would be so unacceptable as to dictate that article 36 *bis* should be abandoned altogether.

3. At the Commission's previous session, the interests of each of the three categories of actors to be safeguarded had been clearly summarized by Mr. Pinto.⁴ First, the organization entering into the treaty had an interest in ensuring observance of its rules and implementation of its treaty intentions. Second, the member States of the organization had an interest in ensuring that they were bound only in a manner clearly set forth in rules of the organization to which they had agreed or, in the absence of any such rules, by their express consent, however demonstrated. Third, the other States participating in the negotiation of the treaty and later parties to the treaty had an interest in ensuring that they would know in advance which other States would receive benefits and incur obligations under the treaty—in other words, ascertaining in advance who their treaty partners would be. Those three groups of interests seemed to him to boil down to what would be referred to in German as "*Rechtssicherheit*", namely, legal certainty and predictability.

4. For the purposes of the discussion of article 36 *bis*, it was important to concentrate on one version or the

other. The revised version proposed by the Special Rapporteur (A/CN.4/353, para. 26) was better because it offered the two advantages of emphasizing the requirement of assent and eliminating the term "third States". Again, it had to be borne in mind that the basic question of need for consent by the member States of the organization was clearly covered by articles 35 and 36, and that article 36 *bis* dealt only with the manner in which the member States of an international organization could express their consent to be bound by a treaty entered into by the organization. Thus, as far as obligations were concerned, article 36 *bis* was an exception to the requirement in article 35 that the consent of third States should be expressed in writing. In considering whether the interests of the three categories of actors were adequately protected, it must also be asked whether the relaxation of the rule embodied in article 35 created a potential for "unfair surprise" for the actors in any one of the three categories.

5. With regard to the first category he had mentioned, it was plain that when the purpose of the organization in entering into the treaty in question was to create obligations and/or rights for its member States, that purpose would be thwarted if the member States could avoid the obligations by claiming that they had never given their consent to the treaty. The organization itself, and the member States which had expected to incur obligations, would thus want some kind of clear agreement that all of the member States would be bound by the treaty. If the organization was to function effectively, such an important matter as the circumstances under which the member States could be said to assent to obligations arising from treaties concluded by the organization should not be left to implication, for a recalcitrant member State might claim that, in the absence of its express assignment to the organization of the right to bind it by treaty, the organization had no such power. Even if a competent tribunal were later to find that the organization did, in fact, have such power, the entire dispute settlement process would, at the very least, disrupt the smooth functioning of the organization and could even prevent it from functioning at all if the recalcitrant State was a sufficiently important member.

6. It therefore seemed that the interest of the organization in ensuring observance of its rules and implementation of its treaty intentions could be effectively safeguarded only by a provision spelling out in clear terms what kind of conduct, short of written acceptance, would create obligations for the member States. In his view, however, that objective could be achieved if the revised version of article 36 *bis* was redrafted, partly along the lines suggested by Mr. Ni (1704th meeting, para. 20).

7. With regard to the second category of actors, namely the member States of the international organization, the question was whether article 36 *bis* sufficed to protect their interest by ensuring that they were bound only in so far as they had given their express consent or in so far as rules of the organization to which they had agreed clearly specified the circumstances under which

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1704th meeting, para. 42.

⁴ *Yearbook ... 1981*, vol. I, p. 184, 1678th meeting, para. 6.

they were considered to have assented to obligations arising from treaties concluded by the organization. That category of actors was, of course, the one that had aroused the greatest interest, and the concern of most of the members of the Commission who had expressed reservations about the effect of article 36 *bis* seemed, basically, to be a fear that the member States of an international organization would be the victims of "unfair surprise" and would have obligations imposed upon them unexpectedly and against their will.

8. Mr. Ni had emphasized the particular importance of protecting the newly independent States of the third world from incurring unexpected responsibilities when they became members of international organizations, and even after, a legitimate concern and certainly one which most, if not all, States would share. Indeed, international organizations were playing an increasingly important part in today's interdependent world as vehicles for collective action, and their role was particularly critical for the countries of the third world, which might wield greater influence by acting collectively than by acting alone. The Commission must undoubtedly avoid sowing the seeds of distrust of such organizations by appearing to give them more power over their member States than was its real intention. The question that then arose was whether it was possible to relax the formal requirements for expressing consent—something that would strengthen the international organization as an actor on the international scene—and at the same time, safeguard the interest of its member States in knowing in advance precisely how much of their sovereignty they were surrendering by joining the organization.

9. The Commission could indeed achieve both of those objectives, which did not appear to be inconsistent, by following Mr. Ni's proposal that in subparagraph (a) the phrase "the relevant rules of the organization" should be replaced by "the constituent instrument of the organization", that subparagraph (a) as a whole should be amended to read: "the constituent instrument of the organization applicable at the moment of the conclusion of the treaty expressly provides that the States members of the organization are bound by such a treaty", and that subparagraph (b) should be amended to read: "the States members of the organization expressly undertake to assume [the] obligations" arising from a treaty concluded by the organization.

10. The problem regarding the phrase "the relevant rules of the organization" was that those rules, as defined in article 2, subparagraph 1 (j), included resolutions, which might not have met the support of a member State, which would then have grounds for a justifiable objection to the imposition of an obligation arising from a treaty entered into by the organization. One solution would be to require that resolutions empowering the organization to create treaty obligations for its member States should be adopted unanimously, or that no member State would be deemed to have given its consent on the basis of "relevant rules" to which it had not expressly agreed. A solution of that kind would be cumbersome both in terms of drafting and in terms

of the functioning of international organizations, but it might be worth considering in the light of the Special Rapporteur's point that making everything dependent upon the constituent instrument of the organization might hamper the organization's development.

11. The advantages of requiring that such a provision should be expressed in the constituent instrument of the organization were that the member States would know in advance to what extent they were surrendering their sovereignty and that there would be no problem of deciding whether unanimity was necessary in order to adopt a rule of the organization allowing the organization to bind its member States through treaties. The principal disadvantage of making the constituent instrument the sole determinant was that the provisions of constituent instruments were cast more or less in concrete and did not lend themselves to development through practice in the same way as did rules that were expressed in resolutions. A stipulation that the requisite power should be conferred upon the organization in its constituent instrument might not be the ideal solution, but it might be the most practical course and the best compromise between the exclusive requirement of express consent in writing, as specified in article 35, and total flexibility.

12. As to subparagraph (b), the main problem seemed to lie in the rather vague term "acknowledgement", which could conceivably be interpreted as meaning anything from an express undertaking in writing to mere passive acquiescence. Although he agreed with Mr. Ushakov that that term was not the most felicitous, article 36 *bis* need not be eliminated in order to solve the problem it posed. As far as the member States of an organization were concerned, an improvement would be to replace the requirement of acknowledgement by the requirement of an express undertaking to assume the obligations in question. That would apparently reflect the practice of CMEA, as described at the previous meeting by Mr. Ushakov, and would allow member States to accept obligations under a treaty concluded by the organization when they had not consented in advance to the imposition of such obligations.

13. The amendments to subparagraphs (a) and (b) proposed by Mr. Ni therefore seemed to safeguard adequately the interests of the member States of the organization by affording them an opportunity to determine in advance the extent to which the organization had the power to bind them through its treaties, or at least to give their *post hoc* consent to obligations arising from treaties concluded by an organization that lacked such power.

14. With regard to the third category of actors, namely, the States parties to treaties concluded with an international organization, it could well be asked whether their interest in determining in advance all of their treaty partners and those on whom they would be conferring rights was properly safeguarded by article 36 *bis*. The answer to those questions was contained not in article 36 *bis* alone but primarily in articles 35 and 36,

both of which protected the interests of States parties by requiring that it should be the intention of the parties to the treaty to create the obligation or right for the “third State”, namely, the member State, in the present instance. Parenthetically, he pointed out that Mr. Riphagen’s suggestion (1705th meeting, para. 21) regarding the insertion of a separate article stating that the provisions of section 4 were without prejudice to the rights and obligations of States members would be a simpler solution than attempting to reformulate the definition of the term “third State” contained in article 2, subparagraph 1 (*h*). Hence, if the requirements of articles 35 and 36 were not met, no obligation or right arose with respect to the member State and there was nothing to which it could assent under article 36 *bis*, which therefore posed no difficulties on that score. Similarly, articles 35 and 36 would not appear to threaten the interests of the States parties, if the latter did not intend the member States to be their treaty partners.

15. It might be desirable, however, to amend the opening paragraph of article 36 *bis* to make it clearer that the constructive consent of the member States was required before they could be bound by treaties concluded by the international organization. The entire article, including a slightly modified version of the amendments to subparagraphs (*a*) and (*b*) proposed by Mr. Ni (1704th meeting, para. 20), would then read:

“A treaty to which an international organization is a party does not create obligations with respect to States members of that organization without their consent/assent. States members will be considered to have given such consent/assent where:

“(a) The constituent instrument of the organization applicable at the moment of the conclusion of the treaty expressly provides that States members of the organization are bound by such a treaty; or

“(b) States members of the organization expressly undertake to assume such obligations”.

16. Although the wording was certainly subject to refinement, it would appear to meet much of the concern expressed by members of the Commission and by Governments and international organizations which had commented on article 36 *bis*.⁵ It would also afford adequate protection for the interests of each of three of the categories of actors. Such an approach was preferable to a compromise on the question of introducing flexibility by making an addition to article 35. Admittedly, deletion of article 36 *bis* would eliminate the entire problem, but he doubted whether an attempt to conceal the problem in article 35 would have the desired effect of eliminating the controversy. The best course was to meet the controversy head-on by removing the uncertainties that now existed in article 36 *bis*.

17. Mr. EL RASHEED MOHAMED AHMED said that the exception to article 35 embodied in article 36 *bis*

was more apparent than real. If the words “Subject to article 36 *bis*” had not been placed in square brackets in article 35, paragraph 1, articles 35 and 36 *bis* would not have given rise to so much discussion. Article 36 *bis* was, of course, quite controversial, but the Special Rapporteur had rightly pointed out in his eleventh report (A/CN.4/353, para. 27) that its purpose was to render more flexible the modalities of assent which article 35 had made subject to very strict formal requirements.

18. Mr. Al-Qaysi (1704th meeting) had noted that, while article 35 referred to third States, article 36 *bis* referred to the member States of an international organization. A distinction was thus made between States which were third parties and States which were members of an international organization, just as there was a distinction between a treaty to which an international organization was a party and the treaty establishing that organization. Moreover, the member States of the organization were not really third parties to treaties concluded by that organization.

19. Mr. Ushakov (1705th meeting) had replied in the negative to the Special Rapporteur’s question (1703rd meeting) as to whether an international organization was a third party in relation to the States that had established it, and had said that, while the organization was composed of all its member States, the member States could not bind the organization. However, the question of whether the organization could bind its member States depended on the constituent instrument of the organization and, above all, on the consent of the member States.

20. The Special Rapporteur had pointed out (*ibid.*) that any obligation arising for a third international organization from a treaty provision was necessarily limited to the activities of that organization. There were, however, a number of ways in which the organization could absolve itself of an obligation, as could be seen from articles 54, 59 and 62. Perhaps article 62 could provide an answer to Mr. Ushakov’s question (*ibid.*) as to whether consent to an obligation would subsist even if the organization ceased to exist.

21. The Special Rapporteur had also asked (1704th meeting) whether the member States of an international organization would benefit from article 36 *bis*. Mr. McCaffrey had given a very clear answer in his analysis of the actors whose interests were affected by that provision. In his own view, the member States of an international organization were not complete strangers to the rights and obligations assumed by the organization and they could not refuse to assume an obligation arising from an agreement concluded by the organization on the grounds that they were third parties in relation to that agreement.

22. In that connection, the Special Rapporteur’s example (*ibid.*) of an international bank which offered benefits to its member States but also imposed obligations on them was particularly pertinent, because article 36 *bis* covered both obligations and rights and stipulated that the obligations must be expressly accepted. It

⁵ A/CN.4/339 and Add. 1-8, reproduced in *Yearbook ... 1981*, vol. II (Part Two), annex II.

therefore safeguarded the interests of all the member States of an international organization, including those of third world countries, and should be retained in the draft articles, although the wording would have to be improved. To that end, either the phrase “[Subject to article 36 *bis*]” should be deleted from article 35, paragraph 1, or the phrase “[Subject to article 35]” should be added at the beginning of article 36 *bis*. The Drafting Committee should also pay careful attention to the drafting suggestions made by Mr. McCaffrey.

23. Mr. CALERO RODRIGUES said that the approach taken by the Special Rapporteur and by Mr. Ushakov differed so much that, in the course of the discussion, he had often wondered whether they were referring to the same article.

24. The Special Rapporteur had said that article 36 *bis* was a straightforward provision, which did not constitute an exception to the principle of consent enunciated in article 35 and was aimed solely at eliminating the requirement that consent should be given in writing in every case. According to Mr. Ushakov, adoption of article 36 *bis* would call into question the basic principles of the draft articles as a whole and the international legal order, because it involved problems relating to the sovereignty of States, discrimination between international organizations, future models of economic integration and the interests of developing countries. Some of the problems to which Mr. Ushakov had referred were very important indeed, but he did not think that they came within the limited framework of article 36 *bis*.

25. Some of the points raised by other members of the Commission who did not have the same apocalyptic view of article 36 *bis* as did Mr. Ushakov were also irrelevant to the discussion. For example, the question of whether the member States of an international organization should or should not be regarded as third States in relation to treaties concluded by the organization had no bearing on whether article 36 *bis* should be retained or deleted. The argument that the article was improper because it related to the case of only one international organization was also irrelevant. Article 36 *bis* did not refer to any organization in particular, and although at present it applied to only one organization, there was nothing to prevent other organizations of the same type from being established in the future.

26. He shared the Special Rapporteur's realistic view of the problems regarding article 36 *bis*, which merely stated that acceptance in writing was not necessary in the case of States that wished to assume obligations established by a treaty concluded by an international organization of which they were members. Their acceptance of such obligations would either be implicit, if the relevant rules of the organization specified that they were bound by such a treaty, or explicit, if all the States and organizations participating in the negotiation of the treaty and all the States members of the organization concerned acknowledged that the treaty necessarily bound the member States of the organization. By

acknowledging that the treaty was binding on them, the member States were giving their consent to be bound, and no further formal act of acceptance in writing was required. Although he was not entirely satisfied with the word “acknowledged” used in article 36 *bis*, subparagraph (b), and thought that a better term could be found, he realized that the Special Rapporteur had probably intended to leave the wording vague in order to take account of every eventuality.

27. Mr. Ushakov (1703rd meeting) had rightly drawn attention to the subsidiary nature of the rules contained in section 4, and particularly in article 36 *bis*. Indeed, there might be cases in which, despite the relevant rules of the organization, the member States would not be bound by a treaty concluded by that organization. An example was to be found in the Convention on the Law of the Sea,⁶ which could be signed by organizations in regard to matters in which competence had been transferred to them by their member States. States were thus entirely eliminated from annex IX of the Convention, and their rights and obligations were transferred to the organization.

28. The Commission was facing a problem because, as the Special Rapporteur had noted (1705th meeting), the controversy over article 36 *bis* had become more symbolic than anything else. It was perhaps too late to consider the provision dispassionately and in the technical terms in which it should have been discussed in the first place. Perhaps it was also impossible to keep article 36 *bis* as it now stood and as he would have liked it to be adopted, subject to some drafting improvements. The Special Rapporteur had admitted that it was not essential, but it would nevertheless be useful to all concerned—international organizations, their member States and the other parties to treaties concluded by such organizations. The answer to the question of whether it should be retained might therefore lie in adopting the amended wording proposed by Mr. Ni (1704th meeting, para. 20) and refined by Mr. McCaffrey at the current meeting (see para. 15 above) or in adopting the suggestion made by Mr. Riphagen (1705th meeting, para. 21).

29. Mr. NJENGA said that, in the controversial discussion of the consequences of article 36 *bis*, the arguments for discarding it far outweighed those for adopting it. Although EEC was the only specific example of an international organization to which article 36 *bis* now applied, he would not go as far as to say that that alone was a conclusive reason for removing the article from the draft. However, the Commission should not engage in drafting provisions for future contingencies unless it could be sure that a trend towards the surrender of State sovereignty to international organizations did exist. If he could be persuaded that there was indeed a trend in that direction, he would be able to agree that article 36 *bis* would serve a useful purpose.

⁶ See 1699th meeting, footnote 7.

30. From what he had seen, particularly in Africa, no such trend was to be found. There was, admittedly, a move towards economic integration in that part of the world and the Heads of State and Government of the African countries had, for example, met at Lagos in April 1980 to adopt the Lagos Plan of Action,⁷ which aimed at the economic integration of the continent by the year 2000. In that connection, he also mentioned the Economic Community of West African States (ECOWAS) and the treaty signed at Lusaka in December 1981 to establish a preferential trade area covering countries in eastern and southern Africa. Under that agreement, an organization would be established to monitor the preferential trade area, but nowhere in the constituent instrument was it specified that the organization could contract on behalf of its member States.

31. East Africa had also had extensive experience of economic integration in the form of the East African Community, which, in its time, had in some respects been even more integrated than the European Economic Community. In every act involving treaties with non-members, however, each of the three member States had been associated with the Community in a kind of mixed arrangement. Again, the African Development Bank and the Arab Bank for Economic Development in Africa assumed rights and obligations on behalf of their member States, but the latter had consented to those rights and obligations in advance in the sense that they had each agreed to pay a share of the contributions to the capital of the Bank.

32. In the light of those examples, his impression was that the African countries were very cautious about surrendering their sovereignty to international organizations over which they might not have full control and that strong nationalistic feelings would continue to prevail in that part of the world for some time. He therefore saw no point in including in a draft of a general nature a specific provision which would cater only for eventualities or for one particular international organization. Moreover, the case of EEC had been taken into account in the Convention on the Law of the Sea. Following that example, instances in which States surrendered their treaty-making powers to an international organization should be dealt with in particular treaties or agreements concluded by the organization concerned and not in the draft articles, which contained general rules. In his opinion, article 36 *bis* was unnecessary, although a case could be made for easing the modalities of assent by the member States of an international organization to the obligations established by a treaty concluded by the organization. Provisions on consent given in advance might therefore be included in a new article 35 *bis*.

33. Mr. KOROMA said it seemed to him that the points at issue in article 36 *bis* were whether the member

States of an international organization could assume obligations under the organization's constituent instrument and whether the consent of the member States to those obligations should be express or construed.

34. It was theoretically possible for the member States of an international organization to assume obligations under the constituent instrument, but practically speaking, in most cases the trend was in the opposite direction, as had just been shown by Mr. Njenga. The Commission's task was therefore one of matching the theoretical possibility with what might be termed the practical impossibility. If article 36 *bis* was to be drafted to take account of the theoretical possibility, it would have to refer to "States members of an international organization", not to "third States members of an international organization". Any reference to "third States" would hamper rather than advance the cause of the progressive development of international law.

35. The article as it now stood also gave rise to difficulties because of its title: "Effects of a treaty to which an international organization is party with respect to third States members of that organization". It could be asked whether the member States of the organization were third parties in the sense that they had not severally negotiated all aspects of the treaty or in the sense that they had legal personality distinct from that of the organization. If they did have different legal personality, there might be a multiplicity of parties to the treaty, as happened in the case of the Convention on the Law of the Sea; but that was a specific situation involving EEC, and it did not reflect a general trend.

36. If article 36 *bis* was to be retained, it would have to be placed elsewhere in the draft. The reference to "third States" members of the organization would also have to be replaced by a reference to the "member States" of the organization, because he was not persuaded that the member States of an organization which accepted obligations established by a treaty concluded by the organization could realistically be regarded as third parties to the treaty.

37. Article 36 *bis* might also prove to be dangerous in that different organs of an international organization might conclude treaties and, if the member States had to assume the obligations established by such treaties, they might find themselves in situations beyond their control.

38. Mr. PIRZADA said that the Special Rapporteur's presentation of a controversial article had been instructive and affirmative. However, Mr. Ushakov's views, particularly his criticism of subparagraph (b), carried great weight. In view of the conflict of opinion over whether to retain the article, the balanced approach was that taken by Mr. Ni (1704th meeting), who had expounded the point of view of the third world with respect to international co-operation and suggested constructive amendments to both paragraphs.

39. The first controversial area relating to article 36 *bis* concerned international organizations. The article

⁷ Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa (A/S-11/14, annex I).

appeared to have been tailored to suit EEC, and it had therefore been suggested that the treaty-making capacity of such supranational institutions replaced that of the member States. Reference had also been made to the Convention on the Law of the Sea, which, as Mr. Riphagen had pointed out (1705th meeting), represented a special situation owing to its "package" character. Other members had cited other categories of organizations, such as customs unions, headquarters agreements between organizations and host States, the West African Monetary Union and arrangements among Asian States concerning refugees. Since the term "international organization" signified an intergovernmental organization for the purposes of the draft articles, only one specific international organization met the situation envisaged in article 36 *bis*, but it was true that international organizations were growing in number, and perhaps the Commission would be called upon in the future to make provisions of the kind under discussion.

40. The second point concerned the position of the member States of such international organizations. The Special Rapporteur (1704th meeting) had referred to the observations of the International Court of Justice in its advisory opinion regarding the *Reparations for Injuries Suffered in the Service of the United Nations* case; an element of detachment did enter into the matter, but the member States could not be described as aliens to an agreement concluded by the organization. Such positions appeared even in municipal law and in cases of corporations or companies with limited liability. Such bodies were distinct and had their own legal personality, but occasions arose when the veil of incorporation had to be lifted. Again, to speak of surrender of sovereignty or abandonment of authority to give consent was too technical an approach. Anticipatory assent might well be involved, but in substance the Commission was dealing with constructive consent and providing for an exception to articles 35 and 36.

41. He therefore believed that article 36 *bis* should be retained for the reason suggested by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 27), in other words, to render more flexible the modalities of assent which article 35 had made subject to very strict formal requirements. On the other hand, too much flexibility must be avoided. For that reason, he endorsed Mr. Ni's suggestion (1704th meeting, para. 20) that the expression "relevant rules of the organization" in subparagraph (a) should be replaced by "constituent instrument". Mr. Ni's formulation for subparagraph (a) could in fact be taken as the point of departure, and the improvements suggested by Mr. McCaffrey and the Special Rapporteur could be examined in the Drafting Committee.

42. As to subparagraph (b), the word "acknowledged" was ambiguous and, together with the phrase "necessarily entails such effects", could create complications. At the same time, Mr. Ushakov's suggestion (1705th meeting) should not be overlooked. There were two choices: either subparagraph (b) should be discarded, or, if it was to be retained, Mr. Ni's or

Mr. Ripagen's suggestions should be taken into consideration.

43. Lastly, with regard to article 35, paragraph 2, he supported Mr. McCaffrey's suggestion (1703rd meeting) that the words "in the sphere of its activities" should be deleted.

44. Mr. LACLETA MUÑOZ said that, unlike several previous speakers, he was convinced that an article like 36 *bis* should be retained. Mr. Ushakov was right to say that, so far, the rules of article 36 *bis* fully applied to only one organization, EEC. However, was that sufficient reason for the Commission to disregard the legal characteristics that had given rise to the existence of that organization? Such a course could prevent a move in the future towards organizations that would fall under the terms of subparagraph (a), namely, organizations whose constituent instrument provided that the member States were bound by the treaties concluded by the Organization.

45. He did not believe the problem should be judged in isolation for the degree of integration reached by an organization. It was difficult to imagine a situation in which an organization would be created in order to conclude treaties that were binding upon its member States. Rather, the treaties entered into by an organization would apply automatically to the member States because of the degree of integration reached by the organization. The world of today unquestionably displayed a marked trend towards integration. Since the Commission had been criticized for a predilection for codifying existing practice and an ostensible fear of making proposals to cover the future development of international law, it was important to retain an article like article 36 *bis*.

46. In his opinion, the article, or one like it, could not be condemned on the grounds that it overlooked the significance of State sovereignty, for there was nothing in the construction of the theory of sovereignty itself to prevent States from giving their consent in advance, under a rule whereby it was understood that they would continue to give their consent to each of the treaties concluded by an organization of the type in question.

47. He had spoken of "an article like 36 *bis*" because the new version proposed by the Special Rapporteur (A/CN.4/353, para. 26) differed in some respects from the text that had been adopted on first reading. It referred to the assent of the States members, which was a step in the right direction, since the previous text could be criticized as relating to one concrete case. The mention of assent was highly beneficial, because it afforded the State a different means of giving its assent while adhering to the essential rule that, in a consensual relationship, there was no obligation without assent. Such an approach considerably enhanced the value of the article.

48. The second difference, also a positive one, was that the new version did not speak of third parties, and he shared the Special Rapporteur's views (1703rd

meeting) on the meaning of the term “third party”. Theoretically, as Mr. Ogiso had pointed out (1705th meeting), a State was either a party to a treaty or it was not. For his own part, he was inclined to believe that the member States of an “ordinary” organization, to use Mr. Ushakov’s words (1702nd meeting), could be considered third parties, but not the member States of an organization having “supranational” competence. The problem could be evaded, as had been done in the Convention on the Law of the Sea, by referring not to third States but simply to States members of an organization. The last difference was that the original formulation spoke of both obligations and rights, whereas the second spoke only of obligations; however, he did not believe that point was one of major importance.

49. For all that, the text stood in need of some improvements. Mr. Ni’s suggestion (1704th meeting, para. 20) that the expression “relevant rules” in subparagraph (a) should be replaced by “constituent instrument” was sound and would respond clearly to Mr. Ushakov’s well-founded objection (1703rd meeting) by affording member States a guarantee that they would not be surprised by a decision or resolution approved by the majority. He shared Mr. Ushakov’s criticisms of subparagraph (b) and was also concerned that it was based on an “acknowledgement”, a term that raised doubts in international law and should be avoided.

50. In all likelihood, the drafting of article 36 *bis* had been influenced by the fact that the two preceding articles had been confined to observance of obligations and exercise of rights. Since a special case of consent was now involved, it was necessary to recast the article. Perhaps the two subparagraphs could be merged, as the Special Rapporteur had suggested, giving priority to subparagraph (a). Other changes had been suggested with regard to subparagraph (b), all of which he found valid.

51. Mr. FRANCIS said that, whatever the decision on the question of whether it was advisable to allow for some flexibility in the matter of assent by a member State of an international organization, the general question involved in article 36 *bis* should be mentioned in the Commission’s report.

52. He inclined to the view that, in a strictly legal sense, the member States of an international organization were third States in relation to treaties concluded by the organization. However, they were third States of a unique kind: third States with a special interest. Mr. McCaffrey had cited the views expressed at the previous session of the Commission by Mr. Pinto in connection with the interests of member States of an organization and the organization itself. In another context, it would be useful to proceed further with the question of interest. To the extent that an organization had the capacity to conclude a treaty, he was convinced that the individual members had a collective interest in terms of the objective of the treaty, for as Mr. Ushakov had rightly observed (1705th meeting), the members were constituent elements of the organization. But each one

also had an identical interest in ensuring that the treaty fell within the mandate of the organization and, as members, an interest identical with that of the organization itself so far as the performance and the effectiveness of the treaty were concerned. The treaty-making powers of an organization were in fact nothing more than the collective will of its members. For that reason, it was advisable to comment on that important question in the report, outside the context of “supranationality”.

53. The Special Rapporteur had suggested (*ibid.*) that some flexibility could be introduced in respect of article 35, either by inserting a separate paragraph or adding an article 35 *bis*, and that Mr. Ni’s suggestion (1704th meeting, para. 20) would form a sound basis for such a course. The answer would depend on whether the Commission wished to state a positive rule in the draft. If so, Mr. Ni’s proposal would be an excellent starting point: it had the virtue of getting away from the rigid element of obligation, since it spoke of “effects” on the member States. If, however, the Commission did not wish to go so far as to introduce a positive rule, then the matter should be pursued on the basis of Mr. Riphagen’s suggestion (1705th meeting, para. 21).

54. Mr. QUENTIN-BAXTER said that, for pragmatic reasons, article 36 *bis* should be retained at the present time; after all the time, effort and skill that had been brought to bear upon the question, it would be quite impossible to do otherwise. The General Assembly was entitled to the best advice and should be given every opportunity to reach its own conclusions on the basis of a developed draft. Secondly, it was true that article 36 *bis* was something of a departure from the pure symmetry of the draft. A relationship other than a relationship between parties to treaties was being examined, and from a more positive standpoint than that of the articles of the Vienna Convention relating to the rights and obligations of third parties. Thirdly, the Commission was not making the fundamental law of international organizations and it should therefore be careful when dealing with the relationship between the members of an organization and the organization itself. That matter fell within the Commission’s purview, but not within the scope of the topic itself. Fourthly, on the question of protection, he was concerned not so much with the interests of the member States of an organization, which were generally in a position to look after themselves, as with the interests of the States which must deal with the organization. They might have rather less opportunity to form a proper view of the extent of the relevant rules of the organization.

55. A paradigm of all those questions could be provided by Mr. Riphagen’s suggestion that, at the very least, a saving clause should make it clear that nothing in the draft would effect the operation of other laws in relation to the matters dealt with in article 36 *bis*, particularly in subparagraph (a). At a practical level, such a saving clause would delineate a gap between the Vienna Convention and the rules applied to organizations in

their relationships with States and with other international organizations.

56. Of course, as the Special Rapporteur had said, the case of EEC stood alone at the present time and no article in a law-making treaty was actually necessary to provide other States security in their dealings with EEC, a circumstance that was adequately covered by its constituent instruments. Yet it was something of a confession if, at the end of the codification exercise, other laws independent of the Commission's codification and of the Vienna Convention had to be relied upon. It had to be remembered that the Commission was dealing with a substantial percentage of all treaties concluded in the modern world.

57. It was not easy to be clear when speculating about the future. In considering the small States in the southern Pacific and in his own region, he would agree with Mr. Njenga that there was no immediate likelihood that those States would wish to take advantage of the kind of arrangements made between the members of EEC. Padoxically, the strong and large States appeared to be the ones that felt able to sacrifice some of their individual freedom in the interests of common action; they did so because the sacrifice of individual discretion represented a gain in strength and influence. Yet he could imagine the possibility that States much smaller and weaker than those composing EEC might wish to strengthen their own hands by adopting such measures, and there was some advantage in not foreclosing the possibility.

58. Like other members, he was extremely interested in Mr. Ni's suggestion for redrafting subparagraph (a) in terms which would emphasize the "constituent instrument" rather than the broader expression "rules of the organization". In that respect, the Commission would have to be clear about the scope of the draft. He would suppose that, whatever was said in the draft articles, they would not in the final analysis govern the relations between an organization and its members. If the rules of an organization had the effect of binding the members under treaty obligations of the organization itself, a narrower scope would not in itself affect the relationships between the organization and its members. The situation would be similar to the existing situation regarding relationships between members of an organization *inter se* and between the members and the organization. Alternatively, one could follow Mr. Laclea Muñoz's line of thought and say that the precedent of EEC was a good one in that the position had been made clear in its constituent instruments, and that the same thing should be done in other cases.

59. In conclusion, he agreed with the general opinion that removal of the term "third State" was a great advantage, that the emphasis on assent was entirely positive, and that the looseness of the term "acknowledged" in subparagraph (b) gave cause for concern.

Organization of work (continued)*

MEMBERSHIP OF THE PLANNING GROUP

60. The CHAIRMAN suggested that the Planning Group should be composed of the following members: Mr Díaz González (Chairman), Mr. Castañeda, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, and Mr. Ushakov.

It was so decided.

The meeting rose at 1 p.m.

* Resumed from the 1699th meeting.

1707th MEETING

Friday, 14 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (continued)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)³ (continued)

1. Chief AKINJIDE, comparing article 36 *bis* to a problem child no one knew how to handle, said that the real impact of that article, if adopted, would be felt by the developing countries, as Mr. Ushakov (1705th meeting) and Mr. McCaffrey (1706th meeting) had both implied. In that connection, Mr. Ushakov had been correct in referring specifically to EEC. He himself did not wish to indulge in politics, but it had to be acknowledged that the effects of colonial rule since 1885 were indelible and that EEC had an economic impact not only on the countries of Europe, but also on their former colonies that were now independent. The various European countries had ruled over virtually every country in Africa, including his own, and, unfor-

¹ Reproduced in *Yearbook: ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1704th meeting, para. 42.

unately, the consequences of colonial rule varied along racial lines. The effects of European rule in Australia, Canada, New Zealand and America had been quite different from those in the African, Asian and Latin American countries.

2. The consequences of article 36 *bis* were far greater than its words indicated and could even be devastating. He agreed with Mr. Reuter's analysis (1704th meeting) of the fate of the developing countries, particularly regarding economic issues. The real impact of article 36 *bis* would be greatest in economic matters, and there could be no political independence without some degree of economic independence.

3. In economic matters, the developing countries were, so to speak, caught between Scylla and Charybdis. They wanted to be independent and to have three square meals a day, which they could not provide on their own. Since the countries having the greatest impact on their economic well-being were the countries of Europe, it would be risky for the developing countries to divorce themselves from EEC. For that reason, they had found it imperative to conclude the Lomé Convention,⁴ which, in a way, tied many of the developing countries of Africa to EEC.

4. Mr. Ushakov's argument (1705th meeting) on the power and structure of EEC was unassailable. That group of States had its own institutions: a parliament, a cabinet, the presidency, which rotated among its members, a court and a military arm. In certain matters, its members had no final right of appeal, which lay with the supranational court. He was not criticizing EEC, but simply analysing the consequences of its structure. It was only natural for the Community to protect the interests of its members and for the interests of the developing countries to be secondary. For their part, the developing countries did not want their hands to be tied economically and more than they already were.

5. Against that background, he entirely agreed with the analyses (1706th meeting) of Mr. Njenga and Mr. Francis. Mr. Thiam had spoken of customs unions (1703rd meeting), and references had been made to headquarters agreements, but, in his own view, EEC had no parallel anywhere in the world. The debate on article 36 *bis* was an attempt to protect the interests of the developing countries, and not the member States of EEC. The developing countries were the children of the world and must be nurtured and protected.

6. It could not be said that EEC represented a trend. If a trend was emerging, it was the one reflected by the attempts of the countries outside EEC to protect their independence. For example, at the meetings of the OAU at which the Charter of Human and People's Rights⁵

had been elaborated, each member State had made a concerted effort to protect its independence. Mr. Balanda had referred to a provision of his country's Constitution which enabled that country to forgo part of its independence.⁶ To his own knowledge, however, that provision, which was called an "enabling act" in municipal law, had never been invoked. On the other hand, the Constitution of his own country provided that a treaty would not have force of law unless it received the express approval of the legislative power, and he could not imagine the National Assembly agreeing to surrender part of the country's independence.

7. As for subparagraph (b), he said that he was not convinced of its significance either in theory or practice. Mr. Ushakov's analysis (1705th meeting) could hardly be improved. To which stage of the treaty-making process did the word "acknowledged" refer? Did it refer to the negotiating process? Agreeing in advance to be bound appeared, to say the least, bizarre. Even assuming an agreement was reached, would it involve unanimity, consensus, majority rule or veto power? Subparagraph (b) was, in his view, extremely vague and had no right to exist.

8. He agreed with Mr. McCaffrey's analysis (1706th meeting) of subparagraphs (a) and (b), but not with the cure proposed. Mr. McCaffrey had spoken of an "element of surprise", "danger to the developing countries", and "danger of relaxing consent". If those dangers existed, the cure must be commensurate with the malady; article 36 *bis* should die. Retaining it would intensify the economic bondage of the developing countries, and he did not think those countries would preside over the tightening of their chains and fetters. He was not unaware that articles 35 and 36 created obligations and rights and that the fate of article 36 *bis* would inevitably affect article 37, paragraphs 5 and 6. Yet why not let the consequences of removing article 36 *bis* flow? He appealed to the members from the developed countries not to look at the problem from the point of view of their own interests alone, but with the interests of the developing countries at heart.

9. Mr. Al-QAYSI said that the basic question raised by article 36 *bis* was clear: could a State member of an international organization be regarded as a third State in relation to a treaty concluded by that organization? In attempting to answer that question, it must not be forgotten that an international organization possessed legal personality in detachment from its members, but only after the organization had come into being as such as a result of the adoption of its constituent instrument by those members. At the same time, in performing the tasks entrusted to it by its constituent instrument, the organization operated as a legal entity, at the policy-making level at least, through the participation of its members. Consequently, what an international organization could and could not do depended on how it had been conceived by its member States at the

⁴ Second ACP-EEC Convention, signed at Lomé (Togo) on 31 October 1979, between the African, Caribbean and Pacific States and the European Economic Community (*Official Journal of the European Communities* (Luxembourg), vol. 23, No. L 347 (22 December 1980)).

⁵ Adopted at the 18th Assembly of Heads of State and Government of the OAU, held at Nairobi, 24-28 June 1981 (CAB/LEG/67/3/Rev.5).

⁶ See 1705th meeting, footnote 9.

formative stage, in its constituent instrument, and on their participation in practice throughout the process of its evolution.

10. In the Vienna Convention, the term "third State" meant a State not party to a treaty, a party being a State which had consented to be bound by the treaty and for which the treaty was in force. Similar rules had been elaborated in article 2, subparagraph 1 (*h*), and article 34 of the draft. But those rules did not pretend to be more than they were. The rules of the Vienna Convention related to the situation of States entirely outside the treaty-making process. In the draft articles being elaborated, the rules applied not to States, but to a subject of international law which had come into being through an instrument which had been concluded by States as sovereign entities, and which defined the parameters of its functions and powers. Those functions and powers could be exercised only through the participation of the members. Accordingly, even on the basis of a strict notion of sovereignty, it was legally conceivable that the member States of an organization could, through express intention in the constituent instrument, transfer treaty-making power, for all or some specific purposes, to the organization.

11. In such circumstances, the question as he saw it was not one of stressing or easing the requirement of consent. Rather, the question was what mode or form constituted consent; was it possible to satisfy the rule embodied in article 34 by a form of consent given in general terms in advance of the conclusion of a particular treaty in the sphere of activities of an international organization?

12. The decisive factor was not whether such a situation was conceivable in law—as he believed it was—but, rather, whether general practice at present warranted the formulation of a general rule of that type. Opinions were divided, comments and observations expressed by Governments were polarized, and the views of international organizations⁷ had not been of great assistance so far. The Commission must rely on its good sense and adopt a functional approach in deciding whether there was a need for an article like article 36 *bis*, regardless of ideologies or the argument that the sole precedent was that of EEC.

13. The Special Rapporteur had admitted that he had perhaps relied too heavily on the European experience and had hinted at a possible solution, as had Mr. Ni (1704th meeting) and Mr. Riphagen (1705th meeting). The Convention on the Law of the Sea,⁸ though it represented a special situation, also offered an example of a possible "way out" through the adaptation of a general formula to the needs which the Commission thought should be covered in the draft articles. In his analysis of the interests to be protected, Mr. McCaffrey (1706th meeting) had also suggested a formula. With regard to the remarks made by Chief Akinjide, he (Mr.

Al-Qaysi) said he considered that there was a need for a comprehensive approach which took opposing viewpoints into account. His own country was also a developing country and he noted that, in connection with article 36 *bis*, members had pleaded the cause of the developing countries from diametrically opposed angles. Some considered that that provision would not serve the interests of the developing countries, while others thought that it would. To his own mind, it might not, in future, be in the interests of the third world countries to have the door closed in their faces through the elimination of article 36 *bis*.

14. As Mr. Quentin-Baxter had pointed out (*ibid.*), however, the ultimate decision lay in the hands of Governments, which would decide whether the draft articles were a significant contribution to the law of treaties. That was a practical consideration that had to be borne in mind. For that reason, the draft articles must contain a functional provision which would be of practical value and could not be said to set up EEC experience as a general rule, but which States, developing and developed alike, would be free to use if they wished.

15. Mr. SUCHARITKUL said that the problem raised by article 36 *bis* involved a number of difficulties. First of all, reference had been made to the "third world", but that term was confusing, as was the term "third States" and the word "third" used in reference to "non-parties". It would be preferable to abandon the word "third" and maintain the distinction between "parties" and "non-parties".

16. Secondly, as Mr. Ushakov (1705th meeting) had rightly pointed out, the trend was not towards a surrender of sovereignty. Referring to the 1955 Asian-African Bandung Conference, he pointed out that the final communiqué of 24 April⁹ contained articles of good neighbourly relations, a declaration on the speedy granting of independence to peoples and an appeal to the United Nations to admit members of the Asian-African Conference who were not members of the United Nations, such as Japan. With regard to regional co-operation in Asia, the trend was not towards an intensification of economic integration, but, rather towards co-operation in various fields on the basis of equal partnership, perhaps more along the lines of the model of CMEA. Neither of the two main examples given, namely, CMEA and EEC, had been labelled an international organization.

17. A third difficulty, moreover, arose in connection with the meaning of the word "organization". According to the second type of treaty, of course, the term "international organization" meant an intergovernmental organization. However, had an analysis really been made of what an international organization was? There was a tendency to forget, for example, that the Security Council was not an international organization, but an organ of the United Nations, and that, just as

⁷ See 1706th meeting, footnote 5.

⁸ See 1699th meeting, footnote 7.

⁹ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

there existed a great variety of States, international organizations were so different in terms of their composition, activities, functions and purposes that it was not possible to identify one model with another.

18. He agreed with Mr. Ushakov that provision should not be made for one organization, namely, EEC. Provision should be made generally for the treaty relations of the member States of an organization which had concluded a treaty. In that connection, Mr. Al-Qaysi had been quite right to say that the conclusion should be drawn from general practice. Referring to examples of several international organizations which had been established in Asia, he was himself of the view that the trend was away from the surrender of sovereignty, as was only natural for the countries of continents such as Asia and Africa which had recently recovered their sovereignty. Yet geographical circumstances sometimes compelled States to give up some of their sovereign rights. A case in point was the Committee for Co-ordination of Investigations of the Lower Mekong Basin, which was composed of Thailand, Kampuchea, Laos and Viet Nam: each of the four countries had surrendered some of its sovereign rights to the Committee.¹⁰

19. Perhaps the Commission was thinking too much in terms of the European experience; the Asian experience was slightly more pragmatic and less legalistic. ASEAN, for example, did not have all its powers included in one instrument; declarations were added every year. Other organizations had been established and some had been disbanded: experience had emphasized the importance of adaptation to the needs that arose. He therefore advised the Commission to take a great deal of care in redrafting article 36 *bis* in order to cover not only EEC or CMEA, but also the situation as it stood at the present time.

20. In that connection, he would like to say a few words about the practice of the United Nations. Headquarters agreements should not be belittled. In the case of ASEAN, for example, the member States had given their consent before the agreement had been concluded, because the draft had been prepared by all the countries concerned and then signed by the Association and the host Government.¹¹ The Special Rapporteur had rightly pointed out that headquarters agreements did not have to be concluded with member countries. Switzerland, for example, had concluded a headquarters agreement with the United Nations;¹² the agreement provided certain privileges and immunities to representatives of member countries, who, in turn, were bound to respect the laws of the host country. When Thailand had con-

cluded an agreement relating to the headquarters of ECAFE¹³ it had been the belief that all Members of the United Nations had rights and obligations arising from that agreement. All those obligations resulted from practice of the United Nations.

21. He hoped that his contribution, which was based primarily on practice, would enable the Commission to go on to consider the possibility of including an accurate and useful provision in the draft articles. In his view, article 36 *bis* constituted codification rather than the progressive development of international law, since it related to existing practice.

22. Mr. RAZAFINDRALAMBO said that his point of view differed in some respects from that of some other representatives of third world countries, but it tied in with that of Mr. Njenga (1706th meeting). First of all, he did not think that article 36 *bis* contradicted the principle enunciated in article 34, namely, that a third State had to consent to be bound by a treaty; rather, it merely sought to make the means of such consent more flexible in the case where the third State was a member of an organization that was a party to the treaty in question. Such flexibility was dictated by the commendable aim of strengthening international organizations, bearing in mind the need to protect the member States through machinery enabling them to express their will advisedly. Those two objectives, which might appear to be contradictory, could be achieved by formulating two separate rules in article 36 *bis*.

23. The words "relevant rules of the organization" in subparagraph (a) had rightly been criticized. As to substance, he said he had no objection to the principle that the member States would be bound by the treaties concluded by the organization if they had consented *ex ante* to be bound in the constituent instrument of the organization. He also thought that it would be preferable to refer to the constituent instrument rather than to the relevant rules. Such a principle might, however, be quite obvious.

24. He was, on the other hand, much less inclined to say that, as indicated in subparagraph (b), the object of the treaty could imply the consent of the member States. To the extent that they referred to genuine international organizations, most of the examples cited related to specific spheres of activity, primarily of an economic or financial nature, and formed part of what Mr. Riphagen (1705th meeting) had called objective regimes.

25. Some members had said that young States were very jealous of the sovereignty and independence it had cost them so much to acquire or recover, but the fact was that, when necessary, they were prepared to accept limitations for the sake of their priority development needs. Apart from Mr. Balanda's example (*ibid.*) of a constitutional act of the State which provided for the possibility of a surrender of sovereignty, it was quite common for the Governments of third world countries

¹⁰ The work of this committee is being assured by the Interim Committee for Co-ordination of Investigations of the Lower Mekong Basin, in which the Democratic Republic of Laos, Thailand and Viet Nam participate.

¹¹ See 1704th meeting, footnote 4.

¹² Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, entered into force on 1 July 1946 (United Nations, *Treaty Series*, vol. 1, p. 163).

¹³ Agreement signed at Geneva on 26 May 1954 (*ibid.*, vol. 260, p. 35).

to agree to sign clauses by which they waived jurisdictional immunity, a basic component of sovereignty, in order to implement their development policies. It was, however, open to question whether those States would agree to establish as a general rule the principle that the member States of an international organization could be bound by the treaties concluded by that organization by reason only of the fact that the States or organizations which had participated in the negotiation of the treaty and the member States of the organization had "acknowledged" that the application of the treaty necessarily entailed such an effect. It had been with good reason that many members of the Commission had expressed reservations concerning the use of the word "acknowledged".

26. It should be borne in mind that many young States might have some difficulty in fully grasping the implications of a provision that was worded in such a vague and general way and on whose scope opinions in the Commission seemed to be divided. It seemed to him that any legal provision that might establish for the member States of an international organization obligations deriving from a treaty concluded by that organization should not leave room for any ambiguity about the means by which those States could consent to be bound by those obligations. That nevertheless brought the Commission back to the ordinary law embodied in article 35 and it had apparently been in order to avoid that dilemma that the Special Rapporteur had decided to say that he was prepared to abandon the article under consideration (*ibid.*). If the Commission did not want to give the impression of having forgotten the case of the member States of an international organization, it could add to article 35 a paragraph in which it would merely require the member States to accept obligations expressly, but not in writing, as in the case of third States in general. It would then not have to include a provision referring to the constituent instrument of the organization, which did not appear essential at the present stage.

27. Mr. BALANDA pointed out, for the benefit of those who had claimed that the phenomenon of supranationality was entirely unknown in Africa, because, in their view, the young African States were too jealous of their sovereignty to surrender any portion of it to an international organization, that the Constitutions of Mali, Guinea and Zaire, for example, contained provisions under which the State could transfer competence to an international organization. Thus, article 70 of the Constitution of Mali provided that: "The Republic... shall be empowered to conclude with any African State treaties of association or partnership which may include partial or total renunciation of its sovereignty for the purpose of realizing African unity."¹⁴ Article 108 of the Constitution of Zaire, which stated the same principle in a slightly different form, provided that "In order to promote African unity, the Republic may conclude treaties and agreements of

association which involve partial abandonment of its sovereignty".¹⁵ Those provisions had not remained a dead letter. Zaire, for example, had concluded, in accordance with article 108 of its Constitution, a convention with Rwanda and Burundi establishing the Economic Community of the Great Lakes Countries.¹⁶ To enable the Community to perform satisfactorily the tasks with which it had been entrusted, the member countries had transferred some of their competence to it, thereby surrendering part of their sovereignty.

28. It should also be noted that, in the Constitutions of most French-speaking African countries, a very clear distinction was made between co-operation agreements, which sought to establish co-operation on an equal basis, and association agreements, which provided for the possibility of achieving integration, particularly in the economic and monetary fields, and assumed that States were prepared to surrender at least part of their sovereignty.

29. That trend towards integration was, however, not found in the French-speaking African countries alone. For example, the signatory States of the Treaty establishing the Economic Community of West Africa,¹⁷ which included several English-speaking countries, had undertaken to adopt a common external tariff within a period of fifteen years. In other words, they had surrendered their sovereignty in tariff matters.

30. The trend towards economic integration was therefore quite real, not only in Europe with EEC, but also elsewhere in the world, particularly in Africa. The Commission should not only take account of that trend, but should also encourage it, since it reflected the needs of a fairly large group of States.

31. He therefore proposed that the Commission should retain the principle enunciated in article 36 *bis*, changing its wording in the light of the proposals made by Mr. Riphagen (1705th meeting), Mr. Ni (1704th meeting) and Mr. McCaffrey (1706th meeting).

32. Mr. THIAM said he regretted the fact that Chief Akinjide had seen fit to give a political turn to the discussion. Only States could praise or criticize a given organization, and the Commission, which was a purely technical body, should confine itself to determining the means of the expression of the consent of the member States of an international organization to obligations arising from a treaty concluded by that organization. In other words, should those States accept those obligations expressly and in writing like third States or in another manner?

33. Article 36 *bis*, which sought to reply to that question, had caused so much controversy primarily because

¹⁵ See 1705th meeting, footnote 9.

¹⁶ Convention concluded at Gisenyi (Rwanda) on 20 September 1976.

¹⁷ Treaty concluded at Lagos (Nigeria) on 28 May 1975 (text in: *International Legal Materials* (Washington, D.C.), vol. XIV, No. 5 (September 1975), p. 1200).

¹⁴ *Constitutions of the Countries of the World*, A. P. Blaustein and G. H. Flanz, eds. (Dobbs Ferry, N.Y., Oceana, 1977), p. 18.

there were two types of entirely different international organizations. There were international organizations of a universal character, such as the United Nations, within which the young States must unquestionably be protected against the great Powers by ensuring that the member States were not automatically bound by all the decisions taken by the Organization. In Africa, in Asia and on other continents, however, there were also organizations that comprised States which belonged to the same geographical area and had reached the same level of development. In that case, a more flexible attitude could be adopted, since all the member States were on an equal footing and none of them required special protection.

34. What was, in fact, needed was a realistic approach. If an international organization was established, it must be given the necessary means to function properly. States which considered that national sovereignty was an absolute principle from which no derogation was possible and that international organizations constituted a hindrance should refrain from becoming members of such organizations. Those which considered that international organizations constituted, at the current stage of development, a particularly effective instrument should transfer some of their competence to them so that the organizations could achieve the goals they had been assigned. The member States of the Economic Community of West Africa, for example, had surrendered part of their sovereignty to enable the Community to create a customs union and to introduce the free movement of goods and persons within a period of fifteen years.

35. Apart from EEC, which was a somewhat special case since its creation had involved the establishment of a supranational authority, there were many organizations to which the member States had transferred competence, and article 36 *bis*, which provided that the assent of member States of an international organization to obligations arising from a treaty concluded by that organization could be expressed by other means than in writing, merely sought to take account of that fact. Moreover, it was entirely logical to seek to make the means of expressing assent more flexible, since that would facilitate the task of international organizations.

36. Instead of deleting article 36 *bis*, it would be preferable to try to improve its wording on the basis of the text proposed by Mr. Ni (1704th meeting, para. 20). That text made it possible to reconcile the positions of those who wished primarily to protect small States within international organizations of a universal character and those who considered it necessary to simplify the task of homogeneous international organizations—namely, organizations comprising States which belonged to the same region and had almost the same political and economic weight—by giving them somewhat more room to manoeuvre.

37. Mr. NI said that article 36 *bis* raised the question whether there was a need for a provision relating to the effects, with respect to the member States of an interna-

tional organization, of an obligation established by a treaty concluded by that organization and another party and, if so, under what conditions the member States of the organization would be bound by the obligation thus undertaken.

38. In considering that question, the Commission should broaden its sights and tailor article 36 *bis* to suit every possible situation and not just that of one or two international organizations, such as EEC and CMEA. A decision to retain article 36 *bis* should not be regarded as tantamount to wanting to take account only of EEC. In that connection, he said that one of the five principles of coexistence was that of equality and mutual benefit. That principle was especially applicable to article 36 *bis*, which should ensure equality between States, whose sovereignty should not be surrendered to international organizations without their express authorization, and promote better co-operation among States with a view to mutual benefit. If the members of the Commission bore that principle in mind, they would find it easier to solve the problems to which article 36 *bis* gave rise.

39. Referring to the progressive development of international law, several members of the Commission had noted that, with a view to establishing closer co-operation and ensuring increased protection of their interests through collective action, States were tending to transfer their competence over certain specific matters to international organizations, which were often given treaty-making power. For example, the negotiations at the eleventh and last session of the Third United Nations Conference on the Law of the Sea had resulted in the elaboration of the text of annex IX of the draft Convention,¹⁸ which provided for the transfer to an international organization of competence over matters governed by the Convention, including competence to conclude treaties in respect of such matters. That annex also provided that the international organization concerned and its member States should make declarations specifying the matters over which competence had been transferred to the international organization.

40. The specialized agencies of the United Nations system had also had experience in concluding treaties on behalf of their member States. FAO had, for example, indicated that, in a number of cases, treaties concluded by an organization had given rise to rights and obligations for the member States, but that that had not caused any particular problem.¹⁹ Concern about acceptance of obligations in advance was thus perhaps more imagined than real. States knew best how to protect their interests and what safeguards they could rely upon. That was why it was necessary to streamline the wording of article 36 *bis* as it now stood.

41. Mr. FLITAN said that unduly flexible means by which the member States of an international organization could express assent to obligations arising from a treaty concluded by that organization might pose

¹⁸ See 1699th meeting, footnote 7.

¹⁹ *Yearbook ... 1981*, vol. II (Part II), annex II, sect. B.3, para. 5.

serious problems for small and medium-size countries which were not yet really in a position to defend their interests in international organizations with complicated internal mechanisms. It was therefore necessary to avoid any arrangement that might harm those countries. However, it must be recognized that international organizations were extremely useful and necessary instruments which must be given the necessary means to function properly and that the interests of small and medium-size countries had to be protected as well.

42. He also wished to warn the Commission against the danger of allowing its discussions to take a political turn. Its role was not to provide support for EEC or CMEA, which had no need of such support, but, rather, to elaborate draft articles on treaties concluded between States and international organizations or between international organizations. In other words, the task it now had before it was to decide on the manner in which a member State of an international organization could indicate its assent to be bound by obligations arising from a treaty concluded by that organization. Should it make the means of assent more flexible, or closely follow the rules of the Vienna Convention?

43. In his opinion, it would be appropriate to provide for greater flexibility in the means of assent and to accept the possibility of assent *ex ante*. Indeed, members were aware that States which concluded a multilateral treaty setting up an organization could include in that treaty a clause under which the organization would be competent to conclude, on their behalf, agreements with third countries or third international organizations. That was a fact that must be taken into account. However, that did not mean that it was necessary to retain article 36 *bis*, which might make undue allowance for a particular organization. At the current stage of the codification of international law, it would be preferable to elaborate a clear and simple text which would take account of the *de facto* situation to which he had referred above, while protecting the interests of small and medium-size States. Such a text, which should be more concise than that of article 36 *bis*, could be incorporated in article 35 after paragraph 3.

44. The CHAIRMAN, speaking as a member of the Commission, said that, in view of the very extensive debate to which article 36 *bis* had given rise, he had thought that he could afford to remain silent. Unfortunately, however, considerations of a political nature had been expressed at the current meeting and they were, in his opinion, quite out of place, because it was not the Commission's role to judge or criticize an international organization for its actions. He had therefore decided that he could not run the risk of allowing his silence to be misconstrued.

45. If the only purpose of article 36 *bis* was to protect the interests of and strengthen EEC, he, a citizen of a developing country which had suffered in the grip of colonialism, could not support the inclusion in the draft of a provision that would benefit an organization which

had served the cause of colonialist and imperialist aggression.

46. If, however, the purpose of article 36 *bis* was to allow some flexibility in the expression of consent and to ensure the smooth functioning of international organizations, he could agree that such a provision of a general nature should be included in the draft. As Mr. Ushakov had said, the members of the Commission were not prophets, but they were able to forecast certain trends, one of which, the progressive development of international law, came precisely within the Commission's terms of reference.

47. States established international organizations for specific purposes and should therefore not hamper those organizations' functioning. The sole purpose of article 36 *bis* was to provide for some flexibility in the expression of the consent of the member States of international organizations to obligations established by treaties concluded by those organizations. In drafting article 36 *bis*, the Special Rapporteur had not had in mind EEC in particular. He had, rather, been trying to provide for the future by laying down general rules designed to protect the member States of international organizations and ensure those organizations' smooth functioning.

48. In his own opinion, the Commission should therefore adopt article 36 *bis*, subject, of course, to amendments that would improve its wording, or draft a new article 35 *bis*, or add a new paragraph to article 35 to take account of the ideas and concerns expressed during the discussions, particularly with regard to the interests of the countries of the third world.

49. Mr. USHAKOV said that he would like some clarifications concerning article 36 *bis*. In particular, he would like to know whether subparagraph (a) of that article applied to EEC, whether, by concluding a treaty with an international organization, a State thereby concluded collateral agreements with all the members of that organization; whether, under such collateral agreements, direct relations were established between that State and each of the members of the international organization; and whether there was a direct commitment on the part of the members of the international organization. In other words, did subparagraph (a) really seek to make the means by which collateral agreements were concluded more flexible or did it meet another objective?

50. He would also like to know whether, in the opinion of the Special Rapporteur, a State which concluded an agreement with CMEA was in the same legal position as a State which concluded an agreement with EEC.

51. When CMEA concluded an agreement creating obligations for its members, the agreement always included a special clause under which the member countries of CMEA had to accept those obligations expressly. If they did accept them, there was a collateral agreement between each of them and the country with

which CMEA had concluded the agreement. If one of the CMEA member countries subsequently failed to fulfil those obligations, the State with which CMEA had concluded the agreement would turn not to CMEA, but to the country concerned, which had expressly undertaken to fulfil the obligations arising from the agreement.

52. He himself did not believe that a State which had concluded an agreement with EEC and which did not succeed in securing fulfilment of the agreement by one of the member countries of the Community could turn directly to that country. In his opinion, it was clear that, when an international organization of the type referred to in article 36 *bis*, subparagraph (a), concluded an agreement with a third State, the result was neither a collateral agreement nor a direct relationship between the members of the international organization and that third State.

53. He also wished to know whether the relevant rules of the organization referred to in article 36 *bis*, subparagraph (a), were rules which provided that the agreement did not bind the organization itself, but produced its effects directly between the member States of the organization and the third State with which the organization had concluded the agreement or, rather, rules which provided, for example, that the international organization alone was competent to conclude agreements, and implied that the obligations arising from the agreements concluded by the organization were established for its member States.

54. All those questions raised by article 36 *bis* were of a purely legal, rather than political, nature.

The meeting rose at 1.05 p.m.

1708th MEETING

Monday, 17 May 1982, at 3.05 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on the topic of jurisdictional immunities of States and their property (A/CN.4/357).

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

2. Mr. SUCHARITKUL (Special Rapporteur) said that, at the present stage, it might be useful to review the Commission's study of the topic so far. The work had begun in 1978 with the submission of an exploratory report by the Working Group on jurisdictional immunities of States and their property,³ a report that had dealt, amongst other things, with the historical background of the topic and with the justification for examining it for the purposes of codification and progressive development of the law.

3. In 1979, he had submitted a preliminary report⁴ suggesting possible approaches and identifying source materials. The guidelines laid down by the Commission called on the Special Rapporteur to concentrate initially on main principles, and then proceed to the examination of exceptions, and subsequently to the question of immunities for execution.

4. In his second report,⁵ he had submitted five draft articles comprising part I of the draft, entitled "Introduction". Article 1, concerning the scope of the articles, had been adopted provisionally⁶ and the phrase "questions relating to the immunity ..." used therein was intended to afford a degree of flexibility in studying matters pertaining to the topic. Draft articles 2 to 5 had been submitted not for immediate discussion, but simply as a framework indicating the various elements to be considered.

5. Draft articles 6 to 10, comprising part II, entitled "General principles", had been submitted in the second report and also in the third report (A/CN.4/340 and Add.1). On the basis of an examination of judicial practice of States, national legislation and governmental practice, he had drawn the conclusion that there was a well-established rule of international law in support of the general principle of the jurisdictional immunity of States. As had been noted, the concept had developed differently in different legal systems. In the common-law system, it had evolved from an extension of the doctrine of the immunity of the local sovereign to cover foreign sovereigns. In civil-law jurisdictions, on the other hand, the question of jurisdictional immunity had been primarily one of the competence or jurisdiction of the courts.

6. The original formulation of article 6 had been amended with the help of the Drafting Committee. The use of the phrase "in accordance with the provisions of the present articles" had given rise to some controversy, on the grounds that it did not definitely establish the existence of a legal principle of State immunity because it made such immunity dependent on the provisions of subsequent articles of the draft. However, other

³ A/CN.4/L.279/Rev.1, reproduced in part in *Yearbook ... 1978*, vol. II (Part Two), pp. 153-155.

⁴ See *Yearbook ... 1979*, vol. II (Part One), pp. 227 *et seq.*, document A/CN.4/323.

⁵ See *Yearbook ... 1980*, vol. II (Part One), pp. 199 *et seq.*, document A/CN.4/331 and Add.1.

⁶ For the text of draft article 1 and the commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142.

members of the Commission had taken the view that the wording in question could provide some degree of certainty when the content of the remaining draft articles had been determined and that a statement of the existing situation regarding legal practice could avoid problems at a later stage. Paragraph 2 of the article had been considered redundant by some members. Others had none the less felt that it reinforced the legal proposition stated in paragraph 1. The article had also been adopted provisionally by the Commission.⁷

7. In articles 7 to 10,⁸ he had sought to enunciate other relevant general principles. It had become increasingly clear that, regardless of its historical development, the concept of jurisdictional immunities was based on the principle of *par in parem imperium non habet*. The evidence provided by State practice was not yet sufficient to warrant amplifying the draft articles to cover immunity from all aspects of State jurisdiction. Rather, they should be limited to the area of judicial jurisdiction, including immunity from the exercise of certain administrative powers by national authorities in respect of legal actions or proceedings.

8. Article 7 set forth the principle of the obligation to give effect to State immunity by refraining from subjecting another State to the jurisdiction of national authorities. In connection with paragraph 1, some members had deemed it unnecessary to include the phrase, in alternative A, "subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities" and in alternative B, the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending". However, a certain relationship could be said to exist between rules of competence and jurisdictional immunity. In that respect, it would be remembered that the original title of article 7 had been "Rules of competence and jurisdictional immunity", something which had been regarded as establishing too close a relationship with private international law. As to paragraph 2, it was essential to determine the starting point of jurisdictional immunity, as well as the type of proceedings that could affect the interests of another State. That, in turn, was closely bound up with the question of who were to be the beneficiaries of State immunity.

9. Article 8 dealt with another important principle, namely, consent of State. Its relevance to the theory of State immunity had been demonstrated in *The Schooner "Exchange" v. McFaddon* (1812)⁹ and was, in fact, pertinent both to States granting jurisdictional immunity and to States requesting a waiver of the exercise of jurisdictional immunity. A State's consent to the exercise of jurisdiction by another State meant that it could

⁷ For the text of draft article 6 and the commentary thereto, *ibid.*, pp. 142-157.

⁸ For the texts of draft articles 7 to 10, revised at the thirty-third session of the Commission, see *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁹ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (New York, Banks Law Publishing, 1911), 3rd. ed., vol. VII, p. 116.

no longer claim immunity and, as such, was approximately equivalent to a waiver of immunity. In drafting the article he had drawn on the Code of Civil Procedure of the Soviet Union.¹⁰

10. Article 9 attempted to systematize the methods whereby consent could be expressed. The terms of paragraph 6, under which failure by a State to appear in a proceeding did not imply consent to the exercise of jurisdiction by the court concerned, were based on the national legislations of a number of countries.

11. Turning to article 10, concerning counter-claims, he said that a counter-claim made by one State against another implied the consent of both parties to the exercise of jurisdiction by the court concerned. At one time, under the provisions of a number of national legislations, counter-claims were allowed to operate only as a set-off, but the Commission had concluded that counter-claims should also be regarded as consent to the exercise of jurisdiction by the court in respect of the principal claim.

12. Part III of the draft dealt with exceptions to State immunities. The possible exceptions to the general rule of State immunity were enumerated in chapter II of the fourth report (A/CN.4/357, para. 10 (c)). They had been introduced into some national legislations and regional conventions, and he would be grateful for guidance from the Commission on how to proceed in his study of relevant State practice.

13. In the fourth report, a number of familiar points discussed in the Commission and in the Sixth Committee of the General Assembly (A/CN.4/L.339, paras. 156-179) were reviewed, including the question of whether State immunity should be viewed as a general rule or as an exception to the more fundamental rule of sovereignty. In that regard, the tentative conclusion seemed to be that it would prove easier to consider it as a general rule, since exceptions to the rule of State immunity itself would have to be examined later. Another question was that of the dual approach, suggested more particularly by Mr. Riphagen.¹¹ An approach of that kind deserved consideration, but it might be rather late to start thinking in such terms once again. Moreover, these seemed to be ample justification for the Commission to base its deliberations on State practice.

14. It was important to realize that one of the main features of the topic of State immunity was its flexibility. Many national procedures showed that the granting of jurisdictional immunity could be made dependent on reciprocity and that, even when not required by law to do so, a State could grant immunity without offending any principle of law. In spite of the many distinctions to be drawn between private and public international law

¹⁰ Law of 8 December 1961, Fundamentals of Civil Procedure of the USSR and the Union Republics, art. 61 (text reproduced in: United Nations, *Materials on Jurisdictional Immunities...* (see footnote 2 above, p. 59)).

¹¹ *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 45th meeting, para. 7.*

on the one hand, and between different international laws and international law on the other, it was to be hoped that a common practice was emerging in clearly defined areas and that, in less clearly defined areas, the Commission would be able to find solutions which were acceptable to all States.

15. In formulating the text of article 11 (A/CN.4/357, para. 29), which related to the scope of part III of the draft, he had taken account of the preferences expressed by members of the Commission. It made all the general principles set forth in part II subject to the exceptions contained in part III, the aim being to avoid any idea that the requirement of consent in effect marked a preference for the concept of absolute immunity.

16. Article 12 (*ibid.*, para. 121) dealt exclusively with the exception applying to trading or commercial activity of States, a fact that should not be taken to signify that non-trading or non-commercial activities were entitled to benefit from immunity, since they could be subject to yet other exceptions. Current State practice with regard to trading or commercial activities seemed to indicate a general trend towards limiting immunity in respect of such activities, although the views expressed by Governments still displayed differing attitudes. Treaty practice, on the other hand, showed greater uniformity. Support for the proposition set forth in the article was provided by recent court decisions in a number of countries, including Pakistan, the United Kingdom and the United States, and by the 1972 European Convention on State Immunity,¹² all of which gave effect to such an exception. At the regional level, there had been some moves in the same direction in Latin America, and the Asian-African Legal Consultative Committee had adopted a report¹³ with recommendations which had been approved in 1960 by a large majority of African and Asian States.

17. The CHAIRMAN pointed out that the Commission had adopted draft articles 1 and 6 on first reading,¹⁴ and had left aside draft articles 2, 3, 4 and 5.¹⁵ At the previous session, draft articles 7, 8, 9 and 10¹⁶ had been referred to the Drafting Committee, which had not had time to consider them. Accordingly, the best course at the present time was to engage in a general discussion of those articles, which the Special Rapporteur was now presenting in a revised form, together with the two new articles 11 and 12 (A/CN.4/357, paras. 29 and 121), before proceeding to examine them one by one.

¹² Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

¹³ See Asian-African Legal Consultative Committee, *Report on the Third Session, Colombo, 20 January to 4 February 1960* (New Delhi [n.d.]), p. 68.

¹⁴ See footnotes 6 and 7 above, respectively.

¹⁵ For the texts of draft articles 2 to 5, see *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658.

¹⁶ See footnote 8 above.

18. Mr. PIRZADA congratulated the Special Rapporteur on his fourth report (A/CN.4/357) and his most lucid oral presentation.

19. A study of the law relating to jurisdictional immunities of States revealed the development of two divergent doctrines: one being the classical theory of sovereign immunity, which was perhaps based on the maxim *par in parem imperium non habet*, and the other being the more recent restrictive theory whereby the immunity of a foreign sovereign State was recognized in regard to its public acts (*jure imperii*) but not its private acts (*jure gestionis*). The Special Rapporteur had rightly pointed out in his fourth report (*ibid.*, para. 54) that, at the outset, the term "absolute" immunity had been unknown and State practice had simply covered carefully selected categories of immunities.

20. Theoretically, trading had fallen outside the operation of the doctrine of State immunity. The Karachi High Court, in the case *The Secretary of State of the United States of America v. Messrs. Gammon-Layton* (1971),¹⁷ noted pertinently that the period following the Second World War had seen the emergence of great nations in which all economic activities, including foreign trade, were carried on by the State. The orthodox doctrine of the complete immunity of the sovereign State had evolved in the monarchial era during a period dominated by *laissez-faire* ideas and had, in many people's view, become an anachronism. Its continuance meant the ouster on an unprecedented scale of the jurisdiction of the court, and had evoked world-wide criticism.

21. Even when immunity had been confined to foreign sovereigns or heads of State, concern had been expressed and limitations had been spelt out. The Special Rapporteur had referred in that connection to the dictum of Lord Stowell in *The "Swift"* case (1813)¹⁸ and, as far back as 1873, Sir Robert Phillimore, one of the draftsmen of the Covenant of the League of Nations, had observed in *The "Charkieh"* case¹⁹ that no principle of international law, no decided case and no doctrine of jurists had gone so far as to authorize a sovereign prince to assume the character of a trader when it was to his benefit to do so and, when he incurred an obligation to a private subject, to throw off that "disguise" and claim all the attributes of a sovereign. It had further been pointed out by the Supreme Court of Pakistan in *A. M. Qureshi v. the Union of Soviet Socialist Republics* (1981)²⁰ that the courts of many countries had developed a distinction between acts of government and acts of a commercial nature, and denied immunity from jurisdiction in the latter case.

¹⁷ *All Pakistan Legal Decisions* (Lahore), vol. XXIII (1971), p. 314.

¹⁸ J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty* (London, Butterworth, 1815), vol. I, p. 339.

¹⁹ United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts* (London, 1875), vol. IV, p. 97.

²⁰ *International Legal Materials* (Washington, D.C.), vol. XX, No. 5 (September 1981), p. 377.

22. In the cases *Rahimtoola, v. Nizam of Hyderabad* (1957),²¹ *Thai-Europe Tapioca Service, Ltd. v. Government of Pakistan* (1975)²² and *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977),²³ Lord Denning had made rulings from which seven propositions could be deduced. First, each State should have proper respect for the dignity and interdependence of other States. Second, the rule of absolute immunity, if carried to its logical extreme, was in danger of becoming an instrument of injustice. Third, a rule of immunity for public but not private acts had proved to be a most elusive test. Fourth, it was certain that international law did change. Fifth, the courts had applied the changes in international law without the aid of any act of parliament. Thus, when, through the force of public opinion, the rules of international law had been changed to condemn slavery, the English courts had been justified in applying the modern rules of international law. Similarly, the limits of territorial waters varied from time to time and the courts applied those limits accordingly. Sixth, even if there was no consensus on the doctrine of sovereign immunity, that did not mean there was no rule of international law on the subject. It was for the courts to define the rule as best they could, seeking guidance from the decisions of other countries, from jurists, from treaties and conventions, and by defining the rules in terms that were consonant with, rather than contrary to, justice. Lastly, under the restrictive doctrine, four exceptions were that there was no immunity in respect of land situated in England, in respect of trust funds lodged for payment of creditors, in respect of debts incurred in England for services rendered to property there, and in instances when a foreign sovereign entered into a commercial transaction with a trader in England and a dispute arose that properly fell within the territorial jurisdiction of the English courts.

23. The significant changes in the limits of sovereign immunity over the past thirty years had been recognized in many countries, and many municipal courts had favoured the doctrine of restrictive immunity. Among the leading cases on the question were *Dralle v. Republic of Czechoslovakia* (1950) (a decision by the Supreme Court of Austria),²⁴ *X v. the Empire of Iran* (a decision by the Federal Constitutional Court of the Federal Republic of Germany) (1963),²⁵ *Alfred Dunhill of London, Inc. v. Republic of Cuba* (a decision by the United States of America Supreme Court) (1976)²⁶ and *Soci t  europ enne d'Etudes et d'Entreprises (SEEE) v. Yugoslavia* (1973) (a decision by the Netherlands

Supreme Court).²⁷ The decisions of the courts of Argentina, Belgium, Egypt, France, Greece, Italy, the Philippines, Romania and Switzerland also had persuasive force.

24. So far as Pakistan was concerned, under section 84 of the Civil Procedure Code of 1908, foreign States were allowed to sue in any court, and under section 86, suits against rulers, ambassadors and envoys of foreign States were barred unless consent in writing was obtained from the Government.²⁸ Consent could be given, *inter alia*, if the party to be sued traded within the local limits of the jurisdiction of the court or was in possession of immovable property situated within such jurisdiction, and the suit pertained thereto. In the absence of such consent suit was not possible, and it had been held by the Privy Council in the *Gaekwar of Baroda* case (1938)²⁹ that the doctrine of waiver was inapplicable. Thus, the terms of section 86 of the Code departed materially from customary international law.

25. In *Kashani v. United Arab Republic* (1966)³⁰ the Supreme Court of India had held that section 86 of the Code of Civil Procedure³¹ not only applied to rulers of foreign States but also covered cases of foreign States. The Court had not, however, dealt with the principles of customary international law, and in any event, the courts in Pakistan had dissented from its interpretation of municipal law. In the *Gammon-Layton* case,³² the High Court of Karachi had held that the term "rulers of foreign States" was used in section 86 in contradistinction to "foreign State". The court in that case had applied the doctrine of restrictive immunity and its view had been upheld by the Supreme Court of Pakistan in *A. M. Qureshi* case.³³ The judge, who had referred not only to the principles of Islamic law but also to the recent trend in customary international law, had reviewed international conventions, municipal law and the decisions of many countries, as well as the work of jurists and other eminent writers on international law. He had held that the tests of *acta jure imperii* or *acta jure gestionis* were not the sole tests for determining the availability or otherwise of the immunity of foreign States: there was also a third category of cases under customary international law, namely commercial and trade cases, in respect of which no jurisdictional immunity was available to a foreign State. It was encouraging to note that, a week later, on 16 July 1981, the House of Lords had also held in the case of "*I Con-*

²¹ *International Law Reports*, 1957 (London, 1961), p. 175.

²² *The All England Law Reports*, 1975 (London, Butterworth, 1976), vol. 3, p. 961.

²³ *International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471.

²⁴ *International Law Reports*, 1950 (London), vol. 17 (1956), case No. 41, pp. 155 *et seq.*

²⁵ *Ibid.*, vol. 45 (1972), p. 57; United Nations, *Materials on Jurisdictional Immunities ...* (see footnote 2 above), p. 282.

²⁶ *International Legal Materials* (Washington, D.C.), vol. XV, No. 4 (July 1976), p. 735.

²⁷ United Nations, *Materials on Jurisdictional Immunities ...* (see footnote 2 above), pp. 355 *et seq.*

²⁸ Pakistan, Ministry of Law and Parliamentary Affairs, *The Pakistan Code* (Karachi, 1966), vol. V (1908-1910), pp. 52-55.

²⁹ *Annual Digest of Public International Law Cases, 1938-1940* (London), vol. 9 (1942), case No. 78, p. 233.

³⁰ *The American Journal of International Law* (Washington, D.C.), vol. 60, No. 4 (October 1966), p. 859.

³¹ India, Ministry of Law, Justice and Company Affairs, *The Code of Civil Procedure, 1908 (As modified up to the 1st May 1977)*, pp. 32-33.

³² See footnote 17 above.

³³ See footnote 20 above.

greso del Partido”³⁴ that sovereign immunity was not available for commercial transactions.

26. Under the State Immunity Ordinance, 1981 promulgated in Pakistan,³⁵ a State was immune from the jurisdiction of the courts of Pakistan. The Ordinance provided for two exceptions however: first, a State was not immune with regard to proceedings in respect of which it had submitted to the jurisdiction. Secondly, it was not immune with regard to proceedings relating to a commercial transaction entered into by the State or an obligation of a State by virtue of a contract which might or might not be of a commercial nature but which fell to be performed wholly or partly in Pakistan. Under the Ordinance, “commercial transaction” meant a contract for the supply of goods or services, any loan or other transaction for the provision of finance or any guarantee or indemnity in respect of any such transaction, and any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State entered otherwise than in the exercise of its sovereign authority.

27. The Ordinance was in line with recent trends. It also reflected recommendations adopted by the Asian-African Legal Consultative Committee in 1960³⁶ that recognized, *inter alia*, that the doctrine of sovereign immunity of foreign States was not meant to include the new and extended functions in trade matters being assumed by Governments and, consequently, Asian and African nations might wish to consider the need to place restrictions on the immunity granted to foreign States in respect of such activities. All the delegations present at that session of the Committee, save Indonesia, had taken the view that a distinction should be drawn between different types of States activity and that immunity should not be granted to foreign States in respect of activities which could be called commercial or of a private nature. The Indonesian delegate had, however, adhered to the view that immunity should be granted to all the activities of the foreign State, irrespective of their nature, provided they were carried on by the Government itself. On that basis, the Committee had recommended that a State which entered into transactions of a commercial or a private character should not raise a plea of sovereign immunity if it was sued in the courts of a foreign State in respect of such transactions. If such a plea were raised, it should not be allowed to deprive the domestic courts of jurisdiction.

28. In conclusion, he wished to voice his support for the views expressed by the Special Rapporteur in the general part of his report.

29. Mr. RIPHAGEN said that one might well wonder whether the existing rules of international law provided the answer, in terms of the strict rights and obligations of States, to the bewildering variety of situations to

which questions of State immunity gave rise. In his opinion, they did not really do so. Many of the questions that arose in practice were a matter of comity, since they involved principles rather than the kind of strict rules that provided an answer in each and every case. Indeed, as the Special Rapporteur had said, there was a complete dearth of international judicial pronouncement on State immunity. In addition, State practice provided scant guidance in the matter. In that connection, there had been an *obiter dictum* in the “*Lotus*” (1927)³⁷ case to the effect that international law left the State a wide measure of discretion in applying its law to matters that occurred outside its boundaries. Also, the 1958 Law of the Sea Conventions preferred to use the recommendatory “should”, rather than the mandatory “shall”, in regard to the jurisdiction of coastal States when foreign vessels passed into their territorial waters. Generally speaking, it therefore seemed that the jurisdiction of a State was not very exhaustively regulated by international law, and he thought that the same applied to jurisdictional immunity.

30. A further point which added to the doubts he had voiced in the Sixth Committee in 1981³⁸ was that, since it had not been possible in the European Convention on State Immunity to cover all situations, a clause had been included³⁹ whereby a State party could declare that it would go further in restricting foreign State immunity than was stipulated in the Convention. That clause had in fact been invoked by most of the countries that had ratified the Convention.

31. Consequently, it might be necessary to recognize clear-cut cases in which immunity would or would not apply and then also recognize a grey area in which there was no rule of international law couched in terms of rights and obligations but in which there were perhaps other rules of comity, and if, in a given situation, one State did not recognize the immunity of another State, the former would not necessarily be in breach of its international obligations and the latter could reciprocate by refusing to grant immunity. An illustration of that point was afforded by draft article 12, as proposed by the Special Rapporteur (A/CN.4/357, para. 121). If that article was compared with United States and United Kingdom legislation, it would be seen that the solutions adopted by the United States and the United Kingdom respectively differed slightly from that proposed by the Special Rapporteur, and that the United Kingdom and the United States legislation did not accord with each other. It would be difficult to say that either system of legislation was in breach of international law in that regard, but it could be deemed to fall into a grey area that could give rise to reciprocal treatment but not to legal consequences of the kind to which he had already referred.

The meeting rose at 5.25 p.m.

³⁴ *P.C.I.J., Series A*, No. 10.

³⁵ *Official Records of the General Assembly, Thirty-Sixth Session, Sixth Committee*, 45th meeting, para. 6.

³⁶ Art. 24 of the Convention: see Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972), pp. 33-34.

³⁴ *The All England Law Reports, 1981* (London, Butterworth, 1981), vol. II, p. 1064.

³⁵ Pakistan, *The Gazette of Pakistan* (Islamabad), 11 March 1981, p. 31.

³⁶ See footnote 13 above.

1709th MEETING

Tuesday, 18 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/ CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES³

1. Mr. MALEK said he had been struck by two points that emerged not only from the numerous United Nations documents on the topic under discussion, including the Special Rapporteur's excellent reports and the records of the Commission, but also from doctrine. First, relatively few countries recognized the theory of the jurisdictional immunity of States in their practice, and even they did not come from all continents. Second, those countries displayed a marked tendency towards restrictive application of the theory of the jurisdictional immunity of States, a theory to which a large part of contemporary doctrine was indeed very hostile.

2. The Special Rapporteur had repeatedly noted and reaffirmed the existence of a rule of international law recognizing the jurisdictional immunity of States and their property. That rule was set out in draft article 6, and a summary of its historical and legal development was to be found in the commentary thereto,⁴ which mentioned differences of opinion as to the validity of the concept of State immunity and its nature in international law. One school of thought held that there was a universal and fundamental principle of State immunity from which exceptions could be made in certain circumstances. Another school held that there was no such general rule, but rather various rules allowing State immunity in some circumstances and not in others. Yet

another school held that, while a general rule on State immunity might well exist, it embraced both restrictions and exceptions.

3. To judge from the commentary to article 6, that provision had been drafted so as not to rule out completely the theoretical considerations forming the basis of those three schools of thought. The article was designed to state the existence of a general rule of State immunity under present-day customary international law, but only in relative terms. To his mind, the Commission had thereby chosen a rather timid means of indicating that it was clearly in favour of the recognition of State immunity as a rule of international law. After all, in provisionally adopting the text of article 6 in its present wording, and the commentary thereto, the Commission seemed to agree that the matter should be studied on the assumption that State immunity already constituted a rule of customary international law. In support of that position, the Commission cited in the commentary State practice, and principally the judicial practice that had emerged from the nineteenth century onwards in the common law and civil law countries and the small number of States that had submitted information on the subject. With regard to African countries, the Commission noted that there had been no report or publication of any recent decision; it did, however, mention two judgements in the Philippines. It also mentioned the practice of some States with respect to national legislation and to universal treaties that concerned certain specific aspects of State immunity. It noted the silence of international case law on the matter, and referred both to authors who had more or less upheld State immunity and to authors who had opposed it.

4. While there might be no room for doubt as to the existence of a rule of international law embodying the notion of State immunity, the universality of the rule was open to question, as was the question of the value of such immunity at the current stage in the development of international relations, either for the State which claimed it or for the State which applied it. At the present time, the application of that immunity, if only in its unlimited form, seemed to be a source of great concern. The Special Rapporteur had brought that point out clearly in his fourth report (A/CN.4/357, para. 117) by stating that the reason why writers had not looked at the possibility of practical limitations on the rule of State immunity when such immunity had first been established in State practice was that, at the time there had indeed been no cause for concern. He had gone on to say that, because of the growing participation of States in fields previously reserved for individuals, such as commerce, industry and finance, supporters of the doctrine of unlimited immunity had become a diminishing minority since the beginning of the present century. For example, Georges Scelle had considered the recognition of immunity to be a custom, but had described that custom as "pernicious" and had affirmed that it led to the paralysis of jurisdictional activity in so many cases and to such a degree as seriously

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles in part I and part II of the draft are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

⁴ See above, footnote 3 (c).

to compromise the international legal order.⁴ Mention should also be made of the views of a British author, D. H. N. Johnson,⁶ who had studied the position taken by doctrine and various learned societies. Doctrine revealed a trend marked either by hostility to the notion of immunity, at least in its absolute sense, or by the acceptance of that notion in specific cases or circumstances. The learned societies in question supported immunity only on condition that it would not apply to the acts of commercial enterprises or other acts under private law. Johnson also cited⁷ the proceedings of an international conference held at London in 1956 under the auspices of the David Davies Memorial Institute of International studies, during which it had been stated that the United Kingdom and the other Commonwealth countries were practically the only States still to adhere strictly to the principle of absolute immunity.⁸

5. Draft article 1 merely set out, in very general terms, the purpose of the draft articles. If that was indeed its only object, it might be preferable to delete the article and to entitle the draft: "Draft articles on the jurisdictional immunity of foreign States and their property". Even if the words "questions relating to" were deleted, the article would be superfluous once those questions had been identified.

6. In provisionally adopting article 6 and the commentary to it, the Commission had viewed State immunity as a rule of customary international law, in keeping with its position since the beginning of its work on the question, in 1949. Time, however, was a very important and sometimes decisive factor in the formation, thrust or transformation of a rule of law. The main principles of the relations between States had undergone a radical change since 1949. State immunity, like any other concept connected with relations between States as such, was founded on the principle of sovereignty. That principle, however, was not what it once had been. It had been profoundly transformed since its affirmation or confirmation by the Charter of the United Nations. Admittedly, it had been placed in the forefront of the Organization's guiding principles, but the Charter had considerably limited its scope in favour of the Organization. Subsequently, the scope of the principle had constantly been reduced by the will of States themselves and, because of the large number of treaties they concluded, they voluntarily agreed to forgo their State competence in fields of steadily growing number and breadth. Hence, it was doubtful whether non-application of jurisdictional immunity could cause offence to States. Furthermore, such immunity was, as the Special Rapporteur had pointed out (A/CN.4/357,

para. 49), two-edged; a State which claimed immunity for itself could also be obliged to extend it to another State.

7. Perhaps the Commission should, in an effort to limit the scope of the rule of immunity as far as possible, consider making its application optional. By so doing, it would include in the draft an element of progressive development of the law. To that end, it would be enough to replace the word "is" at the beginning of article 6, paragraph 1, by the words "may be".

8. He had no objection to the principle enunciated in article 6, but it was one that kindled little enthusiasm. Fortunately, the article was careful to ensure that application of the rule of immunity was confined to the conditions laid down in the rest of the draft. He had no doubt that the Commission would duly define the limits of the principle in the light of the trends in international law in the second half of the twentieth century.

9. Mr. McCAFFREY said that he agreed in principle with the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/357), for it appeared to reflect the contemporary practice of many States in adopting a restrictive approach to State immunity.

10. Mr. Riphagen (1708th meeting) had made some very useful remarks which had focused attention on the question of the Commission's function in drafting the articles and had also posed the fundamental question of whether it was possible, given the current state of international law on jurisdictional immunities, to formulate a set of rules that would cover what he had termed a "bewildering variety of situations". Implicit in his argument was the premise that it was not possible to formulate rules of public international law—namely, customary international law—on the basis of the rich body of State practice—namely, private international law—which the Special Rapporteur had so ably documented. One reason why State practice might not rise to the level of customary international law, even assuming the near universality and consistency of such practice, was that while the material element—actual practice—was present, the psychological element—*opinio juris*—might not be. In other words, the behaviour of States might be explained by considerations of comity, rather than obligations. Even so, subparagraphs 1 (c) and (d) of Article 38 of the Statute of the International Court of Justice recognized two additional sources of rules of international law, namely, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists.

11. Notwithstanding the paucity of decisions by international tribunals on the subject of jurisdictional immunities, could not the examples of State practice assembled by the Special Rapporteur qualify, on some issues at least, as "general principles of law recognized by civilized nations"? There were, however, certain issues on which State practice was either so discordant or in such an embryonic stage of development that it was not possible to speak, with respect to those issues,

⁴ *Manuel de droit international public* (Paris, Domat-Montchrestien, 1948), p. 792.

⁵ "Some recent trends in the Law regarding the jurisdictional immunities of foreign States", *Revue de droit international pour le Moyen-Orient* (Paris), vol. 6, No. 1 (June 1957), pp. 1 *et seq.*

⁶ *Ibid.*, p. 14.

⁷ F. A. Mann, "Immunity of foreign governments in trade", *Report of International Law Conference held at Niblett Hall* (London), June 1956, p. 29.

of a general principle of law. It was in that connection that Mr. Riphagen's caveat had been most forceful, for he had pointed out that, to the extent that the draft articles were couched in terms of the strict rights and obligations of States, failure to observe them would give rise to State responsibility.

12. That prompted two questions, the first of which related to the Commission's function in drafting the articles. Was it engaging in the codification or in the progressive development of international law, or was it seeking to produce a draft that would be acceptable to and reflect the practice of the largest and most representative sample of States? In his submission, the answer was twofold. In the first place, there were certain undeniable and universally agreed rules and, in setting down those rules, the Commission would be engaging in codification. Secondly, Mr. Riphagen had referred to the "grey area" between clear cases of immunity, on the one hand, and of non-immunity, on the other. It was precisely in that grey area that the draft would be most useful, for it would provide guidance as to the circumstances in which jurisdictional immunity should or should not be granted.

13. Viewed in that light, the other possible functions of the Commission—the progressive development of international law and the production of a broadly acceptable draft—might be identical. It might well be that, in the case of certain individual topics, the myriad examples of State practice given by the Special Rapporteur in his reports did not have the benefit of *opinio juris* to elevate them to principles of customary international law; some, possibly, did not even qualify as general principles of law. But did that mean that the topics in question should be eschewed on the ground that a breach of any of the relevant draft articles would give rise to State responsibility, when there was really no rule of international law that required States to adhere to such principles in the first place? The answer was clearly in the negative, for it would be tantamount to an abdication of responsibility on the part of the Commission if it were to forgo the opportunity of providing guidance on the circumstances under which national courts and administrative bodies should and should not grant jurisdictional immunity to foreign States.

14. The second question raised by Mr. Riphagen's remarks was whether all the provisions of the draft should be couched in mandatory terms, so as to provide that States "shall" or "shall not" grant immunity, or whether, for cases falling within the grey area, it was enough to use hortatory language, so as to provide that States "should" achieve a given result. One answer was that mandatory language should be used in appropriate cases, together with the kind of saving clause that was contained in article 2, paragraph 2. Another answer was that it did not really matter whether mandatory or hortatory language was used, since the Commission was not the final arbiter of the language that would appear in any convention ultimately adopted. So long as the draft indicated clearly, either in the body of the text itself or in the commentary, which of the articles

reflected existing international law and which of them constituted an attempt at progressive development of international law, there would be no harm in venturing into the grey area. That, indeed, might be the very area in which the Commission's work would have most value.

15. Mr. NI said that the topic under discussion was noted for the divergent views to which it gave rise and the difficulties experienced in reconciling them. Writers and publicists none the less agreed that State practice revealed two broad theories, known as the absolute theory and the restrictive theory, although it was apparent that the increasing participation of States in commercial and economic activities was leading towards a limitation of State immunity.

16. The law, however, never developed in a straight line, and there were a variety of mutations and variations that had to be taken into consideration. Accordingly, the draft articles should be tailored to suit the different situations. Previously, one member of the Commission had rightly observed that a rule of international law could not be drafted on the basis of a single trend. More recently, other members had pointed out that adherence to the more basic and original concept of sovereignty which stemmed from the maxim *par in parem imperium non habet* was not uncommon among the developing and the socialist States, that contrary tendencies were being followed in particular by those States, and that their practice differed from that of the developed countries. In that respect, he had noted with interest the information submitted by Governments (A/CN.4/343 and Add.1-4) and also that the Special Rapporteur had referred, *inter alia*, to judicial decisions in Latin American countries, as well as in the Philippines (A/CN.4/357, paras. 90-92), and to the relevant provision of the Bustamente Code,⁹ all of which firmly established the principle of State immunity.

17. There was, for all that, a clear and undoubted trend towards the extension of territorial jurisdiction in the case of trading and commercial activities of States, in which connection Mr. Pirzada (1708th meeting) had given a most useful account of developments in Pakistan and elsewhere. It had also been suggested that the presence in the territorial State of a foreign State, in the form of an agency engaged in commercial or profit-making activities, for instance, constituted grounds for invoking the jurisdiction of the local courts. But on more than one occasion there had been cases in State practice in which a foreign State had been summoned to appear before a local court to answer charges, even though there had been no link whatsoever between the act complained of and the territorial State. He was thinking not only of cases when a resident of a foreign State was so summoned, but of cases in which the Foreign Minister of the State named as defendant was summoned to represent it. In that regard, a decision had

⁹ Official name of the Code of Private International Law contained in the Convention on Private International Law adopted on 20 February 1928 at Havana (League of Nations, *Treaty Series*, vol. LXXXVI, p. 111).

been taken in France to the effect that the organs of a foreign State could be sued for acts of an economic and commercial nature, but that the State itself could not be made a defendant.

18. It was plain that, in drafting the articles, the Commission should not lose sight of the wide range of situations and practice. It should be aware of the difficulties that lay ahead and that it would not suffice to label the various tendencies as either “absolute” or “restrictive”.

19. Mr. USHAKOV said he was compelled to point out that, notwithstanding the merits of the report under consideration (A/CN.4/357), the Commission had got off to a bad start. It was apparent from article 6 that the entire draft lacked foundation. The Special Rapporteur was seeking to interpret the article as one which embodied a principle, but that was not in fact the case. Since it stood in part II, entitled “General principles”, the article ought precisely to enunciate a general principle deriving from international law. Yet in the form in which it had been adopted after arduous debate,¹⁰ the article simply indicated the existence of State immunity exclusively in terms of the draft articles as a whole. That was tantamount to saying that, in the absence of provisions thereon, State immunity did not exist. It followed that all that did exist were exceptions, in other words, cases in which one State was exempt from the jurisdiction of another.

20. The situation was both strange and ridiculous, for no State, even one that upheld the theory of limited immunity, had ever gone as far as to proclaim the non-existence of the jurisdictional immunity of States. The very fact that the Special Rapporteur had been able to cite in his fourth report (*ibid.*, para. 27) provisions that were in keeping with the theory of limited immunity showed that the States which held to that concept of immunity accepted the existence of the principle of State immunity. For example, article 15 of the European Convention on State Immunity¹¹ declared that a Contracting State was entitled to immunity from jurisdiction if the proceedings did not fall within articles 1 to 14 of the Convention, and according to the United Kingdom’s State Immunity Act of 1978,¹² a State was immune from the jurisdiction of United Kingdom courts except as provided in the Act itself. The same principle was to be found in the United States Foreign Sovereign Immunities Act of 1976,¹³ which prescribed that, subject to international agreements and the provisions of the Act itself, a foreign State was immune from jurisdiction of the courts of the United States and of its constituent States. Thus, the principle of State immunity was affirmed in each case.

¹⁰ See *Yearbook ... 1980*, vol. I, pp. 265-266, 1634th meeting, paras. 51-61, and p. 287, 1637th meeting, paras. 57-58.

¹¹ See 1708th meeting, footnote 12.

¹² United Kingdom, *The Public General Acts, 1978* (London, H. M. Stationery Office, 1978), part I, chap. 33, p. 715.

¹³ United States of America, *United States Code, 1976 Edition* (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, chap. 97.

21. In contrast, draft article 6 contained only exceptions to the principle of the non-existence of jurisdictional immunity of States. In his view, it was clear from the Special Rapporteur’s written explanations and from the entire commentary to article 6 that a principle of immunity did exist, and it was surprising that it had not been set forth in the article. The Commission could not pursue its work on such a basis.

22. Paragraph 2 of the article backed up paragraph 1 and, in the absence of special provisions to the contrary, no effect was given to immunity. Consequently, the article denied the existence of the principle of jurisdictional immunity and then went so far as to assert that such immunity did not exist unless the State concerned met certain conditions. Hence, the Special Rapporteur and, later, the Commission had twisted the problem around completely.

23. Article 6 posed another fundamental problem, namely, the legal and factual basis of the principle of State immunity, a basis which the Special Rapporteur did not seem to have established properly. In his own opinion and in his country’s doctrine of international law, which was probably the same for many other countries, whether socialist or not, the keystone of jurisdictional immunity was simply the principle of the sovereign equality of States. That principle was set forth in the Charter of the United Nations and formed the true foundation of historical and modern international law. It was a reflection of the situation in which States, sovereign bodies unlike any other entities, actually found themselves. Within the limits of their jurisdiction, States exercised public authority and were independent of one another. Furthermore, they were not subordinate to any other power; otherwise, international law would have to be replaced by a body of world law. It followed that the principle of the sovereign equality of States went hand in hand with the jurisdictional immunity of States, as without that immunity international law would become baseless, for States would no longer exist as sovereign bodies. Any restriction on the immunity of States was a restriction on their sovereignty and entailed the collapse of international law. To assert the existence of limited immunity was to argue that there was no longer sovereign equality but merely limited equality among States.

24. Moreover, could a State have a dual personality—in other words, act one way in political matters and another way in commercial or economic relations—and be treated differently in consequence? That was obviously impossible, for a State was a sovereign body exercising public authority, and it remained so in every kind of activity, whether commercial, cultural, technical or political, that it engaged in. It never lost its public personality and it always acted *jure imperii*. It could never act in the same way as a private person, even though article 7 of the European Convention on State Immunity provided that it could. Similarly, it could never be assimilated to an artificial person, although it could form a *sui generis* subject of its own domestic law or of that of another country.

25. Yet another fundamental question was whether rules of internal law could be treated in the same way as rules of international law. That, again, was impossible: rules of internal law could be invoked only in the light of their conformity or non-conformity with international law, which, as stated in article 27 of the Vienna Convention on the Law of Treaties and in article 27 of the draft articles on treaties concluded between States and international organizations or between international organizations,¹⁴ always took precedence in the event of conflict.

26. Finally, jurisdictional immunities were indivisible. Since article 31 of the 1961 Vienna Convention on Diplomatic Relations provided that, in the exercise of his functions on behalf of the sending State, a diplomatic agent enjoyed immunity from even civil jurisdiction in the receiving State, the sending State should similarly enjoy such immunity for, say, its own trading activities. Plainly, the draft article must be based on the fundamental principle of the unrestricted sovereign equality of States, and he hoped that the Special Rapporteur would take account of his comments.

27. Mr. QUENTIN-BAXTER said that he attached rather less fundamental significance than did Mr. Ushakov to draft article 6. Admittedly, paragraph 1 of the article could not be read as a complete statement of a rule, but it could not be read as a denial of the existence of any relevant law. The article should be seen, not as a foundation, but as a sort of scaffolding without which no building would be possible. It affirmed that the topic in question was one in which it had been customary to state a law and to qualify it. A statement of the rule without qualification would be unacceptable in most quarters, and a statement of the qualifications would make little sense unless those qualifications could be related to a hypothetical rule. Consequently, the Commission should suspend judgement as to whether the sovereignty of States to do as they wished in their own territories preceded or succeeded the duty of States to give effect, where appropriate, to the principle of State immunity. The success of the Commission's efforts would depend on its ability to strike an acceptable balance between the statement of the rule and the statement of the exceptions or qualifications pertaining to that rule. Article 6 should therefore be regarded simply as a pre-condition for that balancing exercise.

28. In its work on the current topic the Commission had reached a stage where it was no longer satisfactory to set forth the rights and obligations of States in hard and fast terms, for modern relationships between States involved a more subtle element of give and take. There could be no doubt that international relations functioned more smoothly when States accorded due deference to the activities and the property of other States within their territory and did not seek to involve

them needlessly in the administration of local justice. The absolute view of State immunity, on the other hand, must imperil the sovereign discretion of States within their own territory.

29. One fact to be considered in deciding how far the Commission wished to take the principle of sovereign immunity was the anxiety felt in some countries with regard to the possible over-reach of domestic laws in other countries. The relationship between that question and the draft articles before the Commission might be remote, but should nevertheless be recognized as a legitimate concern of Governments. In the final analysis, a number of grey areas might persist, as alluded to by a number of previous speakers. The rule might have to be based on the principle of reciprocity, whereby the minimum demands made by law in any circumstances could be supplemented on an agreed and reciprocal basis.

30. Lastly, great difficulty was obviously being experienced with regard to terminology. Expressions such as "trading and commercial activities" had long been the subject of serious disagreement within individual legal systems and between members of courts. The Commission's success in dealing with the topic would be judged partly on its ability to introduce a measure of uniformity and clarification, so that the draft articles would act as an encouragement to national jurisdictions to move towards a common interpretation of certain vital elements. However, that process could not be carried to the point of eliminating the very fine judgements which courts had always had to make in the area in question.

The meeting rose at 1.05 p.m.

1710th MEETING

Wednesday, 19 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLES

Jurisdictional immunities of States and their property (continued) (A/CN.4./340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)
[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

¹⁴ See *Yearbook ... 1980*, vol. II (Part Two), p. 71; see also 1699th meeting, para. 27.

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES³ (*continued*)

1. Mr. THIAM congratulated the Special Rapporteur on a learned report (A/CN.4/357) and brilliant presentation of a difficult and controversial topic (1708th meeting).

2. The basic question was, in fact, whether a State could be brought before the courts of another State without its consent. Some people answered in the negative and others in the affirmative, but all, paradoxically, based their position on the idea of sovereignty. Those who answered in the negative held that sovereignty was absolute because it somehow merged with *imperium*, in other words, authority and dominion, and it was therefore difficult to admit that a State which was exercising its sovereignty could be arraigned by another State. The opposite view was that sovereignty was not necessarily connected with *imperium*: it was above all else a function, and was to be judged in terms of its aim. Hence, it went without saying that an attempt had to be made to determine to what extent that function sometimes merged with *imperium*. For example, when the State exercised its natural powers—when it operated the police force and system of justice, when it ensured external defence and handled international relations—it exercised *imperium*. But a State sometimes acted outside the context of its natural powers, rather like a private person, in which circumstances it was acknowledged that the State must if necessary be brought before the courts in the same way as private persons. That theory, drawn from internal law, in particular administrative law, was perhaps not crystal clear, for cases arose in which it was difficult to say whether the State was acting as a public authority or as a private person. For instance, if a State decided to operate the public transport system within its territory and sold the necessary tickets, was it engaging in a commercial activity? Some held that it was, whereas others held that it was not, precisely because public transport arrangements fell within the sovereign powers of the State. Thus, the distinction between public acts and administrative acts was difficult to establish.

3. Nevertheless, it had to be acknowledged that, from the point of view of codification, the Commission was dealing with two systems. One of those systems, defended by Mr. Ushakov, maintained that the State could not have dual personality and, that there could be no duality in the acts of a State, even if the State was exercising certain powers which, under some systems of

law, fell within the private sphere. That signified that the State always acted as a public authority. But there could be no question of favouring one system over another, and the Commission's work of universal codification must reflect all trends, without neglecting the particular situation in the countries of the third world, for example. How did the problem of jurisdictional immunity arise for them in practical terms? More and more frequently, States were conducting on the territory of other States activities which could entail their responsibility: those States were most often major Powers, with enormous facilities available to them. Accordingly, to lay down the principle that immunity was absolute would naturally run the risk of protecting those Powers to the detriment of other weaker countries. In the final analysis, should the Commission affirm that jurisdictional immunity was an absolute principle, or should it affirm the contrary? In the circumstances he preferred to reserve his reply.

4. In the beginning, the Commission had asked the Special Rapporteur to choose between two methods for his work of codification: the deductive method, which started with the affirmation of a principle in order to draw all the consequences therefrom; or the inductive method, which, on the basis of an analysis of the practices of the various States in the various legal systems, might make it possible to establish a rule. The Special Rapporteur had indeed made a laudable effort to analyse a whole range of judicial, administrative and Government practice, an analysis which showed that State immunity was subject to attenuations and limitations in certain cases.

5. However, some insufficiently explored areas still remained, and it would be useful for the Special Rapporteur to expand on his information. For example, in the newly independent countries, particularly in Africa—apart from the Maghreb, where principles bequeathed by the former colonizers had been reaffirmed—it was difficult to say exactly what current practice was. In Senegal at least, there was for the moment a national law which stipulated that no proceedings could be instituted against a foreign State by any Senegalese court without its consent; if that State engaged in an activity which was not properly speaking an act of public authority, it could be arraigned by Senegalese courts.

6. He had suggested to the Special Rapporteur that, if a principle was to be affirmed at the outset, the principle was not that of jurisdictional immunity, but rather that of the territorial competence of the State within which the dispute arose.⁴ On that basis, the aim then would be to indicate the exceptions to that principle. More often than not, when a dispute arose between two States, each invoked its own sovereignty. In his opinion, the sovereignty of the territorial State—in other words, the State within which the dispute had arisen—must serve as the point of departure. But the Special Rapporteur had

³ The texts of draft articles in part I and part II of the draft are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

⁴ See *Yearbook ... 1980*, vol. I, p. 216, 1625th meeting, para. 13.

adopted the opposite position and affirmed that the basic principle was that of the jurisdictional immunity of the State which was to be arraigned. For the moment, it was difficult to arrive at any firm conclusion, but he was convinced, as was Mr. Quentin-Baxter (1709th meeting), that if the Commission was to engage in fruitful work of codification, it was essential to strike a balance between the interests and the principles involved.

7. Mr. BALANDA congratulated the Special Rapporteur on the quality of his fourth report (A/CN.4/357), which presented the national case law of States, and in certain instances their legislation and practices and the views of learned associations with regard to the sensitive issue of jurisdictional immunities of States and their property. He fully endorsed the approach adopted, namely the inductive method, for international law, like national law, was a fact of life in society and the law could only be elaborated properly on the basis of the facts.

8. He was appreciative of the efforts made by the Special Rapporteur to analyse the differences between immunity itself and jurisdiction or lack of jurisdiction, something which was the other aspect of the problem. In that connection, it should be noted that in most legal systems, at least in systems of written law, the jurisdiction of the courts was established in a legal text that was absolute and radical in nature, in the sense that the allocation of jurisdiction among the various courts was irrevocable once it was determined by the law.

9. On the other hand, immunity, as the Special Rapporteur had rightly pointed out, was relative (*ibid.*, para. 22). First of all, it was relative with regard to the nature of the act, and the objective criterion proposed by the Special Rapporteur in that regard was quite acceptable. Immunity was also relative with regard to the beneficiary: the consequence of the immunity was the inadmissibility of the case, and not lack of jurisdiction. If a court was competent, it could not decline jurisdiction simply because a State entered an appearance before it, since the subject-matter alone established the basis for adjudicatory jurisdiction and was normally determined by the law. Did that mean, however, that the nature of the act should alone be taken into consideration in order to determine whether or not the act came within jurisdiction of a State? Like Mr. Thiam, he believed that in some situations it was not easy to pinpoint the nature of the act itself and precautions therefore had to be taken to ascertain whether it came within the exercise of *imperium* or could be compared to an act under private law. For example, to some people, a contract for arms deliveries concluded by a State in order to equip its armed forces could easily be classed as an act under private law, comparable to an act performed by a private person on his own behalf or on behalf of a third person.

10. Hence, it seemed that the criterion should not be limited *prima facie* to the nature of the act and that in some instances the purpose of the act should be taken

into account. Admittedly, that was basically a matter of interpretation on the part of the judge, but in the light of Belgian practice, at least in the *Monnaie v. Carathéodori Effendi* case,⁵ he believed that the criterion of the nature of the act alone should not preclude other necessary factors, more particularly the purpose of the act performed by the State.

11. He would not go so far as Mr. Ushakov (1709th meeting) and infer that the sovereignty of States formed the foundation of international law, but he did agree that it was indeed the basis of the jurisdictional immunity of States and their property and was, moreover, an attribute of States. On the other hand, he experienced the same difficulties as Mr. Thiam on the question of whether a general rule or an exception was involved. It was apparent that States adopted positions which were sometimes quite contradictory: some recognized absolute immunity, whereas others limited immunity to highly specific areas. But the question was definitely of current interest, in view of the relations that States were obliged to establish with one another, and the Commission should therefore go into the matter more thoroughly. In order to make headway, it should not dwell solely on principles; it should concentrate on matters of formulation and, once a particular area had been properly demarcated, set forth the specific rules, without going so far as to specify that the rule of the jurisdictional immunity of States was peremptory.

12. States, at least those which made a distinction between *acta jure imperii* and *acta jure gestionis*, had sought to place the State and the individual on an equal footing, something which would never be possible, even when the State engaged in certain activities comparable to those conducted by an individual, a natural or juridical person. Basic differences would always persist. The first difference, as pointed out by the Special Rapporteur (A/CN.4/357, para. 37), was that even if the State could, in some of its activities, be compared to a private individual—and thus be said not to enjoy jurisdictional immunity—difficulties arose in connection with execution or related measures, a problem which did not occur in the case of the individual. The second difference lay in article 8, which was concerned with consent of State, a matter to which he would revert in due course. The third difference lay in national law. In legal systems which drew a distinction between civil and commercial law on the one hand and administrative law on the other, the initial tendency had been to allow States a wide margin of sovereignty. However, in view of the abuses in the exercise of the public authority of States, an attempt had been made in administrative law to curtail the array of powers vested in the State as the public authority. Thus, administrative law tended more and more to subject the activities of the State to the control of the administrative tribunals. In the systems of written law based upon the Franco-Belgian system, there was an area of administrative law which both the

⁵ *Pandectes périodiques*, 1903 (Brussels), vol. 16, No. 750, pp. 492-493.

administrative tribunals and the judicial forums did not wish to enter, namely “governmental acts” (*actes de gouvernement*). The power of interpretation was generally left to the judicial authority itself, and when an act was declared a “governmental act” it fell outside the competence and control of the courts and tribunals.

13. In most of the legal systems studied, the Special Rapporteur had analysed two general trends: in one, the State acted as a public authority, and in the other, the State could conduct activities on the same basis as an individual and therefore be subject to the jurisdiction of other States. For his own part, he believed, as did Mr. Thiam, that it would be more logical to view the problem of the jurisdictional immunity of States from the standpoint of the territorial State, rather than that of the State which engaged in an activity in another State.

14. With regard to the substance of the report, there appeared to be a contradiction between paragraphs 25 and 26, for the Special Rapporteur seemed to be indicating that the dual approach, or the distinction between *acta jure imperii* and *acta jure gestionis*, was not reflected in practice. Nevertheless, in the major part of the report, the Special Rapporteur had correctly shown that, in many situations, States did indeed make a distinction between those two categories of acts. Personally, he accepted such a distinction, more especially because the State could act in either capacity under his own country’s legal system. He none the less realized that, as Mr. Ushakov had pointed out, in other systems the State was indivisible.

15. With reference to the articles submitted by the Special Rapporteur, he shared Mr. Ushakov’s reactions to article 6 and wondered whether it should not clearly and unambiguously affirm the principle of jurisdictional immunity in the same way as the 1963 Vienna Convention on Consular Relations and the 1961 Vienna Convention on Diplomatic Relations. Again, in view of the current wording of article 6, it was questionable whether article 7 was really necessary. If article 7 was to be retained, he would prefer alternative B for paragraph 1, since the expression “judicial and administrative authorities” in alternative A could give rise to confusion in certain legal systems; other authorities could well be involved, as had been stressed at the thirty-sixth session of the General Assembly by the Sixth Committee’s Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Account should therefore be taken of all the authorities that could assume jurisdiction in cases involving State activities. Furthermore, the term “instrumentalities” in paragraph 3 of article 7 was too abstract, since legal proceedings could be instituted only against an entity that enjoyed legal personality and an instrumentality had no such personality. Similarly, the expressions in that paragraph “acting as a sovereign authority” and “as State representatives” were not really suitable in that context. Activities which a State performed as a sovereign authority were precisely *acta jure imperii* and

therefore did not fall under the terms of the draft. Exactly the same applied in the case of activities carried on by persons in their capacity as “State representatives”. In point of fact, the paragraph sought to cover activities performed by States acting as if they were private persons.

16. Article 8 also posed serious difficulties, since it brought into play an element alien to internal law: the principle of the consent of the State to be arraigned before the courts of another State. Consent was certainly fundamental to international law, but in internal law it was not a prerequisite for jurisdiction. In internal law, someone who did not consent could still be prosecuted and the court could, if necessary, pronounce judgment by default. Therefore, the behaviour of the courts was dictated by the national legislation. In those circumstances, how was it possible to bring in the idea of consent so far as the defendant was concerned? The question called for thorough examination, for the incorporation of a new rule would cause upheavals in the legal systems in some States.

17. As for article 9, the expression “*jurisdiction du tribunal*” (jurisdiction of the court) in paragraph 3 seemed tautological in French, and a more appropriate term should be found. Similarly, it would be better to replace the word “*tribunal*” (court) in paragraph 4 by a more comprehensive expression that would make allowance for all kinds of systems of law.

18. With respect to the French version of article 10, it was not clear in which cases a party—in other words, the State—to be prosecuted by the courts of another State could *take part (participer)* in the proceedings. Generally speaking, one could enter appearance (*comparaître*) before the courts and tribunals either as the plaintiff or the defendant. A State could also take a step (*intervenir*) in proceedings to which it had not been a party *ab initio*. There seemed to be some confusion regarding the principle involved in article 10. Perhaps the best course would be to set forth the principle, and define what was meant by “counter-claim” in another paragraph. Similarly, the last clause in paragraph 1: “if, in accordance with the provisions of the present articles jurisdiction could be exercised, had separate proceedings been instituted before that court”, did not appear to be absolutely necessary. It went without saying that if jurisdiction could be exercised in regard of the principal claim, it could also be exercised in respect of a counter-claim.

19. Mr. LACLETA MUÑOZ said he believed that it would be useful for the members of the Commission to have a document that would give them a more comprehensive view of the entire draft and would consist of an introduction, with the definitions and the rules of interpretation, followed by a general rule or principle, and then by articles setting forth the exceptions to the rule and perhaps the exceptions to the exceptions.

20. He wished to commend the Special Rapporteur’s fourth report (A/CN.4/357), which, in addition to its practical contents, afforded an overall idea of the first

exception—that of trading or commercial activities—and backed up his own convictions. Spanish law did not contain any provision relating to the principle of jurisdictional immunity of States and their property, and no decision on the matter had been taken by the Supreme Court, which alone made case law. However, a dual trend had emerged in Spain in decisions of judges of courts of first and second instance: on the one hand, an affirmation that the jurisdictional immunity of States and their property was absolute, and on the other, the idea that such immunity was limited, because a distinction was drawn in the majority of cases between *acta jure imperii* and *acta jure gestionis*. In fact, absolute immunity was not affirmed *a priori*, but when he considered that the circumstances of the case so warranted, the judge simply recognized it, without elaborating on the matter. On the other hand, so far as the executive power was concerned, the guiding idea was undoubtedly that of placing limitations on immunity in terms of public acts and administrative acts. He therefore endorsed the conclusions reached by the Special Rapporteur and, in particular, believed that article 12 was acceptable in the main.

21. Nevertheless, he experienced serious doubts regarding articles 1 and 6, which the Commission had adopted on a provisional basis. The usefulness of article 1 depended upon the final formulation of the draft, but the wording of article 6 was not satisfactory, and in that respect he largely agreed with Mr. Ushakov's criticisms (1709th meeting) of the text. In its present form, article 6 sought to reflect the various schools of thought, and paragraphs 1 and 2 duplicated each other; rather, it should lay down a rule which would then be followed by exceptions. Again, article 7, especially alternative B for paragraph 1, was subordinated to the current wording of article 6.

22. The general structure of articles 2 and 4, which had been set aside for the moment, was acceptable. Nevertheless, those articles would have to be worded very precisely, since they would define jurisdiction and competence and determine whether the set of draft articles would deal with immunity from the jurisdiction of the courts of justice, including administrative courts and tribunals, or whether they would deal with immunity from the jurisdiction of all the authorities of the State. In his opinion, the draft should deal exclusively with immunity from the jurisdiction of the courts, for in essence, jurisdictional immunity signified immunity with respect to the organs of the State that were required to interpret and apply law.

23. He was disturbed by the lack of any reference to the immunity of diplomatic missions, something with which the Vienna Convention on Diplomatic Relations did not deal. Article 3 was not clear in that connection; yet the jurisdictional immunity of diplomatic missions, as organs of a State, was greater than the actual immunity of the State.

24. Two "extremist" positions had emerged in the course of the discussion. On the one hand,

Mr. Ushakov had said (*ibid.*) that jurisdictional immunity must inevitably be absolute, for the State was sovereign, all States were equally sovereign and, hence, their immunity from the jurisdiction of the courts of other States must be absolute. But that was a one-sided point of view: what happened in the case of the other State, which was also sovereign? Obviously, one of them must give up some of its sovereignty in some way, and the Commission should find an answer to that problem. Furthermore, the sovereign equality of States required the economic, social and even the political systems of States to be identical, together with the substance of the State's sovereign powers. But such was not the case.

25. On the other hand, Mr. Malek (*ibid.*) had expressed some doubts as to the very existence of an international norm relating to State immunities. For his own part, he believed that, despite differences of opinion as to the scope or content of that norm, the norm itself was generally acknowledged. In any event, even if some States did not deem it conceivable in certain instances, they none the less considered it to be a practice, a rule of customary international law. Accordingly, it would be to the Commission's credit if it raised a rule of customary international law to the rank of a legal norm.

26. Mr. YANKOV expressed his appreciation of the Special Rapporteur's learned and comprehensive report and said that, in view of the new composition of the Commission, the review of basic principles embarked upon at the present session was a very useful exercise. Only when the basic premises had been fully explored could the Commission proceed to draft specific articles.

27. He concurred with Mr. Thiam in his view that the main object of the examination of the topic was to draft a universally applicable code. While States with similar socio-political and legal systems might not require such a code, it was important to establish a bridge between countries with differing systems of law. If that aim could be achieved, the Commission could then offer the international community a credible and dynamic instrument containing legally binding rules which provided a flexible but stable regime. If, however, the topic was regarded as falling within the area of comity of nations, it might not be advisable to engage in a codification exercise. Moreover, if the rules drafted were to be optional, rather than mandatory, it was difficult to see the purpose that would be served by the instrument ultimately adopted.

28. There were a number of very difficult problems to be solved, many of them stemming from the complex nature of the acts of States themselves. Admittedly, the specific purposes of the various acts of States were a very important consideration, but nevertheless, the State itself was a single entity, and whatever it did was an expression of its public authority. In that regard, he associated himself with the observations made by Mr. Ushakov.

29. As it stood, article 6 reflected only one school of thought; in other words, the rule of immunity was

stated negatively in terms of the exceptions thereto. Therefore, for the time being the words "in accordance with the provisions of the present articles" could well be deleted from paragraph 1, but retained in paragraph 2. Paragraph 1 would then simply state the principle of immunity as such, while paragraph 2 would provide for some flexibility in applying it.

30. Mr. USHAKOV said that, in his opinion, there could be no clash between the sovereignty of the territorial State and that of the foreign State which was acting upon its territory. The principle of the sovereign equality of States meant that States were free to establish the political, legal, social, cultural or other systems that they deemed most appropriate. Each one of those systems fell within the domain of internal affairs. Being equal, States were therefore duty bound to recognize one another's different systems. Although they enjoyed immunities, they must respect the internal law of any State in whose territory they were acting. That was stated in article 41 of the Vienna Convention on Diplomatic Relations, under which all persons enjoying the privileges and immunities set forth in the Convention had the duty, without prejudice to those privileges and immunities, to respect the laws and regulations of the receiving State.

31. Obviously, by reason of their sovereignty, States were free to disallow any activity by another State in their territory, including trading or commercial activities. But if a State accepted certain activities, it accepted those activities along with all of their consequences. When the political, legal or other system of a State disallowed certain activities by other States, the latter must respect that prohibition. It followed that the sovereignty of the territorial State was safeguarded, since it was for that State to allow or disallow activities by other States in its territory. Under article 2 of the Vienna Convention on Diplomatic Relations, a State was not even required to establish diplomatic relations with other States, for such relations were established by mutual consent. Plainly, that rule stemmed from the principle of the sovereign equality of States. There again, if a State allowed diplomatic missions into its territory, it allowed them with all of the consequences laid down in customary or written international law, more particularly in the matter of privileges and immunities.

32. In connection with another question raised during the discussion, he emphasized that, when a State concluded a contract with a legal entity under private law, such as a bank, it concluded a private law contract and not a contract under international law. The law applicable to the contract could be determined by the rules of private international law and was internal law, for example, the law of the place at which the contract was signed. The State which had concluded the contract must obviously respect the law governing the contract. But the question of the applicable law and the obligation to respect that law had to be differentiated from the question of legal proceedings that could be instituted. Because of State sovereignty, proceedings could not be

instituted in one State against another State without the latter's consent. Any State compelled to appear before the court of another State without enjoying jurisdictional immunity would be subjected to the public authority of that other State, something that would be a serious breach of the principle of the sovereign equality of States.

The meeting rose at 11.40 a.m.

1711th MEETING

Friday, 21 May 1982, at 10 a.m.

Chairman: Mr. Constantin FLITAN

Jurisdictional immunities of States and their property (continued) A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (continued)

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES³ (continued)

1. Mr. JAGOTA said that the Commission's enlarged membership and the new element of regional representation that it afforded would certainly enhance the Commission's contribution to international law.

2. With the fourth report (A/CN.4/357), in which the Special Rapporteur had encapsulated his broad knowledge of the subject of jurisdictional immunities of States, the Commission was now entering into the heart of the matter, namely, the exceptions to the rule of sovereign immunity. Opinions on how to state the rule were divided. On the one side it was rightly felt that, since all sovereign States were equal, no court of one sovereign State could sit in judgement on another State and, hence, that fundamental principle must be stated unequivocally. The other side, however, queried

¹ *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles in part I and part II of the draft are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

whether there was a rule of immunity at all. It recognized the existence of principles of comity but considered them as so different from a rule of international law imposing obligations that it was necessary to look to the conduct of States in seeking to restore a balance between the sovereignty of the territorial State and the sovereignty of the claimant State. Between those two schools of thought lay the majority view, namely, that there was indeed a rule and that there should be exceptions thereto.

3. The question then arose as to the exact nature of the rule and of the exceptions. The need to achieve a balance between two sovereign States had resulted in two affirmations: one being that the rule should recognize the sovereignty of the territorial State and that immunity should form the exception, the other being that the rule should recognize sovereign immunity and that the exception should apply in instances in which the sovereignty of the territorial State would prevail. Instead of the dual approach of specifying the cases in which immunity did or did not apply, the best course would be to state a rule of sovereign immunity and then list the exceptions, for the object and purpose of such a rule was basically to provide a framework for friendly and co-operative relations between States.

4. The reason for the increasing number of exceptions to immunity lay in the enormous growth in State trading and commercial activities in various forms. If such activities were made subject to the jurisdiction of the territorial State, the economic relations of States would be affected. For example, the developing countries were in need of economic aid and a donor, whether of money, technology or know-how, usually requested that its agents should be immune from the jurisdiction of the local courts. If that request was refused, the project or programme was withdrawn. The Commission should therefore carefully examine the precise nature of the activities in question with a view to ascertaining whether they were of a commercial, trading, financing or other type, and then determine the matters in respect of which a foreign individual, foreign State or foreign entity of a foreign State conducting such activities in another State would or would not be immune. That was why it would be preferable first to state the rule and then to list the exceptions, with greater clarity and in more detail: in matters not covered by conventions, the rule would then apply as a kind of residual rule.

5. The first exception discussed in the fourth report concerned trading or commercial activity (draft article 12), although eight other exceptions were also listed as possibilities (*ibid.*, para. 10, subpara. (c)). In his view, the Commission should reserve judgement on those possibilities until later, always bearing in mind that the rule should not be whittled away by exceptions. It should also examine the conflicting decisions adopted by States, and sometimes even within one and the same State, on whether or not a trading or commercial activity was to be deemed a public or a private act. In that connection, the Special Rapporteur had cited the case of the purchase by Bulgaria of bullets, which had been

deemed to be a private act (*ibid.*, para. 59), whereas the purchase of cigarettes for an army had been held to be a public act for which immunity would lie (*ibid.*, para. 66). Again, a contract for a survey of water distribution in Pakistan, although apparently a private arrangement, had none the less been deemed a public act since its object and purpose was public service (*ibid.*). Accordingly, it was essential to be meticulous in laying down the exceptions, for their content would indicate whether or not there was any residual rule. Such a rule was indispensable for mutual respect among States and would promote co-operation and mutual development; something that would not be the case if all State activities were made subject to the jurisdiction of the courts of another State.

6. There was also the question of what was meant by the expression "State claiming jurisdictional immunity". If it was understood to embrace the agency or instrumentality of a State, what was meant by agency or instrumentality? Did it include a State entity, a State organization, a statutory corporation created and totally owned and directed by the State, or a registered company in which the State was the majority shareholder? Where was the dividing line? Again, was a diplomatic mission an agency of the State? Could its acts be made subject to the jurisdiction of the local courts—for instance, when it rented housing for its diplomats? Were the recruitment and termination of the contracts of local employees by the mission subject to local laws? If any dispute arose, could proceedings be instituted against the head of the mission before the local courts? Admittedly, the Special Rapporteur had provided in article 4 that the draft did not apply to diplomatic privileges and immunities, but that provision was subject to the rider in subparagraphs (a) and (b). The Commission must therefore ensure that there was a clear demarcation between State immunity and diplomatic immunity and eliminate any possible duplication.

7. As to draft article 6, in his opinion paragraph 1 did not signify that there was no sovereign immunity unless some other provision of the draft specified the contrary. Rather, it meant that a State was immune from the jurisdiction of another State and the content and the modalities for the exercise of immunity were determined by the provisions of the draft. The modalities of the exercise of immunity were a procedural matter and could, for example, involve contacts with a foreign ministry. That, until recently, had been the case in the United States of America, but a foreign State now had to plead immunity before the local courts. With regard to the content of immunity, it was better to retain paragraph 1 largely in its present form, although it might be possible to incorporate an immediate reference to the exceptions by redrafting it to read: "A State is immune from the jurisdiction of another State, except as provided in articles ... and ...".

8. In draft articles 8, 9 and 10, the Special Rapporteur had set forth the concept of consent in negative terms, in other words, absence of consent would imply that the

forum had no jurisdiction and, conversely, instances of express or implied consent would preclude a plea of sovereign immunity. On the thorny question of the point at which the draft should deal with consent, his initial feeling was that, in view of its intent and effect, the matter should be treated separately in part III, among the exceptions, rather than as part of the general rule. Indeed, there was a precedent for so doing, since consent had been made an exception to State responsibility and was covered by a separate article on that topic in part I of the draft.⁴

9. The scope of the term “trading or commercial activity”, as used in article 12, also called for careful consideration. In ordinary everyday language, a trading or commercial activity was one that involved the purchase, sale or exchange of goods or services and the financing thereof. However, in the fourth report (*ibid.*, para. 120, subpara. (b)), reference was made to activities “in a commercial, industrial or financial field”. If the exception under article 12 was confined to trading or commercial activity, industrial and manufacturing activities would not be encompassed. It was those latter activities that had gained so much importance in the past decade, and they were precisely the ones to which the question of jurisdiction was so germane. The Commission should therefore determine whether article 12 ought to extend to industrial and manufacturing activities or should be confined solely to the sale, purchase and exchange of goods and services. For that purpose, it should also review the definition of “trade or commercial activity” contained in article 2, subparagraph 1 (f).

10. Furthermore, the rule laid down in article 12 would tend to perpetuate, rather than resolve, the difficulty inherent in the question of the relationship between the nature of the act and the purpose of the act. In that connection, article 3, paragraph 2, provided that

In determining the commercial character of a trading or commercial activity ... reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose.

In his opinion, it was the latter part of that provision which had given rise to all the controversy. In India, for example, under section 86 of the Code of Civil Procedure⁵ it was for the Government to give consent for a suit to be filed against a foreign State. Accordingly, the Foreign Ministry would examine any facts submitted to it and, on that basis, could take the view that even though the acts in question were apparently of a trading type, they involved a function that was a function of the State and a public service. The issue was a sensitive one and it called for careful examination in order to avoid controversy.

11. Mr. AL-QAYSI said that the discussion had highlighted the differing views on the concept of State immunity. Even though the Commission already had before it a number of draft articles, there was a virtually automatic inclination to discuss at almost every stage of

the debate questions such as the correct point of departure or the most appropriate approach—questions that he would have thought had already been dealt with. While there was no harm in that, given the complexity and importance of the issue, it was essential, if any measure of progress was to be achieved, to arrive at a degree of understanding which, while not deliberately ignoring any viewpoint, would aim at a collective agreement that would provide the basis for a universally acceptable set of draft articles.

12. It was worth recalling certain simple and clear premises. The topic under consideration involved the interplay between two fundamental principles of international law, namely, those of territoriality and of State personality. The interplay was not theoretical; problems of State immunity had arisen with considerable frequency, although admittedly they had not always been resolved in a uniform manner. In that connection, attention must be paid to the changes in the international community, particularly in the present century. The shift in the forms of government, the changes in the functions of the State, decolonization, the ever-increasing trend towards socialist and welfare concepts in managing societies, the quest for development, the universality and heterogeneity of the international community, the interdependence of State relations—all those, together with other factors, underlined the need to codify the topic. As subjects of international law, States were sovereign as of right. As sovereign entities, however, they existed not in a vacuum but in constant relations with one another. Hence it was logical that the legal norms for the exercise by a State of its territorial sovereign authority and for the assertion of its sovereign right to be exempt from the exercise of a similar authority by another State should be made more readily ascertainable in the interests of all States.

13. So far, the Commission had seemed to speak with one voice, but divergent opinions were apparent when it came to the point of departure. The question of whether jurisdictional immunities of States should be treated as a general principle of international law or as an exception to the more fundamental principle of territorial sovereignty had yet to be settled unanimously. Some members felt that jurisdictional immunity of States could be viewed as a general rule which itself admitted of certain exceptions. The other viewpoint asserted that jurisdictional immunity was an exception to the principle of territorial sovereignty, since the basis for such immunity was the cardinal principle of the sovereign equality of States that lay at the very foundation of international law.

14. In determining how important that difference of opinion was for the Commission's task, he wished to point out that theoretical questions, no matter how interesting and thought-provoking, gave rise to views that inevitably differed, as had been amply demonstrated in the course of the discussion. Although that aspect of the work was fundamental at the initial stage, it was certainly not so at the present stage, when every effort

⁴ Art. 29 of part I of the draft articles on State responsibility (*Yearbook ... 1980*, vol. II (Part Two), p. 33).

⁵ See 1708th meeting, footnote 31.

should be made to prepare draft articles designed primarily to solve specific problems.

15. It was abundantly clear that the two positions regarding the point of departure depended on the standpoint from which the topic was being treated, namely, the point of view of the State which benefited from immunity or that of the State which granted it. Equally clear was the fact that, in provisionally adopting one approach rather than the other, the Commission had done so simply because it wished to prepare the ground for the future draft articles and did not want to foreclose the possibility of reverting to the matter for the purposes of settling it later. Neither of the two opposing views, therefore, was compromised. Another, and perhaps the most important factor, was that neither of those two views seemed to be free of doctrinal shortcomings. For example, the Special Rapporteur stated in his fourth report (A/CN.4/357, para. 14) that:

even in dealing with aspects of State sovereignty, from the standpoint of the State claiming jurisdictional immunity, it is asserting its own sovereignty and not an exception or waiver of its sovereign powers.

It should none the less be remembered that the proponents of the "exception approach" seemed to conceive the exception in relation to the sovereignty of the territorial State, and not to that of the State claiming jurisdictional immunity. Yet there was no denying that sovereign equality of States was the very foundation of international law, something which signified, to borrow the terms of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,⁶ that States had equal rights and duties and were equal members of the international community, notwithstanding differences of an economic, social, political or other nature. Since rights and duties were corollaries, however, it was evident that the concept of sovereign equality, while mutually exclusive, could not remain so juridically in a situation involving a conflict of sovereignties between States as a result of the presence of one sovereign authority within the jurisdiction of another. In such a situation, the conflict had to be settled in a manner that respected the law of the jurisdiction in question, failing which the equality of States in regard to duties would be impaired.

16. Mr. Ushakov (1710th meeting) had given a number of interesting theoretical examples in support of his analysis, which, in his own view, were perfectly but not necessarily absolutely legitimate. For instance, Mr. Ushakov had spoken of a State that had concluded a contract with an individual and had rightly said that such a contract was governed not by public international law but by private international law, which was a branch of internal law. He had also said that a State could not act in two capacities and could not be treated as an artificial person (*personne morale*) because that notion was governed by internal law, which emanated from the State itself. If the question was one of the applicable law, in other words, of the choice of law rather

than the choice of jurisdiction, it was well known that the cardinal rule governing choice of law in cases like that cited by Mr. Ushakov was that the matter depended on the law chosen expressly or implicitly by the parties. On the other hand, choice of law did not necessarily carry with it choice of jurisdiction, in other words, the sphere with which the present topic was concerned.

17. Generally speaking, the rules governing choice of jurisdiction conformed to certain internationally acceptable standards, although certain differences were to be seen in situations falling outside the sphere of contractual obligations. Mr. Ushakov's reasoning, if carried to its logical conclusion, might well mean that mutual consent prevailed in the case of applicable law, but in the case of jurisdiction, the unilateral consent of one party—the State, in the present instance—would alone be decisive in settling the final outcome of the question. It could be argued that that was inevitable, since the State was sovereign and the individual was not. All the acts of the former were political, but those of the latter were not. In a sense that might be true, but it could also be argued with some force that, if it had been possible to distinguish between the official and private functions of the individual, why should a similar distinction not be made in the case of States as well? Again, any immovable or incorporeal property within the territorial State could be acquired by another State only in accordance with the former's internal law, which covered the conditions relating to the competence of judicial bodies. How then was it possible to separate immunity from non-immunity in a case of that kind?

18. His remarks were made in an endeavour to show that the best course of action would be to assume for the time being that the question of point of departure had been settled, so that the Commission could move ahead. In that connection, he pointed out that Mr. Tsuruoka, speaking at the thirty-second session of the Commission,⁷ had recalled that the role of the Commission was different from that of a university or a parliament. The inductive approach had much to commend it, but the Commission should seek at the same time to screen, in so far as possible, State practice, national legislations, and internal judicial decisions. The wider the screening, the greater the likelihood of a broadly acceptable set of rules. No avenue should be dismissed out of hand. For instance, the useful dual approach proposed by Mr. Riphagen⁸ might, at a later stage in the Commission's work, prove to be the only way of dealing with the formulation of the exceptions to the general rule of State immunity. There was no lack of precedent in the annals of the Commission for adopting a novel approach if it seemed more promising. He was not calling for such a drastic change at present and was merely urging that the possibility should be borne in mind for the future, in the interests of a successful outcome to the task in hand.

⁶ General Assembly Resolution 2625 (XXV) of 24 October 1970.

⁷ See *Yearbook ... 1980*, vol. 1, p. 204, 1624th meeting, para. 19.

⁸ See 1708th meeting, footnote 11.

19. Lastly, the link which article 11 formed between parts II and III of the draft had been expressed in article 6, paragraph 2, which dealt with the question of giving effect to State immunity. While that was broadly in conformity with the Special Rapporteur's approach, as provisionally endorsed by the Commission, namely, that there should be a statement of a general rule followed by a statement of the exceptions to it, he felt that the misgivings regarding article 6 related more to the statement of the principle in paragraph 1 rather than to the effect. He therefore wondered whether it would not be possible for the Drafting Committee to consider resolving the controversy on the point of departure by deleting from the statement of principle in paragraph 1 of article 6, and keeping in paragraph 2 thereof, the phrase "in accordance with the provisions of the present articles". He wished to make that suggestion simply because he believed the difficulty that some members experienced in connection with article 6 was not insurmountable.

20. Mr. LACLETA MUÑOZ said that he wished to comment on some of the draft articles in the course of the general discussion, because he would be unable to attend the meetings in which the Commission would be engaged in considering each one in turn.

21. Paragraph 1 of article 7, both in alternative A and in alternative B, posed some difficulties because it was tied in with article 6 and contained the words "A State shall give effect to State immunity ...". Article 6 should in fact be recast to provide a better formulation of the idea underlying the entire draft, namely, the existence of the principle of immunity and of exceptions to that principle. The exceptions would not stem from the fact that, in certain situations, effect would not be given to State immunity. Where exceptions existed, there would be no immunity and there could be no question of giving effect to immunity which did not exist.

22. Alternatives A and B differed more particularly in the terminology employed to designate the jurisdiction from which a State could be exempt. Whereas alternative B spoke simply of "jurisdiction", without further qualification, alternative A referred to the "jurisdiction of its ... judicial and administrative authorities". The term "jurisdiction", at least in its English meaning, appeared to designate the public authority which the State exercised on its territory and which was the manifestation of its sovereignty. In his opinion, the draft should not adopt that approach, for it was concerned with the immunity from the exercise of the functions of the authorities of another State that were required to apply and state the law, whether they were civil, administrative or criminal courts. For that reason, he preferred alternative A.

23. As to alternative B, he wondered whether a State really allowed proceedings to be instituted against another State. Admittedly, States had to establish rules so that proceedings would not be instituted in their courts against a foreign State if the foreign State enjoyed jurisdictional immunity, but was it possible in

practice for a State to allow proceedings to be conducted against another State? Again, under alternative A, a State should not allow proceedings to be conducted against another State when the latter was entitled to jurisdictional immunity. Lastly, apart from difficulties of substance, both alternative A and alternative B required drafting changes.

24. Paragraphs 2 and 3 of the article, which sought to indicate when a legal proceeding was considered to be one against another State, were fairly satisfactory, but the wording could well be improved. The term "State" was to be taken to mean not only the State itself but also State organs, bodies and entities. In that connection, he fully endorsed the views expressed by Mr. Jagota in connection with diplomatic missions.

25. Articles 8 and 9 were largely acceptable in terms of substance, but the drafting could be considerably simplified. Apparently the Special Rapporteur had endeavoured to satisfy everyone, as could be seen from the simultaneous use of the notions of consent and waiver. For example, under the terms of article 9, paragraph 3, consent could be given by an express waiver of immunity. However, waiver always implied consent. The mention of both notions made the wording unnecessarily cumbersome. The 1961 Vienna Convention on Diplomatic Relations (art. 32, para. 2) dealt concisely with the question of waiver by specifying that an express waiver sufficed. Accordingly, it should prove possible to simplify paragraph 3 of article 9.

26. Similarly, article 10 was unnecessarily long. The first five lines should be enough, for the main point was that, in any legal proceedings instituted by a State or in which a State took part or took a step relating to the merit in a court of another State, jurisdiction could be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.

27. Article 11 was not really required if article 6 was to be interpreted as signifying that there was a general rule which admitted of exceptions. It was pointless, at the beginning of part III of the draft, concerning exceptions to the principle of State immunity, to point out that, subject to those exceptions, effect had to be given to jurisdictional immunity.

28. The merit of article 12 was that it covered all cases of trading or commercial activity and their effects on jurisdictional immunity. Paragraph 1 covered the most important case, namely, the case in which a State organ, in the exercise of its sovereign power, engaged in trading or commercial activity with a private person. Fortunately, paragraph 2 also took account of the fact that States could directly engage in commercial activities among themselves, in a private capacity. Trade in goods and the sale of products by one State to another were perfectly conceivable, and States could carry on such activities without making themselves subject to a special system of internal law, in which case international law appeared to apply. Thus, article 12 covered all eventualities.

29. Mr. JACOVIDES congratulated the Special Rapporteur on his erudite and comprehensive report on a topic which was more complicated and fraught with difficulties than might appear to be the case at first sight.

30. Controversy had arisen, both in the Commission and elsewhere, regarding the doctrinal basis for the jurisdictional immunity of States and the method of approach to the subject. On the one hand, there were those who argued that the legal basis was the principle of respect for national sovereignty and equality of States that underlay the classical theory of sovereign immunity. On the other hand, it had been argued that what was involved was conflict of sovereignties, which could be resolved by the expression of consent by one sovereign State or by the application of the more recent restrictive theory that immunity was limited solely to the public acts of a sovereign State. The problem was compounded by the fact that much of what was encompassed by the topic lay in the grey area of usage and comity among nations, in which reciprocity could be a relevant factor. Moreover, despite a wealth of judicial precedent and legislation at the national level, some of those precedents, even within the same national jurisdiction, were mutually contradictory, although the general trend had been towards limited immunity.

31. In his view, a valid starting-point lay in the principle of *par in parem imperium non habet*, which should operate both on behalf of and with respect to the territorial sovereign. The Commission's objective should be to reconcile the two conceptual approaches, using the inductive method, with a view to achieving a generally acceptable pragmatic compromise. In the matter of sovereign immunity, where no question of *jus cogens* arose, there was much to be said for balance, for a spirit of give and take and for realistic adjustment to contemporary conditions. Moreover, in such a large and important area of the law, there was ample scope for progressive development of the rules of international law—and even of the rules of comity and usage—in order to achieve the desired objective.

32. In its new and expanded form, the Commission should forge ahead and be concerned less with doctrinal differences and more with achieving practical results. The main thesis upon which it could rely was that there was a rule of State immunity and that it was subject to certain exceptions. Another relevant factor was that, in recent years, there had been a marked tendency to adopt the restrictive approach in specific cases of *acta jure gestionis*, as distinct from *acta jure imperii*. While the line of demarcation was not clearly definable in all cases, abundant State practice had been adduced by the Special Rapporteur and other members of the Commission to substantiate that view. He hoped that, once the Commission had arrived at a final formulation of the basic thesis and the exceptions to it, it would be possible to draft a generally acceptable compromise text that would remove the existing uncertainties and inconsistencies and would unify and harmonize the different approaches currently evident at both the international and the national levels. It was the most constructive and

positive course to follow, and one which fell squarely within the Commission's mandate.

33. Draft article 6 in its present form suggested that jurisdictional immunities existed solely in so far as they were established in the draft articles themselves. In that regard, he agreed with Mr. Yankov (1710th meeting) that it was better to leave the door open for greater flexibility rather than to prejudge specific issues by including the words "in accordance with the present articles". One possible solution might be to adopt the wording used in the 1972 European Convention on State Immunity.⁹ While, at the current stage, he was not formally proposing the deletion of the words in question, the matter might usefully be re-examined to determine how the concerns expressed could be more satisfactorily met as a way of facilitating the desired consensus.

34. Mr. CALERO RODRIGUES said that, while he agreed with the approach adopted by the Special Rapporteur, he did not believe that the Commission should base its deliberations exclusively on the materials available, which consisted solely of decisions by national courts, did not cover all the problems to be dealt with in the draft articles and reflected only one approach to the problem.

35. With regard to article 6, he had been somewhat surprised to hear doubts expressed as to the existence of the principle of State immunity. Acceptance of that principle, whether as an exception to the principle of territorial sovereignty or as an independent principle, was basic to the work of the Commission. Rather than take an excessively doctrinaire view, the Commission, as a technical body, should attempt to reconcile the different views and interests involved. He agreed almost entirely with the substance of the observations made by Mr. Ushakov (1709th meeting). Indeed, Mr. Ushakov's view that State immunity was a well-established principle was not new, for the principle had been stated long ago by Chief Justice Marshall.¹⁰ Moreover, in his second report,¹¹ the Special Rapporteur had also made it clear that he concurred in that regard. However, Mr. Ushakov appeared to believe that the phrase "in accordance with the provisions of the present articles" in article 6 could be interpreted as meaning that the principle could not exist independently of the articles. Personally he did not agree, but it might be advisable to redraft the text so as to make it plain that the principle did exist, subject to the exceptions or limitations set out in the provisions of the articles. A number of possible solutions had been suggested, and the problem was essentially one of drafting rather than substance.

36. As to article 7, and particularly the use of the words "give effect to State immunity", the view of the Special Rapporteur in that regard was not unacceptable

⁹ See 1708th meeting, footnote 12.

¹⁰ In *The Schooner "Exchange" v. McFaddon* (1812) (*ibid.*, footnote 9).

¹¹ See *Yearbook ... 1980*, vol. II (Part One), pp. 217-218, document A/CN.4/331 and Add.1, paras. 75-76.

(A/CN.4/340 and Add.1, paras. 9 *et seq.*). Nevertheless, the alternative version of paragraph 1 could be dispensed with entirely if article 6 gave a clear and complete definition of "State immunity". Alternative B contained a reference to "competence", which the Special Rapporteur insisted was necessary for immunity to come into play (*ibid.*, paras. 11-16). If a court was not competent, then the question of State immunity did not arise. Since that idea was totally implied in the concept itself, it was unnecessary for it to be stated specifically.

37. Paragraphs 2 and 3 of article 7 were quite acceptable, subject to a number of drafting changes, provided the Commission approved the Special Rapporteur's basic approach to articles 6 and 7.

38. The structure of articles 8, 9 and 10, dealing with the notion of consent, was satisfactory, but the concept itself had given rise to a number of difficulties. In his opinion, the very concept of immunity implied non-consent, for if a State gave its consent, then the question of immunity did not apply. However, with a few drafting improvements, articles 8, 9 and 10 could provide a useful working basis.

39. Mr. NJENGA said he agreed with the conclusion reached by the Special Rapporteur (1708th meeting) that there had been a general trend towards limiting the principle of immunity. The Special Rapporteur himself had never questioned the existence of the principle, and the Commission should start from the premise that the principle did exist and then proceed to identify exceptions to it. A number of speakers had affirmed quite categorically that the basis for the principle was the concept of the sovereign equality of States, a view which had been expressed by Chief Justice Marshall in *The Schooner "Exchange"* case. If the Commission accepted that as a useful starting-point, then it must also agree with the Special Rapporteur's rejection of the dual approach (A/CN.4/357, para. 26), since it would call into question the very existence of the principle of immunity.

40. He endorsed Mr. Ushakov's views (1709th meeting) concerning the wording of article 6. As it stood, paragraph 1 appeared to question the existence of the principle, since it implied that there could be no immunity except under the terms of the draft. Consequently, article 6 should be recast in an acceptable form, perhaps even by using the wording of the provision of the European Convention on State Immunity stipulating that a State was immune except where otherwise provided.¹²

41. On the question of exceptions, the trend towards the restriction of immunities in the field of trading and commercial activity did not mean that such activity did not fall within the area of State sovereignty. In all cases, a State acted as a sovereign entity, regardless of the type of activity in which it engaged. The fact that a State acted in a private capacity could not serve as a basis for

the limitation of immunity. The move towards making such activity subject to the jurisdiction of the territorial State was based on the premise that the limitations were without prejudice to the vital interests of States. Furthermore, contracts could be entered into with greater confidence if it was known that they could be enforced by adjudication, something which was borne out by the practice of a number of countries which, in trade agreements, always indicated their willingness to accept local jurisdiction.

42. However, in providing for exceptions to, or limitations of, State immunity, the Commission should be careful not to go too far. If, for example, State trading and commercial activities were made the subject of an exception, would that mean that the commercial attachés of embassies enjoyed no diplomatic immunities when engaged in trade activities on behalf of their Governments? It was difficult to see how such an exception could be reconciled with the provisions of the Vienna Convention on Diplomatic Relations. The Commission should not engage in an exercise which had the effect of diminishing the privileges and immunities provided for in that Convention. There was a broad area in which the trading and commercial activities of States could be made subject to local jurisdiction without thereby infringing existing conventions. For example, many countries whose trading activities were conducted by members of their diplomatic corps entered into specific agreements governing those activities. Consequently, article 12 should be drafted in such a way as to avoid any possibility of conflict with the Vienna Conventions.

43. Mr. FRANCIS said that, in an exercise of the kind in which it was now engaged, the Commission should proceed with care, caution and patience, because it was dealing with a very sensitive issue and the inductive approach would lose its effectiveness if the sampling of State practice studied was not truly representative of the attitude of the international community as a whole.

44. State practice did not exist in a vacuum, but was invariably influenced by social and political factors. Attitudes prevailing at any given time might be totally discarded within a decade. In the early 1960s, for example, newly-independent States had generally been in favour of total acceptance of the rights and obligations provided for in treaties entered into by their former administering Powers, an attitude reflected in the wording of article 6 of the draft code on the law of treaties.¹³ Within a decade, that idea had been supplanted by the concept of unilateral declarations and was never reflected in the final version of the Vienna Convention on the Law of Treaties.

45. As to the question of restriction of immunity, he knew of one Caribbean State which had been arraigned before the court of a metropolitan Power in respect of an action arising out of an incident that had taken place, not within the territory of the metropolitan Power but

¹² Art. 15 of the Convention; see 1708th meeting, footnote 12.

¹³ See *Yearbook ... 1959*, vol. II, p. 98, document A/4169, chap. II, sect. II.

within that of the Caribbean State. The very idea of a sovereign State or State organ being arraigned before another State in such circumstances was a very serious matter, and the frequency with which it occurred should be a matter of concern to the Commission. A series of questions pertinent to the exception provided for in article 12 was bound to emerge from the North-South and South-South dialogues. Another factor to be considered was that the new diplomacy occasioned by the emergence of newly-independent States would bring into focus new concepts of international relations centring on basic needs rather than issues of high politics.

46. The Commission should bear in mind that few developing countries had any recorded State practice in the area in question, except to the extent that they had been adversely affected by the restriction of immunity. Consequently, it had a duty to be patient and to endeavour to ascertain the attitude of developing countries with regard to the very important question of limitation of State immunity, since it was those countries that stood to lose most from any restriction of immunities.

The meeting rose at 1.05 p.m.

1712th MEETING

Monday, 24 May 1982, at 3.05 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC(XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES³ (continued)

1. Mr. RAZAFINDRALAMBO joined in congratulating the Special Rapporteur, who had con-

¹ *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of the draft articles contained in parts I and II of the draft are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), pp. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

siderably facilitated the Commission's task by putting before it a working document (A/CN.4/357) of exceptional scientific value on a most delicate subject.

2. The exhaustive study made by the Special Rapporteur, with masterly recourse to the inductive method, convincingly demonstrated the existence in both the common law systems and the civil law systems of a close link between the principle of absolute sovereignty and that of immunity. That link had tended to weaken in the course of the centuries, and the notion of absolute immunity based on absolute sovereignty had been progressively run down because of the appearance, in the very countries which had professed that notion, of new factors inherent in the evolution of the State's duties and role in the sphere of economic and industrial activities.

3. It should be asked, however—and many of the Commission's members had done so—whether the resulting trend towards restricting and limiting immunity, which might seem quite normal in the market-economy countries and consumer societies, made allowance for the situation of the developing countries, particularly those which had achieved their independence since the 1960s. Many of those countries had come, for overriding reasons pertaining to their economic development, to extend considerably the limits of the public sector. They had done so either through the nationalization of private companies or through the exercise of public authority in spheres of activity considered in industrialized countries to come under *acta jure gestionis*.

4. It would have been interesting to see an evaluation from the Special Rapporteur of the effects of the new concept of non-immunity based on the distinctions mentioned in his fourth report (*ibid.*, paras. 35-45) between the principles of the sovereignty, equality and dignity of all States, particularly the economically and politically least advantaged and powerful among them. It was true that in paragraph (31) of the commentary to article 6⁴ a deficiency was noted with regard to the situation in Africa, but that could be explained by the fact that there were in some African countries public establishments of an industrial or commercial nature which had expressly been given the status of a trading company; it was those institutions, therefore, which undertook the activities subject to the non-immunity principle. In addition, developing countries were almost unanimous in inserting in the contracts they concluded in the context of their development, including those in the sphere of commercial activities, clauses assigning competence, and so avoiding the problem of domestic remedies.

5. Whatever the situation, the attachment of third world countries to the principles of sovereignty and independence needed no further proof, as two instances would suffice to show. To take, first, nationalization: recently, in *Libyan-American Oil Company v. Socialist*

⁴ *Yearbook ... 1980*, vol. II (Part Two), p. 149.

People's Libyan Arab Jamahiriya,⁵ a United States District Court had judged it to be an "act of State"; and, in an arbitral award in *Agip v. Etat malagasy et Socima*, the International Chamber of Commerce (ICC) had given the same legal value to the right of nationalization as to the rule *pacta sunt servanda*. That jurisprudence confirmed the doctrine of such authors as Ian Brownlie, according to which right of nationalization was part of *jus cogens*.

6. The second instance concerned investment disputes: third world States which received capital had made only minor concessions to the World-Bank-supported industrialized countries which furnished capital and investments, for the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States⁶ provided for recourse to arbitration by the Centre set up for that purpose only with the express consent of the State party to the dispute. In addition, States signatories to the Convention had discretion to exclude certain items from its field of application, and many of them had made use of that faculty in connection with oil. But the signatory States had undertaken to recognize to awards the same value and effects as to final judgements by their own national courts. The position thus defended by third world countries concerning investments seemed altogether indicative of the concept of immunity and sovereignty which continued to prevail in the majority of those countries.

7. It was, however, a fact that the realities of the contemporary world, based on the need for closer cooperation between North and South and for a new, fairer and more equitable international economic order, required a more flexible approach to the concepts of sovereignty and immunity. At the same time, fine distinctions such as those based solely on the functions of the State or the nature, rather than the real aims, of its activities should be avoided, for they might be thought too abstract.

8. With general reference to the draft articles submitted by the Special Rapporteur, he considered that article 6, which had been called in question by many members of the Commission, should convey unequivocally that immunity was a rule *per se*, separate from the articles which would follow. Article 7 would gain from being simplified, particularly by the deletion of paragraph 3, which referred to a concept already expressed in article 3, subparagraph 1 (a) (iv). Article 9 could also be simplified, as Mr. Lacleta Muñoz (1711th meeting) in particular had proposed. It might also be advisable to form a single paragraph from paragraphs 4 and 5 of that article, linking the two parts by a phrase such as "On the other hand ...". Article 10 was acceptable, subject to a few drafting changes.

9. Mr. MALEK remarked that, at the 1710th meeting, Mr. Lacleta Muñoz had ascribed to him the view that

the jurisdictional immunity of States had not been recognized as a rule of international law. In fact, the opinion which he himself had expressed on such immunity at the 1709th meeting had simply been that, while there might be no room for doubt as to the existence of a rule of international law embodying the notion of State immunity, the universality of that rule was open to question. He had used the term "might" to point up the relative nature of his statement. That word would certainly not have been necessary if the matter at issue had, for example, been any of the immunities recognized to diplomatic agents. Since the constitution of the modern international community into independent and legally equal states—in other words, since well before the conclusion of the 1961 Vienna Convention on Diplomatic Relations—States maintaining diplomatic relations had granted each other the generally-accepted diplomatic immunities. Such widespread and unopposed practice represented the application of a customary rule of law of a universal nature. He wondered, however, whether the same could be said of the jurisdictional immunity of States? Could it be categorically affirmed that such immunity was a rule of international law applicable to all States, when many States neither accepted nor applied it and while much doctrine, whether old or new, did not recognize it as international law?

10. Those considerations explained his caution in subscribing to the opinion that State immunity was a customary rule of international law. Such a rule did undoubtedly exist, regardless of individual conceptions of the real value of its social or inter-social function; it existed by the very fact that large numbers of States had been making constant use of it in their practice for some time. It could not, however, be maintained, without risk of error, that it was a universally recognized rule, as was the case with diplomatic immunity. It was a rule of manifestly limited territorial scope: after having first been restricted to a few countries, particularly European countries—which had, furthermore, only begun to apply it during the past century—it has subsequently been introduced into the other continents; but under what conditions, and to what extent?

11. The Special Rapporteur had made an effort to furnish the Commission with the information to enable it to solve, in the interests of all States, the problems attendant on the elaboration of the draft articles under consideration. He had been concerned to make the geographical scope of his research as great as possible. In studying in his fourth report (A/CN.4/357) the judicial practice of States with regard to commercial activity, he had stressed that his inquiry was not confined to the practice of industrialized countries of the Western world, but was intended to cover all States generally, adding that "In any event, the Special Rapporteur is not expected to supplement want of judicial decisions with his own inventions or speculations" (*ibid.*, para. 55). In fact, the information provided concerning thirteen or fourteen countries, not all industrialized, revealed the attitude of national

⁵ *International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 161.

⁶ United Nations, *Treaty Series*, vol. 575, p. 159.

jurisprudence to the commercial activities considered as exceptions to State immunity.

12. Whatever the case, the somewhat special circumstances surrounding the preparation of the draft articles under consideration should rather serve as a stimulus. Once established, the draft would provide States with uniform and universal rules, some of which would or should govern the jurisdictional immunities of States. As early as 1949, when it had included the subject in its list of fourteen topics for codification, the Commission had recognized that, despite the difficulties which it might occasion, State immunity was a suitable matter for codification.

13. Mr. KOROMA commended the Special Rapporteur on his report. The topic of jurisdictional immunity was one of increasing importance, in particular for developing countries, where problems of poverty, health and education had occasioned a state of emergency of a magnitude similar to that brought about by war and necessitating intervention by public sectors in the market-place in order to ensure nations' survival as independent States. The Secretary-General of the United Nations himself had referred to that phenomenon. Consequently, the issue was not one of ideology, or of involvement of sovereign States in the market-place for motives of profit alone. In that regard, he agreed with Mr. Yankov (1710th meeting) that any universally acceptable and viable regime must cater for all social and economic conditions and for all socio-economic and legal systems.

14. For that reason, the numerous domestic cases cited by the Special Rapporteur in his report remained unpersuasive, since their point of departure and philosophy did not always coincide with those of the developing countries. A case in point was that of *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria*.⁷ Admittedly, the Special Rapporteur had merely advanced those cases as examples of practice within the international community. Nevertheless, the philosophy underlying most of the decisions was not universally valid.

15. The point at issue was one of two sovereignties—territorial competence and sovereign immunity—and the relationship between them. He agreed with the view expressed by Mr. Ushakov (*ibid.*) in that regard, namely that one sovereign State could exercise jurisdiction within the territory of another sovereign State only by licence or permission. An important concomitant of that principle was the exclusion of the foreign State from the jurisdiction of local courts and local law-enforcement agencies.

16. The basic principle that a State was immune from the jurisdiction of another State was well established. Although, as Mr. Malek had pointed out, jurisdictional immunity derived from diplomatic immunity, it had become a universally accepted principle of international law in its own right. The question, then, was not the ex-

istence of the principle itself, but whether the scope of immunity was absolute or restrictive. While there was nothing absolute about jurisdictional immunity, in that it was recognized that consent must be given to one sovereign State to operate in the territory of another and that immunity could be regulated or waived, there was no rationale for the so-called principle of restrictive immunity, nor had that principle been clearly defined. While the rationale of practicality put forward by Mr. Njenga (1711th meeting) could be accepted as valid, it was also true that no self-respecting State would wish to find itself in the position of pleading jurisdictional immunity whenever it was in breach of a contract. In an age of mutual interdependence, any State acting in that way would find its trade relations in difficulty. Nor was the element of reciprocity alone sufficiently viable or predictable to serve as a basis for any regime.

17. The Commission should start from the premise that the principle of one State being immune from the jurisdiction of another State existed, and that it harmonized the elements of territorial competence, sovereign immunity and the consent of one sovereign State to allow another to operate within its territory. However, since the territorial State remained competent, a treaty between the two States could be concluded setting out the categories of activities to be subject to local jurisdiction. Such an approach would eliminate the arbitrary distinction between *acta jure imperii* and *acta jure gestionis*.

18. It was to be hoped that the views of developing countries on the issue would be canvassed further, so that the regime which emerged would be truly universal and viable.

19. Mr. OGISO agreed with the approach adopted by the Special Rapporteur in beginning by stating the general principles of State immunity and then setting out the exceptions to that immunity in part III of the draft articles.

20. Referring to draft article 6, he said that, in his view, State immunity constituted a general principle of international law and, although Japanese courts had previously expressed views based on the concept of absolute immunity, the Japanese Foreign Ministry and academic circles in Japan were currently leaning towards the idea of restrictive immunity. In considering the wording of draft article 6, the Commission should take account of the relationship between the principle and the exceptions set out in part III of the draft. When it took up the question of exceptions, the Commission might have to consider the grey area between what clearly fell within the ambit of State immunity and what were clearly exceptions to it. Consequently, if the Commission decided at the current stage to adopt a wording such as that proposed by Mr. Yankov (1710th meeting), which, by the deletion of the words "in accordance with the provisions of the present articles", clearly leaned towards the principle of absolute immunity, it might prejudice any future consideration of the exceptions to immunity, in particular as far as grey areas were con-

⁷ See 1708th meeting, footnote 23.

cerned. Moreover, in paragraph 6 of his fourth report (A/CN.4/357), the Special Rapporteur himself recommended that the wording of draft article 6, even if adopted provisionally, should be left open to review at a subsequent stage. Again, paragraph 27 of the report seemed to indicate that the Commission should review draft article 6 after it had completed the general review of the exceptions. It was his hope, therefore, that, if draft article 6 was referred to the Drafting Committee, it would be on the understanding that it would be subject to review after the Commission had considered part III of the draft articles.

21. With regard to the source materials cited by the Special Rapporteur in connection with exceptions to State immunities, he noted that no reference was made to the practices prevailing in socialist countries. Japan, for example, had concluded a commercial treaty with the USSR containing a provision to the effect that commercial contracts concluded by the trade representative attached to the Soviet Embassy should be excepted from State immunity.⁸ Perhaps similar provisions existed in commercial treaties between the socialist countries and other countries with different social systems. Information on the practices of the socialist countries with regard to trading activities could prove to be very useful to the Commission in its consideration of the topic and, in particular, of part III of the draft articles.

22. Mr. EL RASHEED MOHAMED AHMED commended the Special Rapporteur on his report and endorsed his general line of approach.

23. The general rule of State immunity in international law derived from the personal immunity of the monarch, in which regard the law was well established. With the increase in inter-State transactions, however, the rule had been extended to Governments and their representatives in host countries. Subsequently, as the activities of Governments had grown, State practice had started to fluctuate between unlimited and qualified immunity, but not in any coherent way. That fact was well reflected in the differing practice of States and in the conflicting judgements delivered by municipal courts, even within the same country. As Mr. Riphagen had stated (1708th meeting), existing rules of international law could not really provide a ready answer to the problem, and it was not possible to give exhaustive treatment to immunity and jurisdiction in terms of rights and obligations. That was as it should be, since international law tended to be couched in hortatory rather than mandatory language. There was, however, already a recognized trend towards a rule of qualified immunity: whether that trend was acceptable to everybody was a matter of conjecture, but there was always room for compromise.

24. The distinction between *acta jure imperii* and *acta jure gestionis* was not clear, as the Special Rapporteur had noted in his fourth report (A/CN.4/357, para. 41).

⁸ Treaty of Commerce between Japan and the Union of Soviet Socialist Republics, signed at Tokyo on 6 December 1957, annex, art. 4 (United Nations, *Treaty Series*, vol. 325, p. 86).

Mr. Ushakov's point (1709th meeting) was well taken: could the State have two faces? Would the commercial attaché who enjoyed diplomatic immunity under the Vienna Convention on Diplomatic Relations be subject to the municipal jurisdiction of the State to which he was accredited? Mr. Njenga (1711th meeting) thought not; the State had only one face, but sometimes acted as an individual. Where, however, was the line to be drawn? Other tests had been suggested—for instance, that it was necessary to look to the nature of the transaction, or to the purpose of the transaction with a view to determining whether that purpose was public or non-public. The "nature of the transaction" meant its commercial or non-commercial nature, which, according to some, was readily identifiable and easily understood. He did not agree, for in law, if not in common parlance, the issue was one which gave rise to a host of problems. For instance, did commercial or trading activity mean trading for profit? Could every transaction for profit be termed a commercial or trading activity? What of "strategic goods or commodities"? The Sudanese Government, for example, had a monopoly of certain strategic commodities such as sugar, flour and petrol. Could such a monopoly be dubbed commercial, if commercial were taken to mean motivated by profit or if the transaction was of a speculative nature, to borrow the phraseology of the Cour d'Appel of Paris, as cited in the Special Rapporteur's fourth report (A/CN.4/357, para. 64)? If the commodities in question were not always available, it could give rise to a breach of the peace. The Government therefore took the action it did, which included the import by public corporations of the commodities in question, to ensure their supply.

25. In the Sudan, the courts followed the English common law in general and were guided, but not bound, by the English precedents. While he knew of no decided case on State immunity, the situation would not be dissimilar to that of any common-law country. In practice, it was a question of "easier said than done". That applied even to the major policy statements of the super-Powers, for the reason that there were a host of factors to be taken into account in the international arena. It had been seen how former President Carter had wavered in the human rights campaign that had been a cornerstone of his foreign policy.

26. To cite an example from the Sudan, an English construction company called Turriff had entered into a contract with the Ministry of Public Works for the erection of new houses in which people were to be settled following the completion of the Aswan High Dam. A dispute had arisen over performance and that dispute had been submitted to arbitration. The Sudan Government having refused to participate further, an *ex parte* award had been made in favour of Turriff. The interesting point was that the company had sought an attachment order before the Hague District Court against the vessels of the Sudan Shipping Line, which was owned jointly by the Government and the Bank of Sudan. In the event, no proceedings for attachment had in fact been taken, but had they been, the Government of

Sudan had decided to plead immunity. He mentioned that case as an indication of how matters could go awry even when a transaction was said to be commercial. It had already been seen how the courts could be influenced by declarations of policy or official circulars. Even when left to their own devices, the courts tended to seek guidance, for example, regarding admission of evidence.

27. In his view, neither limb of the definition laid down in article 2, subparagraph 1 (f), would do much to dispel the difficulties to which he had alluded. There were, however, two possible solutions: to adopt the test used by the Supreme Court of Austria,⁹ namely, was the act such that it could not be performed by a private individual, in which case it would attract jurisdictional immunity; or to adopt the rule adumbrated in the recommendations of the Asian-African Legal Consultative Committee,¹⁰ namely, that a State trading organization which was a separate legal entity under the municipal laws of the mother country should not be entitled to immunity in the State where it carried on its activities. The second of those choices was to be preferred, since it was the more realistic and gave rise to less obvious problems.

28. Turning to draft article 4, he asked how it was possible to guard against an overlap with the Conventions referred to in that article. Bearing in mind the definition of the expression "trading or commercial activity" laid down in article 2, subparagraph (1) (f), a number of acts would be covered by that expression, such as services rendered, rentals, electricity and water supply. Default on payment of rent by diplomats was now giving rise to serious debate in certain places. What was the remedy of the landlord? If it were known that the sending State paid for the diplomat's lodging, could the conduct of the diplomat in that regard be attributable to the sending State? Were such acts excepted under article 31, subparagraph 1 (a) of the Vienna Convention on Diplomatic Relations? What would be the position if it were alleged that the property was held on behalf of the sending State for the purposes of the mission? It was clear, from such cases, that overlap was a very real possibility which called for further scrutiny.

29. Execution of the judgement obtained by the municipal courts as against the agency or instrumentality of a foreign Government was bound to give rise to difficulties. The draft articles, however, were silent on the matter. Little was known of State practice, although the Commission had been referred to the treaty practice of the USSR. It had been told that, where valid, execution might be levied only on the outstanding claims and goods that stood to the credit of the trade delegation concerned. That, however, begged the question: what if they did not suffice to compensate the claimant? It had

rightly been said that there was no point in seeking a right that could not be enforced.

30. Lastly, he agreed that, in so far as it purported to state a general principle of State immunity, draft article 6 was acceptable, although it needed to be redrafted. Draft article 11 could be discarded, although its terms could be accommodated within draft article 6. Care should be taken to avoid giving an exhaustive list of exceptions and, as Mr. Jagota had stated (1711th meeting), exceptions should not be allowed to become the rule. Care was also required with regard to the question of consent in draft article 7, which could also give rise to difficulty.

31. Mr. FLITAN said that the Special Rapporteur's fourth report (A/CN.4/357) was a work of great scientific value on a difficult subject. The need to define the content of international law in connection with the jurisdictional immunities of States and their property derived particularly from the fact that some judicial or arbitral decisions and some international conventions concerned that immunity as it was provided for in international law. For example, article 50 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character provided, in paragraph 2, that, when he led a delegation to an organ of an international organization or to a conference convened by an international organization, a Head of State enjoyed in the host State or in a third State, in addition to what was granted by that Convention, the facilities, privileges and immunities accorded by international law to Heads of State. As the basis of its work, the Commission could take the Special Rapporteur's conclusion (*ibid.*, para. 68) that the qualification of State activity as "sovereign" and "non-sovereign" must in principle be made by national law of the forum, since international law contained no criteria for making that distinction.

32. It seemed from the discussions that most members of the Commission thought that there was a principle of international law concerning the jurisdictional immunity of States and their property. In his view, the existence of that principle should be recognized in the draft, but more should be done in that respect than to amend a few words in article 6 or delete paragraph 2 of that provision. Article 6 should be supplemented so as to show clearly what was that meant by the fact that jurisdictional immunity was a principle of international law. Since his country's law was broadly based on French law, he had always considered the question in the perspective of the celebrated case *Gouvernement espagnol v. Casaux* (1849)¹¹ mentioned by the Special Rapporteur (*ibid.*, para. 62). In that case, a State's jurisdiction had been defined as "a right inherent in its sovereign authority, which another Government cannot arrogate to itself without running the risk of adversely affecting their respective relations".

⁹ Decision of the Supreme Court of Austria of 10 February 1961 in the case *X v. Government of the United States* (text reproduced in United Nations, *Materials on Jurisdictional Immunities ...* (see footnote 2 above), p. 203).

¹⁰ See 1708th meeting, footnote 13.

¹¹ Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine*, 1849 (Paris), part 2, p. 9.

33. Account must also be taken of the work of codification which had given rise to the four Conventions mentioned in draft article 4. Some members of the Commission had been concerned to know whether the jurisdictional immunity of States had preceded diplomatic and consular immunities. In view of the development of the structure of States, he supposed that problems of immunity must have arisen first with regard to sovereigns or Heads of State. Subsequently, the existence of diplomatic missions, consular missions, special missions and missions of representation to international organizations and conferences had led to a large-scale codification movement which had resulted in the expression of general agreement in the Conventions to which he had alluded and by which the Commission should be guided throughout the preparation of the draft articles. Draft article 3 defined the expression "foreign State" as including the sovereign or Head of State and the central government and its various organs or departments. For him, it was inconceivable that any of those entities should enjoy, in their relations with another State, a legal status other than that laid down with regard to jurisdictional immunity in the four Conventions in question. It was therefore indispensable to keep those instruments in mind and to refrain from contradicting their provisions concerning jurisdictional immunity, since they represented what States considered to constitute international law.

34. At the start of its work, the Commission had repeatedly stressed that it would have to study the jurisdictional immunity of States in the light of the evolution of international relations, particularly the predominance of international commercial activities. Some members of the Commission had rightly pointed out that international trade was of vital importance for all States, whatever their political and social organization. He hoped that in the future the Commission would respond specifically to that implicit appeal. In his country, the main means of production had been nationalized and entrusted to legal entities which had acquired, by law, the right of direct administration. Their estate was separate from that of the State; they could not be held responsible for the State's activities, and vice versa. Each of them could engage in foreign trade activities, conclude contracts with States and take part in international co-operation. To take due account of such developments in international life, the Commission should perhaps provide for two forms of distinction. A distinction *ratione personae*, depending on their status, would apply to persons engaging in international relations with a foreign State and it would be obligatory to follow international law as already codified with respect to all those who, in their capacity as sovereign, Head of State, head of Government or other position, exercised State sovereignty. In the case of State organizations or machinery involved in State activities, the distinction would be made *ratione materiae*. It would then be possible to identify exceptions like those deriving from commercial activities. Since the latter sphere embraced all kinds of activities, the Commission would have to continue studying practice and doctrine and to

invite Governments to continue furnishing observations and comments.

35. Mr. BALANDA said it was his impression that article 11 duplicated article 6, since both stated the principle of jurisdictional immunity and its corollary, the obligation to give effect to it. A choice should therefore be made between the two provisions. Subject to what he had said at the 1710th meeting about article 6, he considered that article 11 could be deleted, since it only repeated the content of article 6. If article 11 were maintained, it should embody the rule of jurisdictional immunity, the existence of which the Special Rapporteur had finally recognized in his fourth report (*ibid.*, para. 14). It might then read along the following lines:

"Subject to the provisions of the present part, States are not subject to the jurisdiction of other States".

36. Bearing in mind State practice as presented by the Special Rapporteur, and notwithstanding the comments made in that respect by Mr. Ogiso, it seemed that States recognized some exceptions, apparently mainly within the sphere of commerce, to the principle of jurisdictional immunity. In that connection, the Commission should above all, seek to define the notion of acts of commerce (*actes de commerce*), for which States used a number of expressions such as "trading operations", "commercial activities" or "commercial transactions". A definition as precise as possible, but broad enough to cover activities of a financial or industrial nature, would be required.

37. When he had inquired into the basis of jurisdictional immunity, Mr. Njenga (1711th meeting) had stressed the concern with assimilating States to individuals in international commercial relations. When a State came to perform the commercial activities which a person could perform, it should not enjoy jurisdictional immunity. In his own opinion, that concern for assimilation and equality should not be taken too far. Firstly, unlike an individual, a State enjoyed not only jurisdictional immunity but also immunity from execution. Secondly, even in domestic law, where a similar trend was apparent, an effort had been made to limit the scope of the State's *imperium* to the benefit of the individual. French-based administrative law, however, recognized at least the theory of the governmental act (*acte de gouvernement*), the effect of which was to remove from the sphere of control of courts certain activities which Governments might perform. Consequently, in the case of an act of commerce, which most of the Commission's members felt should be the main exception to the rule of jurisdictional immunity, there would be other elements to be taken into consideration when the activity concerned an individual or a State. In domestic law, where the notion of an act of commerce was sometimes defined in the commercial code, a presumption of commerciality attached to such acts: when an individual, whether a natural person or a legal entity, performed an act qualified by the code as commercial, he became a trader. Was the same true of the

State? The objective criterion proposed by the Special Rapporteur, that of the nature of the act, was of course, relevant, but it was not sufficient. Other criteria, such as purpose, must also be considered.

38. It was surprising that the Special Rapporteur should have stated in his fourth report (A/CN.4/357, para. 31) that, in the circumstances falling within any of the accepted exceptions, the rule of State immunity as an obstacle to the exercise of jurisdiction was "obviated or removed". In fact, it was never obviated since, if the act performed fell into the category of the accepted exceptions, immunity was always completely removed.

39. In the report (*ibid.*, para. 43), the Special Rapporteur also referred to the theory of implied consent "to submit to the exercise of jurisdiction by the sovereignty controlling the territory into which a foreign State has transplanted itself". In his opinion, that theory was not absolute; it could be set aside under the rules of private international law, particularly in the name of freedom of will. It was accepted that, in a legal relationship containing an element of foreign origin, the parties could refer to the jurisdiction of a State other than that where the commercial activity had taken place.

40. Referring to draft article 12, he observed that the words "In the absence of agreement to the contrary", with which paragraph 1 of that provision began, seemed to exclude the exception. The parties would thus be enabled to stipulate that, in a specific relationship, any acts of commerce they performed would enjoy jurisdictional immunity even though it might be generally accepted that jurisdictional immunity could not be invoked in such a case. To permit States to depart from that rule would be a step towards the negation of the exception it was wished to assert. With regard to the words "being an activity in which private persons or entities may there engage", it was, as Mr. Ushakov had observed (1709th meeting), difficult to envisage a State acting with or without its *imperium*; the State should be taken as such. He could readily imagine, however, that a State could act as a private person. By retaining the present wording of article 12, paragraph 1, the Commission would sustain the controversy between the act performed *jure gestionis* and the act performed *jure imperii*. That criterion had still not been definitively adopted by the courts and the relevance of certain decisions—such as that in *Montefiore v. Congo belge*,¹² which the Special Rapporteur had cited (A/CN.4/357, para. 66) was open to question.

41. With respect to article 12, paragraph 2, he was surprised to see a reservation made for transactions concluded between States and contracts concluded on a government-to-government basis. States and Governments could effect transactions and conclude contracts among themselves just as private persons could. If the operations in question were commercial, they fell within a sphere where an exception was recognized and there seemed no reason to exclude them from its scope.

¹² *International Law Reports*, 1955 (London), p. 226.

42. The Commission should avoid delay over doctrinal problems deriving from differences between legal systems. The guiding factor should be State practice. While the principle of jurisdictional immunity no longer seemed in dispute and was accepted in practice, with a few exceptions, it must be stated in carefully-selected terms so that its expression would gain general acceptance.

43. Mr. NI was grateful to the Special Rapporteur for having introduced in his fourth report useful amendments to certain draft articles submitted in his third report.

44. With regard to article 6, many members of the Commission seemed to think that the jurisdictional immunity of States constituted a rule. Some considered, however, that the sovereignty of the territorial State was essential and that reciprocity should be the basis. The Special Rapporteur was right in proposing to keep in article 6 the words "in accordance with the provisions of the present articles" for the time being. Jurisdictional immunity was nevertheless the principle.

45. The various drafting suggestions made by such members of the Commission as Mr. Yankov, Mr. Jagota, Mr. Calero-Rodrigues and Mr. Al-Qaysi could constitute variants to be chosen at a later stage. But to say that article 6, as it stood now, implied a denial of State immunity would be an unnecessary over-apprehension. It would be better not to take a final decision on the matter immediately. Unless the Special Rapporteur could find better wording or the Commission could choose a constructive proposal among those already submitted, the present formulation should not be an obstacle to the continuance of the discussion on the articles which follow. He himself thought it preferable not to modify article 6 for the time being.

The meeting rose at 6. p.m.

1713th MEETING

Tuesday, 25 May 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT
ARTICLES³ (*concluded*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that the discussion on the topic of the jurisdictional immunities of States and their property attested to the fact that there had indeed been a need to enlarge the Commission, for the new composition was a true reflection of the healthy State of the development of international law. It was particularly gratifying to note that the Commission agreed with the general structure of the draft articles and endorsed the inductive method advocated by the General Assembly in the Sixth Committee.

2. Following the presentation of the preliminary report,⁴ it had been decided that emphasis should be placed on general principles before proceeding very carefully to deal with the exceptions to immunity. At an earlier session, Mr. Reuter had stated a preference for the word "rule" rather than "principle", but the Commission had opted for the expression "general principles", which had accordingly become the title of part II of the draft. There would, however, be no difficulty in using another expression such as "general provisions" if members so wished, although "general principles" seemed both practical and useful for the time being.

3. A basic point concerned the nature of sovereign immunity. Was it a principle or was it an exception to another more fundamental principle? Mr. Thiam (1710th meeting) had rightly observed that the title to the topic meant, in effect, jurisdiction over foreign States. Since the fundamental rule was one of sovereignty, of which jurisdiction was merely an attribute, immunity signified immunity from the jurisdiction and was therefore but an exception to the general rule. The territorial State was supreme within its own territory. One school of thought held that the norm lying at the root of all other rules of international law was *pacta sunt servanda*. Nevertheless, his own view was that Mr. Thiam was more correct. Surely, sovereignty was more fundamental, for *pacta sunt servanda* was merely a rule that expressed the sovereign will of the State. Mr. Ushakov (1709th meeting) also was right in inferring that the sovereign equality of States was the basic issue.

4. With regard to the source material cited in his fourth report (A/CN.4/357), he had earlier suggested,

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ *Yearbook ... 1979*, vol. II (Part One), pp. 227 *et seq.*, document A/CN.4/323.

in his preliminary report,⁵ that the Commission should examine a variety of sources of international law, including not only the decisions of municipal courts but also national legislation, Government practice, the practice of agencies of all kinds, the writings of publicists, and treaties and textbooks, although he had also recognized that it was neither possible nor desirable to examine all the decisions of each and every State. Mr. Yankov (1710th meeting) had suggested that special attention should also be paid to the practice of the developing and the socialist countries, while other members had advocated that the Commission should aim at a measure of universality by drawing up rules of law that would be more harmonious in terms of the different legal systems.

5. The significant increase in the membership of the United Nations over the past twenty to thirty years had to be borne in mind. In the context of international practice as established in the nineteenth century, the first of the classic cases—*The Schooner "Exchange" v. Mcfaddon* (1812)—had been a miracle, for at the time it had been less than forty years since the United States of America had attained independence. It had in fact been an extra-European judicial decision, but had not been followed by the European courts, which had arrived independently at a similar decision. With reference to the nineteenth century, it had only been possible to examine the case law of certain European countries and the United States. Most Latin American countries had been busy struggling for independence, and it was difficult to find cases from Africa in that period. As for Asia, many countries there had been subjected to a capitulation regime. Even Japan had been obliged to sign a treaty subjecting itself to such a regime. It was scarcely possible to have a decision from Asia that recognized the principle of sovereign immunity at a time when foreign nationals were not only immune from the jurisdiction but even from the law. He had also had recourse in his research to textbooks. While there were a number in Europe, he had discovered only two in Asia, one on the legal status of aliens in China (1912)⁶ and the other on the immunities of State ships (1924).⁷

6. International law was not more universal in character because, when it had first been formulated following the Peace of Westphalia (1648), international law-making had been largely the province of Europeans. That indeed was the reason for General Assembly resolution 2099 (XX) of 20 December 1965 on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law. Fortunately, much progress had been made in the meanwhile and the situation had notably improved.

7. During his studentship under Sir Humphrey Waldock, then editor of the *British Yearbook of Inter-*

⁵ *Ibid.*, chap. II.

⁶ V. K. W. Koo, *The Status of Aliens in China* (New York, Columbia University, 1912).

⁷ N. Matsumani, *Immunity of State Ships as a Contribution towards Unification of the Laws on the Subject* (London, Flint, 1924).

national Law, over a quarter of a century ago, he had been asked to assist in looking for relevant cases from Asia and other parts of the world. He had also contributed reports on cases from Asia to the *Annual Digest of Public International Law Cases* under the editorship of Sir Hersch Lauterpacht. A number of searches had been made for cases from such countries as China, Japan, Thailand and Burma. Some had been found, but not as many as would have been desirable. Of the cases brought to his notice, he had listed in his report only those which were illustrative of the points at issue, in keeping with the criterion adopted for the selection of the materials. In fact, the problem of source material had been a matter of major concern not only to him but also to the Secretariat, which had circulated to United Nations Members a questionnaire asking for source material, cases and legislation. Some thirty countries had supplied material, some of which had already been published in the Legislative Series.⁸

8. It was apparent from the cases cited that virtually every developing country had been a party to a claim for jurisdictional immunity before the courts and, in that sense, the cases afforded a measure of universality, although not necessarily from the point of view of practice. No information had been received from Spain, but Mr. Laclata Muñoz (1710th meeting) had been able to advise the Commission that decisions on the issue had been taken only in the lower courts and not by the Supreme Court. Mr. Ogiso (1712th meeting) had also helped to supplement the information provided by confirming that judicial decisions revealed a trend towards a more restricted immunity. He himself had noted that the comparative law technique was now being used even by municipal courts which would normally have adhered to their own national precedents. Furthermore, in the common law doctrine of precedent, the English courts had become more flexible over the past decade and referred to decisions from other jurisdictions.

9. On the question of practice, the Secretariat had been of great assistance in providing him with more than thirty treaties from the USSR alone and was conducting research into a number of other treaties. Bearing in mind Mr. Yankov's remarks (1710th meeting), he had also studied decisions from the socialist countries but had found relatively few cases since the Revolution, in view of the nature of the disputes that had arisen. In Europe and the United States of America, proceedings were generally brought by private individuals and corporations. It would be difficult for an individual in a socialist country to bring proceedings against a foreign State and, where they were instituted by a State agency or State corporation, most of the cases involved arbitration or negotiation at a higher level. That provided a partial explanation for possible defects in source material, but he much regretted that it had not been possible to meet the requirement of universality in the matter.

10. While Mr. Ushakov (1709th meeting) was quite correct, legally speaking, in stipulating for a principle of international law on sovereign immunity based on the sovereign equality of States, other legal bases had also been advanced, such as independence, political co-operation, friendly relations and international comity. There was no difference of opinion on jurisdictional immunity as a principle of international law, and the only concern was to vest that principle with a universal character. "Universality" was a difficult term, and many arguments had been adduced in its name—above all else the argument that certain concessions would have to be made in order to achieve it. As a servant of the Commission, he was simply endeavouring to accommodate all views. He agreed in particular on the need to view matters from the standpoint of the territorial State, but he also believed that every territorial State had a right to claim sovereign immunity. Those were in fact two sides to the same coin: every State was both a territorial State and a beneficiary of a State immunity. By diversifying his research, he trusted that it would be possible to give a universal character to the rules of international law on the subject.

11. With reference to the statement of principle set forth in article 6, he expressed gratitude to all those members who had helped to dispel the doubts and hesitations. It was his hope that, ultimately, after all the exceptions had been examined, the principle would prove to be more than a hollow shell.

12. Mr. Riphagen (1708th meeting) had pointed out that the terms of the Commission's analysis of rights and obligations were perhaps too absolute. The Commission, in its approach to the topic, could not afford to be too absolute, since everything was relative, including immunity itself as a notional concept. Mr. Riphagen had also spoken of the existence of a grey area, a point with which many members agreed. Regrettably, he had been unable to give effect to Mr. Riphagen's suggestions by identifying areas where there was agreement on what constituted sovereign acts and on what amounted to non-sovereign acts. The existence and the minimum content of a principle of immunity posed no problems, but its scope and extent did. That accounted for a certain inconsistency in the dicta he had cited in his report and, inevitably, the conclusion had to be drawn that sovereign immunity could not be viewed as absolute.

13. Again, the theory of the dual personality of the State was not universally accepted and a number of writers found it untenable. Professor Lauterpacht had proposed the abolition of State immunity, but had suggested four exceptions: legislative acts, administrative acts, cases of diplomatic immunity, and State contracts that lay outside the jurisdiction under the rules of private international law. For his own part, he had been somewhat wary of pursuing such a line, quite apart from the difficulties inherent in identifying each and every exception. To take the case of legislative acts, for example, if the court's decision was to turn on whether there was a law on the subject, the test would become very formal and would not help at all. The same type of

⁸ See footnote 2 above.

controversy that now existed would be prolonged in every case of a sovereign act. Mr. Riphagen was right to affirm that there was a minimum rule of jurisdictional immunity and, beyond it, a grey area in which immunity might or might not be granted. It was possibly in that border area that practice should be scrutinized and inductive methods should be used to see whether the Commission could reach agreement on a recommendation regarding exceptions and how to formulate them in a generally acceptable manner.

14. Mr. Ushakov (1709th meeting) had raised the question of a possible overlap between State immunity and diplomatic immunity and had referred in that connection to article 31, subparagraph 1 (c), of the Vienna Convention on Diplomatic Relations. From an examination of State practice, it was clear that cases involving diplomatic and sovereign immunity dated back to the early eighteenth century and writings on the subject as far back as the year 1600. Ambassadors had been granted immunity in respect of their trading activities on a twofold basis, first, on that of *ratione personae*, so that they were exempt from the civil and criminal jurisdiction and, secondly, on the basis of *ratione materiae*. A number of classic cases made it clear that immunity on the basis of *ratione personae* also applied with respect to the personal and private activities of the ambassador, but only during his term of office. That was clear, too, from the second sentence of paragraph 2 of article 39 of the Vienna Convention. A case decided in 1867 before the Cour d'Appel de Paris⁹ involving a Russian diplomat had required the intervention of the Avocat Général, who had appeared as *amicus curiae* to plead absolute immunity, even for acts labelled as commercial acts under the Code de Commerce, on the grounds that the personal immunity of the diplomat remained intact. The Avocat Général had argued for immunity and the Court had accepted his argument. Italian case law had fluctuated on the application of immunity to the private and trading activities of ambassadors. In one case decided in 1922,¹⁰ the doyen of the diplomatic corps in Rome had presented a protest against the Italian decision and, referring to that protest, the Supreme Court had, nearly twenty years later, decided to grant immunity to ambassadors even with respect to their private trading activities. At the same time, however, an Italian law was introduced prohibiting Italian diplomats and ambassadors from trading. In England, a higher court had explained in 1735 that an exception in the case of trading contained in a law of 1708¹¹ had never been intended to apply to ambassadors, since the legislators had not foreseen that ambassadors would engage in trading.

⁹ *Tchitcherine et le Ministère public v. Pinet* (Sirey, *Recueil général des lois et des arrêts*, 1868 (Paris), part 2, pp. 202-203).

¹⁰ *Comina v. Kite* (*Annual Digest of Public International Law Cases, 1919-1922* (London), Case No. 202, p. 286).

¹¹ *Statute of 7 Anne* (1708), chap. XII: "An Act for Preserving the Privileges of Ambassadors and other public Ministers of Foreign Princes and States" (United Kingdom, *The Statutes at Large of England and of Great Britain* (London, Eyre and Strahan, 1811), vol. IV, p. 17).

15. He mentioned those facts merely to underline the very strong reasons for maintaining absolute immunity in the case of the private trading activities of ambassadors. Mr. Ushakov (1710th meeting) had asked whether a commercial attaché who was acting outside the scope of his official duties would benefit from diplomatic immunity. The answer was that immunity had been waived to some extent in cases of that kind. The Commission would also have to decide whether the draft articles on State immunity overlapped with or should apply to the other conventions. There was a large body of practice not only in the judicial but also in the quasi-judicial sphere, and much would be learned from studying it. The best course, however, would be to identify each issue and tackle it as and when it arose.

16. He agreed with the views of a number of speakers that the interests of all countries, in particular the developing countries, must be taken into account. Given the circumstances in which those countries found themselves and the pressure exerted on them to sign development contracts, further consideration must also be given to the purposes, rather than simply the nature, of their activities. The interests of developing countries lay not only in asserting their territorial sovereignty, but also in asserting their sovereign immunity from foreign jurisdiction in appropriate cases. In State contract practice, developing countries were often required to sign contracts waiving their immunity beforehand in the event of disputes regarding the activities covered by the contract in question. Care should therefore be taken that the developing countries did not waive all their immunities. The developed countries, on the other hand, were more experienced, and their nationals investing in developing countries were protected by their own national legislation, by investment guarantee agreements and by bilateral treaties ensuring compensation for damages arising out of acts of the receiving State. There were many cases in which jurisdiction had been declined, not only on the grounds of lack of jurisdiction under private international law, but also on the grounds of non-justiciability or the political nature of the dispute. That again raised the question of whether immunity and jurisdiction were mutually exclusive or whether they overlapped. Practice in that regard was confusing and, as Mr. Riphagen had pointed out (1708th meeting), international law did not clearly prescribe what a State should do with regard to the extent of its own jurisdiction.

17. He had of course taken note of all the drafting suggestions made by members of the Commission and would consider them all in due course.

18. The CHAIRMAN congratulated the Special Rapporteur on a brilliant summing-up and, with reference to the situation at the present time, pointed out that article 6 had already been provisionally adopted on first reading, but could obviously be reviewed at a later stage in the light of the progress made in the Commission's work. At the previous session, articles 7 to 10 had been placed before the Drafting Committee, which had not had time to examine them. However, the Special Rap-

porteur had included revised versions in the fourth report (A/CN.4/357) and the Drafting Committee would therefore have to take account of the new wording and the comments to be made at the present session. Accordingly, the best course might well be to concentrate on those articles first, and then take up articles 11 and 12 before referring them to the Committee.

19. Mr. USHAKOV pointed out that, at the present session, the Commission (1699th meeting, para. 19) had deemed it advisable to consider once again articles 27 to 41 of the draft articles on treaties concluded between States and international organizations or between international organizations before referring them to the Drafting Committee. It could well do the same with articles 7 to 10 of the topic under discussion, again, for the reason that the membership of the Commission had been renewed and greatly enlarged since the previous session.

20. It had to be remembered that article 6 had been adopted on first reading but was provisional in character. Indeed, the Commission was at the beginning of its work and, discounting article 1, article 6 was the real point of departure for the entire draft. He saw no disadvantage in the Drafting Committee reconsidering the article, and it would be interesting to learn the Special Rapporteur's view in that regard.

21. Mr. SUCHARITKUL (Special Rapporteur) said that he had taken note of all the suggestions for possible improvements to the text of article 6, which he understood to have been adopted provisionally so as to enable him to proceed with his examination of the topic. He was quite willing to amend the text in any way that was deemed necessary and hoped that the article would be reviewed following consideration by the Drafting Committee.

22. Mr. YANKOV said that, in the general discussion, a number of references had been made to article 11 in connection with article 6. That was a further reason why the Drafting Committee should at least consider the relationship between the two articles.

23. Mr. NJENGA, referring to the Special Rapporteur's summing-up of the discussion, said that further clarification was needed regarding the interrelationship between the subject area covered by the draft articles and questions covered by the Conventions on Consular Relations, on Diplomatic relations, on Special Missions and on the Representation of States in Their Relations with International Organizations of a Universal Character. He had understood the Special Rapporteur to say that there would be an area of overlap between the draft articles and the provisions of those Conventions. Article 31, subparagraph 1 (c), of the Vienna Convention on Diplomatic Relations, for example, stated that any action relating to any professional or commercial activity exercised by a diplomatic agent in a receiving State outside his official functions would not be covered by immunity. Article 43, paragraph 1, of the Vienna Convention on Consular Relations stated, equally clearly, that consular officers or employees were

not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions—functions which, to a large extent, involved promoting the trading and commercial activities of the sending State. Again, similar provisions to that contained in article 31, subparagraph 1 (c), of the Convention on Diplomatic Relations could be found in article 57, subparagraph 2 (a), of the Convention on Consular Relations and in article 31, subparagraph 2 (c), of the Convention on Special Missions.

24. His concern was that, by dealing with the same areas in the draft articles, the Commission might be regarded as attempting to revise established provisions of diplomatic and consular law, something it had no mandate to do. Before proceeding any further, it should determine whether or not it was to deal with those very clearly defined areas.

25. Any members of the Commission who acted as legal advisers to their respective Governments were well aware that disputes involving diplomats constituted a problem area. In his own country, it would be impossible to take a diplomat to court, since to do so would require authorizations from the Ministry of Foreign Affairs and the Attorney General, and such authorizations would never be issued because of the very clear provisions of the various international conventions. In most cases, therefore, it was necessary to approach the foreign ministry of the diplomat concerned in order to obtain a satisfactory settlement.

26. In one recent case in Pakistan, mentioned by the Special Rapporteur in his report (A/CN.4/357, para. 89), namely, *A. M. Qureshi v. Union of Soviet Socialist Republics* (1981)¹² the issue could easily have been decided on an interpretation of the agreement establishing the trade representation office, which provided that the trade representative was responsible for carrying out State contracts in Pakistan, and could have been regarded as agreement in advance that the Pakistani courts would have jurisdiction. However, that had not been the only basis on which the courts had decided that they had jurisdiction in the case, despite the issue of a certificate by the Pakistan Minister for Foreign Affairs stating that the trade representative in question enjoyed full diplomatic privileges. In another case, *The Secretary of State of the United States of America v. Messrs. Gammon Layton* (1971),¹³ the relevant agreement provided that any dispute would be submitted through a petition. Although that could have been regarded as a specific waiver in advance, the United States had refused to submit a petition and had sheltered behind its immunities. In both instances, the courts in Pakistan had explored the whole field of the restrictive nature of State immunities and had concluded that they had jurisdiction.

¹² See 1708th meeting, footnote 20.

¹³ *Ibid.*, footnote 17.

27. Consequently, the Commission should come to an agreement if it did not wish to find itself revising established law concerning diplomatic and consular officials.

28. Mr. SUCHARITKUL (Special Rapporteur) said that, as far as the question of overlapping was concerned, the areas most directly involved were the immunity of premises of missions from search, requisition, attachment or execution. Immunity from jurisdiction had two aspects, namely, immunity from pre-trial attachment and proceedings and immunity from post-judgment attachment and execution. Article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations provided that the premises of missions, their furnishings and other property thereon, as well as means of transport of the mission, were immune from search, requisition, attachment or execution. Immunity from search or requisition related to inviolability and concerned an obligation of the receiving State, whereas immunity from attachment or execution entailed immunity from intervention by the judiciary.

29. When the Commission came to deal with the immunities of State property, it would have to draw a distinction between property assigned to public uses and property set aside for commercial purposes, a question that had already been dealt with in a number of cases. In one such case, concerning the bank account of the Tanzanian Embassy,¹⁴ the court of the receiving State had placed responsibility on the Embassy by saying that, if the Embassy wished to maintain immunity, it should divide its mixed account into two parts, one for official Embassy purposes and the other for the settlement of contracts. The court had therefore assumed jurisdiction. In that case, the receiving State had been asserting the application of *lex fori* or *lex situs*, in which connection private international law had also come into play, for the property had been considered as belonging to the territorial State and, therefore, not covered by any immunity. However, article 22 of the Vienna Convention on Diplomatic Relations provided an exception to that exception. The same was true of the Vienna Convention on Consular Relations and the Convention on Special Missions. The provisions of other conventions could also be taken into account in that regard. The area was one to which a great deal of attention must be paid. While the Conventions referred to above contained provisions for the specific matters with which they dealt, any remaining cases would have to be covered by the draft articles currently before the Commission.

30. The CHAIRMAN suggested that the Commission should consider, one by one, all the draft articles submitted by the Special Rapporteur, in other words, articles 1 and 6 and articles 7 to 12, on the understanding that, if the Commission wished to alter the wording of article 6, it would have to authorize the Drafting Committee to do so. He wondered whether the members of

the Commission wished the Special Rapporteur to introduce the draft articles formally.

31. Mr. USHAKOV said that articles 11 and 12, which were quite new, had been introduced in the context of the Special Rapporteur's fourth report (A/CN.4/357), but not on a formal basis.

32. Mr. SUCHARITKUL (Special Rapporteur) said that article 6 was a compromise text which could be improved on at the present session. A number of arguments and suggestions had already been put forward and should provide an adequate basis for the deliberations of the Drafting Committee.

33. Mr. NJENGA said that, although it had already been adopted provisionally, article 6 had already been discussed extensively by the Commission in its newly constituted and enlarged form. In view of the improvements suggested and the references to the relationship with draft article 11, the best course would be to refer article 6 again to the Drafting Committee, with a view to making it more generally acceptable.

34. Mr. AL-QAYSI said that he was in general agreement with the views expressed by the Special Rapporteur and by Mr. Njenga. Article 6 had been amply debated and the general discussion indicated that there might be good reason to refer it once again to the Drafting Committee. If so, there was no need to proceed further in the Commission itself, particularly since the key words, concerning the effect to be given to State immunity, would undoubtedly be discussed in connection with articles 7 and 11. The Drafting Committee could seek to improve the wording of the article, so as to bridge the difference of opinion regarding the point of departure to be adopted. Moreover, because articles 7 to 10 had been recast by the Special Rapporteur, there was merit in Mr. Ushakov's view regarding the order in which the articles should be considered.

35. Mr. JAGOTA said that, in re-opening consideration of article 6, the Commission might create a precedent that could well be misinterpreted. The article had been discussed extensively in the general debate and would in fact have to be probed again in the course of the examination of article 11. The Special Rapporteur himself, in his fourth report (*ibid.*, paras. 27-28), had expressed doubt as to whether article 6 could be retained in its current form, which was intended to indicate that the applicable law would be that of the future convention, rather than customary law. Even the validity of that statement could be discussed in connection with article 7.

36. As he had pointed out earlier, the need to retain article 11 would depend on the wording of article 6, since the two were integrally linked. In other words, there would be no "lingering doubts" (*ibid.*, para. 28) if article 6 was drafted differently, thereby obviating the need for article 11. Indeed, article 11 appeared in effect to be an attempt by the Special Rapporteur to revise article 6. In view of the fact that the Commission was

¹⁴ *Birch Shipping Corp. v. Embassy of Tanzania* (1980), *American Journal of International Law* (Washington, D.C.), vol. 75, No. 2 (April 1981), pp. 373-374.

newly constituted, the matter could indeed be referred to the Drafting Committee.

37. Mr. FRANCIS said that, when he had spoken in the general discussion (1711th meeting), it had been his understanding that the draft articles would subsequently be discussed one by one. Mr. Ushakov's main concern seemed to be the order in which they should be dealt with. In order to be consistent with its earlier agreement, the Commission should first discuss articles 1 and 6 and then proceed to articles 7 to 10.

38. Mr. McCAFFREY said he endorsed Mr. Jagota's suggestion regarding the procedure to be adopted in respect of article 6, which had been adopted only provisionally on first reading and would in any event be open for subsequent reconsideration. Moreover, it would undoubtedly continue to be examined, since it was linked with the substance of later articles, more particularly articles 7, 11 and 12. The matter should not be taken up again in the Commission at the present stage.

39. Mr. USHAKOV suggested that article 6 should be referred to the Drafting Committee forthwith and that the Commission should proceed to consider draft articles 7 *et seq.*

40. The CHAIRMAN suggested that, in view of the late hour, the discussion should be resumed at the following meeting.

The meeting rose at 1.10 p.m.

1714th MEETING

Wednesday, 26 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, since draft articles 1 and 6 had already been

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art.1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

adopted provisionally, there was no immediate need to re-examine them or to refer them once again to the Drafting Committee. Draft articles 7 to 10 had been recast and were still before the Drafting Committee, but it might none the less be useful to re-examine them, in order to afford new members an opportunity to express their views on them and thus assist the Drafting Committee. The Commission could then proceed to consider draft articles 11 and 12 (A/CN.4/357, paras. 29 and 121) in terms of their formulation.

2. Mr. NI said that, at its previous meeting, the Commission had been faced with the possibility of having to recommence consideration of the draft articles from the beginning. Ordinarily, as a new member of the Commission, he would have welcomed such a procedure, but considered that, in view of the years of labour on the topic, the Commission should move forwards rather than backwards.

3. Draft articles 1 and 6 were still open to review, an understandable situation, given the variety of opinions on them. However, the Commission could afford to leave consideration of those articles in abeyance for the time being and go on to consider the later articles; otherwise, it might find itself involved in a perpetual exchange of views. Indeed, the Commission had often been criticized for proceeding at a slow pace, and to reopen the discussion of articles 1 and 6, precisely at a time when they were not being considered on second reading, would lend weight to such criticism.

4. He agreed with the procedure suggested by the Special Rapporteur and proposed that the Commission should take up draft articles 7 to 12 and make such references to other draft articles as were appropriate.

5. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to the method of work suggested by the Special Rapporteur.

It was so decided.

ARTICLE 7 (Obligation to give effect to State immunity)

6. The CHAIRMAN invited the Special Rapporteur to introduce draft article 7, which read:

Article 7. Obligation to give effect to State immunity

PARAGRAPH 1—ALTERNATIVE A

1. A State shall give effect to State immunity under [as stipulated in] article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State.

PARAGRAPH 1—ALTERNATIVE B

1. A State shall give effect to State immunity under article 6 by refraining from subjecting another State to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.

2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not

named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.

3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives, or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control.

NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subparagraph 1 (a).

7. Mr. SUCHARITKUL (Special Rapporteur) said that article 7 was not simply another way of expressing the main principle of State immunity but a different aspect of the matter, namely, the duty of one State to refrain from subjecting another to its jurisdiction.

8. The words “otherwise competent ... authorities” used in paragraph 1, alternative A, had been borrowed from a number of sources, including judicial practice in India. The competence of authorities to consider a question was presumed to exist beforehand. When he had raised that point at the previous session, a number of members, particularly Sir Francis Vallat,⁴ had pointed out that, in the practice of common law countries, the pre-existence of jurisdiction was not always deemed a priority and the question of jurisdictional immunity, which came under the heading of public international law, was sometimes considered independently of the private international law question of rules of competence. The article had therefore been revised accordingly. In alternative B, the phrase “notwithstanding the existing competence of the authority before which the proceedings are pending” was also meant to convey the idea of the pre-existence of jurisdiction and of immunity as freedom from existing jurisdictions.

9. As to paragraph 2, the original text had spoken of the exercise of jurisdiction against a foreign State, but in the light of observations made by Mr. Calle y Calle⁵ had been altered to refer to proceedings against another State. Such proceedings might, in the event, be instituted against an organ or agent of the other State, or against property under its control or in its possession. In many jurisdictions, the possibility of attachment of property existed during the pre-trial period and such attachment could be carried out *in rem*, without any proceeding being taken directly against a party. For that reason, it was necessary to indicate when the obligation of a State to refrain from subjecting another State to its jurisdiction arose. If paragraph 3 was adopted, the definition of a foreign State contained in article 2 subpara. 1 (d), would be unnecessary, and it would therefore be useful for the Drafting Committee to bear in mind the views expressed by members of the Commission as to the appropriate place for such a rule.

10. Mr. EVENSEN said that he preferred alternative A of paragraph 1, with the following changes: the words “and administrative authorities” should be replaced by “or administrative and police authorities”, and the remainder of the sentence should be deleted. The wording of the paragraph would then be consistent with that of article 3, subparagraph 1 (b) (iv).

11. The text of paragraph 2 should be amended to read:

“The provisions of paragraph 1 of this article are applicable whether or not the other State is named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of determination by the competent judicial or administrative or police authorities which may affect the sovereign rights, interests, properties or activities of the other State.”

In paragraph 3, the words “In particular, a proceeding may be considered to be one against another State” should be replaced by “A proceeding may be considered to be instituted against another State”.

12. Lastly, in view of what was stated in article 7 and other articles, the definitions of “territorial State” and “foreign State” contained in article 2, subparas. 1 (c) and (d), could be dispensed with by using the terms “State” and “another State”, as in article 7.

13. Mr. USHAKOV said that, although article 7 figured in part II of the draft, entitled “General principles”, it did not in fact enunciate a principle. Paragraph 1, in each of the versions proposed by the Special Rapporteur, provided that a State should give effect to State immunity under article 6; yet article 6, which was also contained in part II, did not specify the modalities for applying the principle of immunity. Admittedly, it did set forth the principle, but contained a *renvoi* to the other articles of the draft, which embodied exceptions to that principle. What were in fact the immunities in question? Would the draft deal with all possible immunities, establishing them as a general and fundamental rule of international law that applied to State activities in all domains and to all inter-State relations, or would it deal solely with jurisdictional immunity, in other words, with immunity from the judicial system of another State?

14. He was convinced that State immunity was a thing complete in itself, even though, for the sake of convenience, it had been split up for codification purposes according to the spheres of State activity and the relations of State *inter se*, in which connection he mentioned as examples the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions. Immunity was still immunity, for all that. It was important to pinpoint the scope of the draft, namely, jurisdictional immunity, in order to avoid merely reproducing or going against the provisions of those Conventions, and to define the word “jurisdiction”, which could, for example, mean both sovereignty and judicial competence.

⁴ *Yearbook ... 1981*, vol. 1, p. 59, 1653rd meeting, para. 29.

⁵ *Ibid.*, p. 61, 1654th meeting, paras. 2-3.

15. The wording of article 7 raised numerous problems that were difficult to solve. He had in mind, for instance, such formulations as, in alternative A of paragraph 1: "by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State"; in paragraph 2: "so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, properties or activities of the State"; and in paragraph 3: "a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives".

16. For all those reasons, he was of the opinion that article 7 was entirely unnecessary: the rule of immunity was a rule on so-called international obligations "of result", and States alone were competent, under their internal law, to equip themselves to achieve that specific result.

17. Mr. THIAM said he had the impression that there was some incongruity between the title and the content of the article. From the title, one would expect the article to enunciate a basic rule, but it was purely descriptive and, as a result, the Commission could not discuss it in terms of substance. He also had some reservations about the use of the word "instrumentalities" in paragraph 3, because he could not see how a proceeding could be instituted against an "instrumentality".

18. Mr. McCAFFREY said that, although it seemed impossible to avoid alluding to article 6 in the course of the present discussion, he did not suggest that the Commission should refer that article once again to the Drafting Committee.

19. Article 7 performed a predominantly definitional function and did not accomplish anything that could not be done by amending articles 2 and 6. He agreed with previous speakers who experienced difficulties regarding article 6, particularly in regard to the phrase "in accordance with the provisions of the present articles" and the two-paragraph structure. Article 6 might therefore be amended to read as follows:

"A State and its property are immune from the jurisdiction of another State except as provided in part III of the present articles."

That wording would eliminate the troublesome phrase, state the rule more clearly and also make it applicable to State property, which was not included in the definition of a "foreign State" in article 2, subparagraph 1 (d) or specifically mentioned in the definition of "jurisdiction" contained in article 2, subparagraph 1 (g). Again, the latter definition might usefully be expanded to read:

" 'Jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, to adjudicate litigations, or to attach or affect interests in property, as well as the power to administer justice in all its aspects."

In that way, it would also cover all measures relating to property, from pre-judgement attachment to post-judgement execution. Moreover, such an expanded definition of "jurisdiction" would have a bearing not only on the broad rule of jurisdictional immunity laid down in article 6, but also on the reference in article 7, paragraph 2, to the consequences of judicial determination which might affect properties of the State. The changes he was suggesting would eliminate the need for that part of paragraph 2 and, at the same time, render superfluous the reference in paragraph 3 to a legal proceeding designed to deprive another State of its public property or the use of such property.

20. The Commission would undoubtedly have to deal with the exceptions as to property, and could well do so in part III of the draft. However, it did not seem necessary to follow the approach adopted in the United States Foreign Sovereign Immunities Act of 1976⁶ and establish separate rules for the jurisdictional immunity of State property and the jurisdictional immunity of the State itself.

21. The substance of the two alternative versions for paragraph 1 of article 7 was already implied by the words "immune from the jurisdiction of another State" contained in article 6, but if such a paragraph was held to be necessary, alternative A would be preferable, since its terms covered both judicial and administrative authorities. In that connection, he agreed with Mr. Evensen that a reference should be made to police authorities, and also proposed that the words "[as stipulated in]" and "[or]" should be deleted and that the words "[conduct] continuance" should be replaced by "maintenance".

22. The aim of paragraph 2 seemed to be to ensure that the rule of immunity could not be circumvented by not naming the other State as a party, and that proceedings would none the less be considered as being against another State—in which case the rule of immunity would apply—so long as either one of two conditions were satisfied, namely, that the proceedings had the effect of seeking to compel the other State either to submit to local jurisdiction or to bear the consequences of a judicial determination affecting its sovereign rights, interests, properties or activities. The first condition apparently referred to initial assertions of jurisdiction in the action itself, while the second could be read as referring to the enforcement of a judgement already obtained. Of course, a waiver of immunity in regard to the action itself did not carry with it a waiver of enforcement of a resulting judgement against the property of the State. Paragraph 2 could, therefore, be referring to the two situations. Like paragraph 3, it was in effect a refinement of the general principle.

⁶ See 1709th meeting, footnote 13.

23. A decision on the retention of those two paragraphs would depend on whether a detailed definition of sovereign immunity was regarded as necessary. No harm would be done by spelling out exactly what it meant for a foreign State to be immune from local jurisdiction, but one could argue equally strongly that such a course would be unnecessary in article 7 if all terms were properly defined in article 2.

24. Again, article 7 used a number of terms in the form in which they were employed in article 3, which in effect supplemented the definitions of “foreign State”, “jurisdiction”, and “trading or commercial activity” set forth in article 2. In his opinion, it was somewhat cumbersome to define the same terms in two different places and it would be better to consolidate articles 2 and 3. Thus, article 3, subparagraph 1 (a), could be added to article 2, subparagraph 1 (d); article 3, subparagraph 1 (b), could be combined with article 2, subparagraph 1 (g), and article 3, paragraph 2, could be added to article 2, subparagraph 1 (f). In that way, most of the rules stated in paragraphs 2 and 3 of article 7 would be covered by the straightforward statement in article 6 that “A State is immune from the jurisdiction of another State”.

25. The two points in paragraph 3 of article 7 that were not specifically covered by the definitions in articles 2 and 3 were, first, the term “representatives” of the foreign State, and second, the reference to depriving a foreign State of its property. In the first instance, “representatives” could easily be added to article 3, subparagraph 1 (a) (iv), as combined with article 2, subparagraph 1 (d), and in the second instance, the matter would be covered by his earlier suggestion for an expanded definition of “jurisdiction”. Paragraph 3 would then prove to be unnecessary or of only marginal use at best.

26. Lastly, assuming that the admonitory function of paragraph 2 was deemed to be a desirable feature of part II of the draft, it could constitute the whole of article 7, with the first part redrafted to read:

“The immunity of a State and its property from the jurisdiction of another State under article 6 applies whether or not the former State is named as a party to legal proceedings in the latter State, so long as such proceedings in effect seek ...”.

27. Mr. EL RASHEED MOHAMED AHMED, expressing his preference for alternative A for paragraph 1, said that it set forth the procedure whereby a State could meet its obligation, for the word “shall” denoted obligation. However, a difficulty arose in relation to article 3, subparagraph 1 (b) (iv), which, in addition to the expression “judicial or administrative authorities” also used in article 2, subparagraph 1 (b), included a reference to “police authorities”. Accordingly, in alternative A the word “executive” should be added before “judicial”, so as to cover not only police authorities but also ministries of foreign affairs.

28. Paragraph 2 was designed to guard against unnecessary litigation by preventing those who were unable to institute proceedings directly from attempting to initiate proceedings indirectly. However, the words “may [involve] affect” should be replaced by “designed to affect” or “intended to affect”, in order to bring the wording of the paragraph 2 into line with that of paragraph 3.

29. Mr. JAGOTA said that it was essential to be clear about the scope of the jurisdictional immunities of States and their property. As defined in articles 2 and 3, jurisdictional immunity meant, basically, immunity from the adjudication procedures of foreign States, in other words, of their courts and other, quasi-judicial bodies. Thus, the draft was not concerned with such matters as the international sea-bed, which fell outside the jurisdiction of sovereign States, but was confined mainly to the jurisdictional immunities of States and their property in the relations between States.

30. Assuming the article 6 stated the rule of sovereign immunity and that the extent of the obligation involved would be specified later in part III, the question that arose was whether article 7 was necessary. Unlike Mr. McCaffrey, who considered that it was simply definitional in nature and that whatever it sought to achieve could be done by redrafting articles 2 and 3, his own view was that it was indeed useful, and he would not hasten to delete it. The essence of article 7 lay in paragraph 1, which dealt with a State’s obligation to implement the rule set forth in article 6 and was expressed not only in positive terms but also in negative terms, since it required a State to refrain “from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities”. It would be advisable to retain that element, which would not normally be incorporated in a definition.

31. There were two basic differences between the alternative versions for paragraph 1. In the first place, alternative A, unlike alternative B, did not provide for general immunity from the jurisdiction of another State. By virtue of its reference to “competent judicial and administrative authorities”, it respected the actual scope of the draft and did not extend to such areas as immunity from payment of taxes. Consequently, it was concerned solely with disputes that arose before the local courts and other authorities having quasi-judicial functions and such ancillary police functions as seizure, attachment and execution.

32. The second difference might be unintentional, but it could well cause difficulties. In alternative A, the expression “competent judicial and administrative authorities” covered only the first limb of the paragraph, starting with the words “refraining from subjecting another State” and did not encompass the question of disallowing proceedings against another State. In alternative B, however, the reference to competence appeared at the end of the paragraph and therefore applied to both things. Those were purely drafting matters, but whichever alternative was

adopted, it was essential to specify clearly the type of forum from which immunity should be claimed.

33. Again, paragraph 2 had both a purpose and a place in the draft. To illustrate his point, he cited the case of a dispute over goods owned by the Government of India that had arisen between the supplier of the goods and the repairer. The latter had secured an order from the local courts authorizing it to retain the goods as a lien until such time as the supplier had paid over monies due. The Foreign Office had been asked to intervene, since the goods in question were public property, but had replied that it had no power to do so. A case of that kind fell squarely within the terms of paragraph 2: the Government of India had not been named as a party to the legal proceedings and its property had most certainly been affected.

34. It was suggested in the footnote to article 7 that paragraph 3 could constitute an alternative to article 3, subparagraph 1 (a), which dealt with the definition of a "foreign State". However, the latter part of paragraph 3 also dealt with property, which was not covered by article 3, subparagraph 1 (a). Hence, the footnote did not apply to paragraph 3 in its entirety.

35. Mr. BALANDA said that he would not repeat the amendments to article 7 he had proposed during the general discussion (1710th meeting). The more he looked at the article, the more he questioned its real value, for the basic principle already seemed to have been enunciated in article 6. As other members of the Commission had pointed out, article 7 did not, strictly speaking, contain a rule and was simply a corollary to article 6.

36. If article 7 was retained, it would have to be worded so that it would not give rise to any practical difficulties for the various legal systems. For example, it had been proposed that, in alternative A for paragraph 1, reference should be made not only to the judicial and administrative authorities, but also to the "police authorities". It should, however, be noted that some countries, such as his own, had no police authorities, but did have a *gendarmerie* and armed forces.

37. As the Special Rapporteur had said, in alternative A the words "otherwise competent", which referred to the judicial and administrative authorities, were not necessary because immunity always entailed competence. In any event, he himself would have a definite preference for alternative B, which came much closer to meeting the concerns he had expressed.

38. On the other hand, if article 7 were deleted, the consequent elimination of paragraph 2 would be regrettable, for it sought to clarify the way in which the interests of a State could be affected by a measure, whether judicial or administrative, taken by another State. Subject to better formulation, the idea expressed in paragraph 2 warranted consideration. As to the words "judicial determination", a distinction was sometimes drawn between judicial courts and ad-

ministrative courts and, as some members of the Commission had also noted, in some legal systems the police authorities could take measures that might affect the rights and interests of other States. Hence, paragraph 2 would have to be recast in order to cover all those situations. At the same time, the words "competent authority" were not entirely satisfactory and should be amended. Immunity did indeed entail competence, as he had already pointed out, but a measure taken by an authority which was not competent could still affect the interests of another State.

39. In respect of paragraph 3, he agreed with Mr. Thiam that the word "instrumentalities" really had no place in the text because, in systems based on the French model at least, it would be inconceivable for a proceeding to be instituted against an instrumentality, which did not have legal personality. However, the word "*mécanismes*" in the French text was perhaps only a poor translation of the word "instrumentalities". Similarly, in connection with the phrase "as a sovereign authority", he shared Mr. Ushakov's view that it was difficult to see how a State could act otherwise than as a sovereign authority, whether on its own or through its political or administrative organs. Retention of the phrase would therefore give rise to problems, particularly since the exceptions provided for in the draft related to private law activities, something which prevented a State from performing them as a sovereign authority.

40. Several members of the Commission encountered difficulties with the words "State", "organs", "agencies" and "representatives" and regarded them as conflicting with the definition of the scope of the draft apparent in article 4, which specified that the articles did not apply to the jurisdictional immunities accorded in the four Conventions on diplomatic relations, consular relations, special missions and the representation of States in their relations with international organizations of a universal character. To reassure those members, the Commission could simply refer to the "State" and add, before the definitions of the terms "territorial State" and "foreign State" in article 2, paragraph 1, a definition of the term "State" as it was to be understood in the draft. In view of the varied systems of internal law, the definition should encompass political and administrative entities and agencies subordinate to them. Indeed the concept of the term "State" differed considerably from one country to another, and no attempt should be made to take account of the niceties of the different systems.

41. Furthermore, in the French version of article 7, paragraph 3, the words "*faits accomplis*" (acts performed) did not appear to be correct. The part of article 2 concerning the activities that could be conducted by the State related to *actes juridiques*, and not *faits juridiques*. Lastly, the expression "public property" in paragraph 3 was normally used in contrast to "private property", which signified property that fell within the private domain of the State and was therefore open to seizure, at least in some systems of law. To employ the expression might well cause problems, for the question

could arise of whether, in a particular case, the property was public or private, something that might create a very delicate situation in view of the unicity of the State. If the property was private and the act did not come within the category of *acta jure imperii*, immunity could not be claimed. Hence, it would be better to avoid a *renvoi* to internal law.

The meeting rose at 1 p.m.

1715th MEETING

Thursday, 27 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (continued)

ARTICLE 7 (Obligation to give effect to State immunity)⁴ (continued)

1. Mr. AL-QAYSI said that the terms “rule” and “principle” had been employed a great deal in the course of the discussion and, in order to determine whether they could be used interchangeably, he had consulted the authorities. Paton, in his work on jurisprudence,⁵ had defined a principle as the broad reasoning that lay at the base of a rule of law: it demonstrated that the law was not simply a collection of rules, and through it, the law could draw nourishment from the views of the community. Rules, on the other hand, were precepts which laid down the consequences that would inevitably flow from certain facts—for instance, a will would be invalid if it was not attested by two witnesses. On that basis, it was apparent that article 6 set forth a rule on the jurisdictional immunity of States that was based on the principle of sovereignty.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the text, see 1714th meeting, para. 6.

⁵ G. W. Paton, *A Text-book of Jurisprudence* (Oxford, Clarendon Press, 1946), p. 176.

2. Clearly, the content of article 7 had to be examined in the light of its purpose, for it sought to enunciate the obligation that was the corollary to the right embodied in article 6. Accordingly, article 7 viewed the rule of State immunity from the opposite standpoint, namely, that of the State granting immunity, rather than the State claiming immunity. Moreover, the provisions of article 7 were set in the context of the interrelationship between competence and State immunity, in which connection the Special Rapporteur had rightly stated in his fourth report (A/CN.4/357, para. 21) that the “rules of competence of the court are very relevant in all cases, whether or not the question of State immunity is also involved”; the reason being that, without the necessary jurisdiction, the question of immunity would be hypothetical, since there would be no exercise of jurisdiction from which the foreign State could be deemed immune.

3. During the Commission's deliberations it had been maintained that article 7 stated nothing of substance. Although he did not share Mr. Ushakov's views (1714th meeting), they were fully justified inasmuch as they were the logical outcome of his position on article 6, to which article 7 referred. Mr. Thiam's doubts (*ibid.*) seemed to be caused, first, by the incongruity between the title of the article and the actual content, which was descriptive, and second, by the negative terms in which the article was couched. It had to be remembered, however, that obligations could be stated in negative terms, which did not detract from the force of the obligation and afforded a very appropriate drafting device when there were exceptions to the operation of the rule itself, as was the case in point. It certainly could not be argued that the principle of the non-use of force in international relations, as laid down in Article 2, paragraph 4, of the Charter of the United Nations, did not state an obligation because it was expressed in negative terms.

4. The point concerning the descriptive character of the article tallied with Mr. McCaffrey's view (*ibid.*) that the text was definitional and could be covered by making changes in articles 2 and 3. In that respect, he would endorse most of what Mr. Jagota had said (*ibid.*), namely, that paragraph 1 was not definitional because it stated an obligation, something that could readily be seen from the analysis of jural relationships referred to in the Special Rapporteur's third report (A/CN.4/340 and Add.1, para. 18). Paragraph 2 of the article was also substantive in that it dealt with legal proceedings against a State, whether or not named as a party, when the said State was in effect impleaded. That aspect of the matter was part and parcel of the obligation laid down in paragraph 1. Consequently, paragraph 3, despite the note thereto, only provided a partial alternative to the text of article 3, subparagraph 1 (a), since it contained a reference to property, a notion that obviously could not be subsumed under the notion of foreign States.

5. In one respect he disagreed with Mr. Jagota's comments on the two versions of paragraph 1. The matter

of jurisdiction was covered in the latter part of alternative A for that paragraph by the emphasis on disallowing the "continuance" of legal proceedings against another State, which implied existing competence. In alternative B, the notion was simply expressed differently by using the word "allowing" in conjunction with the phrase "to be conducted against". That meant that the competence of the court could be affirmed only by way of a clear statement, and thus accounted for the use of the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending".

6. As to drafting matters, the wording of paragraph 2 should be aligned with that ultimately adopted for paragraph 1. In paragraph 3, the phrase "acting as a sovereign authority" did not seem to convey the precise intent, for the sovereign authority belonged to the State of which the organ or instrumentality formed part. Perhaps it would be better to say "when acting in the exercise of the sovereign authority of that State", which would be more in keeping with article 3, subparagraph 1 (a) (iv). Lastly, in view of the distinction between immunities *ratione materiae* and immunities *ratione personae* of representatives or agents of a foreign Government, he wondered whether the test of acting "as State representatives" was indeed preferable to the earlier formulation,⁶ which spoke of acts performed by representatives "in their official functions", which was the true crux of the matter. His comments on the drafting were in no way intended to detract from the significant improvements in article 7, on which the Special Rapporteur was to be commended.

7. Mr. OGISO said that he had some doubts about the reference to disallowing the "continuance of legal proceedings against another State" in alternative A for paragraph 1, the version which appeared to command the support of most members in the Commission.

8. If paragraph 1 was read in conjunction with paragraph 2, "legal proceedings" included proceedings against another State, even if that State was not named as a party. Normally, the competence of the court in respect of a State's jurisdictional immunity would not be determined until legal proceedings had commenced and the court had considered the case and taken a decision on it. Even then, the matter could still be brought before a higher court and, indeed, in many cases the question of whether jurisdictional immunity should be invoked would be finally decided only by the Supreme Court. He therefore wondered at what stage the State could disallow the "continuance of legal proceedings". To his mind, the statement in alternative A that a State should "give effect to State immunity under article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities" signified that the court had to decide whether or not it had competence in a particular case. If the court decided that it did not, it should then

refrain from entering further into the substance. At the same time, the State could not go further and take steps to disallow the continuance of legal proceedings which might still be referred to a higher court. In the circumstances, the phrase in question should be deleted, and he hoped that the Drafting Committee would take account of that suggestion.

9. Mr. FLITAN said that, during the general discussion (1712th meeting), he had stressed the need to clarify the link between the set of draft articles and the four multilateral conventions enumerated in article 4. Members of the Commission who had taken up that point had sometimes gone beyond his own idea. However, the Special Rapporteur, in summing up the discussion (1713th meeting), had supplied the necessary explanations. In fact, the value of emphasizing the link was that the question of immunities was already partly dealt with in the four conventions in question. Nevertheless, he had not proposed that the draft should depart from or reproduce any of the provisions of those conventions and had simply pointed out that some of them should be a source of inspiration in considering the present topic. For example, it was inconceivable that, in matters pertaining to jurisdictional immunities, a head of State or a member of Government should enjoy lesser status than was provided for in the conventions. Some members had pondered the question of which particular immunities were in fact recognized in those instruments, but the Commission had no need to concern itself with that point. For the purposes of articles 6 and 7, reference had to be made to article 3, subparagraph 1 (b), which explained the concept of jurisdiction, and it was apparent therefrom that the draft covered a certain category of immunities, namely, jurisdictional immunities, as defined in the draft.

10. Article 7 could not be studied independently of article 6. Generally speaking, it seemed to be agreed that article 6 should enunciate the principle of jurisdictional immunity of States more clearly but that any recasting of the article at the present juncture would prevent the Commission from moving ahead. In his view, article 6 should therefore be viewed as the point of departure, on the understanding that the Commission would later define the principle of immunity of States more explicitly and more comprehensively in a new version. The new version of the article would have to stipulate, for example, that the States must grant one another immunities from criminal, civil and administrative jurisdiction, and perhaps explain that enforcement measures against other States were prohibited. It was not essential for the moment to decide whether the words "in accordance with the provisions of the present articles" should be retained. However, it was indispensable for the Commission to agree on the question of substance; otherwise, members would continue to refer constantly to article 6 while examining the other draft articles.

11. As Mr. Thiam had observed (1714th meeting), neither of the two alternative versions of article 7, paragraph 1, set forth a rule of law. The paragraph did

⁶ For the original text of draft article 7, see *Yearbook ... 1981*, vol. II (Part Two), p. 155 footnote 661.

appear to be required, for it imposed on States the obligation to give effect to jurisdictional immunity, or more exactly, to take appropriate measures to ensure *de facto* respect for such immunity. Nevertheless, the drafting should be more precise and three points should be highlighted. First of all, it should be specified that the national judicial or administrative authorities should not follow up a request which might injure the immunity of another State; next, it should be indicated that, if proceedings had already been instituted, the national authorities did not have to continue them; finally, it would be useful to clarify the questions that arose in connection with enforcement. In the final analysis, article 7 was necessary, and it must cover all possible instances in which a State must give effect, at the national level, to obligations stemming from the principle set forth in article 6.

12. Obviously, in establishing measures to be taken at the internal level the Commission should avoid interfering in the internal affairs of States. Yet it had to be remembered that obligations deriving from rules of international law must be fulfilled by the States which assumed those obligations. Thus, under article 59 of the 1963 Vienna Convention on Consular Relations, the receiving State must "take such steps as may be necessary" in order to protect the consular premises of a consular post headed by an honorary consular officer. In the present instance, no attempt should be made to specify the practical details, as that matter came within the purview of the internal organization of each State, but the affirmation of the principle of jurisdictional immunity in article 6 inevitably meant that article 7 should indicate the measures to be taken by the national authorities in the three areas he had mentioned.

13. As several members had rightly pointed out, paragraph 2 was of practical value because of the rules laid down therein but the formulation plainly called for improvements.

14. Mr. RIPHAGEN said that the draft articles as a whole were concerned with what exactly was immune from what. Article 7, however, prejudged the question, since it was expressed in the form of a basic obligation of the State. The wider the content of the obligation, the greater the number of exceptions that would be required, for the article was based on the assumption that each and every exception to the obligation would be spelt out in the draft. It would thus exclude the grey area to which he had alluded earlier (1708th meeting), unless of course article 6 was retained in its existing form. Nevertheless, a number of members were anxious to alter article 6.

15. Stressing the need for careful drafting of article 7, he noted that paragraph 1, in both versions, imposed an obligation on the State to refrain from subjecting another State to its jurisdiction. It might seem as though that obligation excluded the service of a writ on a foreign State, at least under legal systems like that in the Netherlands, in which the normal method of securing the appearance of a defendant was for an officer of the

court to serve a writ of summons on him. Yet, such a summons to appear could constitute an act of subjecting another State to the jurisdiction of the court, and it was obvious that paragraph 1 was not intended to exclude the service of a writ in all cases. That was also borne out by the terms of article 9, which presupposed that a foreign State could decide not to plead immunity and to accept the jurisdiction, which could happen only if the State had been summoned to appear; otherwise it could not waive its immunity. If such an understanding of paragraph 1 was correct, then it should be clear from the actual terms of the paragraph.

16. Paragraph 2 was designed to preclude the indirect impleading of a foreign State. Such impleading could be done in a number of ways, one of them being to draw on the doctrine of the act of State. There again, he doubted whether the real intention of the paragraph was to do away with that possibility. Moreover, the words "involve" and "affect" and the expression "sovereign rights, interests, properties or activities of the State" encompassed concepts that were too far-reaching.

17. The language of paragraph 3 was likewise too broad. Admittedly, the paragraph spoke of the "public" property of the State, unlike paragraph 2, which referred to any property or activities of the State, but it also spoke of proceedings "designed to deprive another State of ... the use of such property in its possession or control". To illustrate the use of property, one might cite the case of a foreign State that wished to build an extension to one of its embassies, something which would not be immune from all government control. It was common practice in such instances for embassies to seek permission from the national authorities, which permission might or might not be granted. Again, the embassy's neighbours might object, with the result that contentious proceedings would be brought and some authority would sit in judgement on the foreign State. Evidently, the draft should not seek to preclude such a possibility.

18. For all those reasons, he wondered whether the Commission was fully aware of the enormous task that would be involved by establishing a broad obligation of the kind set forth in the article in its present form.

19. Mr. NI said that, since part II of the draft was concerned with general principles, it should normally begin with a provision indicating how to give effect to State immunities rather than a provision emphasizing that the existence of the competence of the authorities in the territorial State represented the *sine qua non* of those immunities. In particular, it was not necessary in the title of the article to place rules of competence on an equal footing with the concept of jurisdictional immunity, as had been done in article 7 in its original form.⁷ If a court of the territorial State was not competent to entertain proceedings under the internal law of that State, it would not normally take any measures contrary to that law. In judicial practice, the question of whether a court was competent to conduct proceedings under internal

⁷ See footnote 6 above.

law did not necessarily have to be resolved beforehand, for the court could examine the question of jurisdictional immunity instead. If immunity was to be granted, the question of competence no longer required solution. It would be impractical if the court's competence over a particular case had to be determined before the question of jurisdictional immunity could be examined, as had been provided in article 7 in its earlier form. Sir Francis Vallat⁸ and Mr. Quentin-Baxter⁹ had analysed that problem quite thoroughly at the previous session.

20. The changes made by the Special Rapporteur in the present, recast version of article 7 were satisfactory. Personally, he preferred alternative A for paragraph 1, but some drafting changes seemed essential. For example, the phrase "and by disallowing the [conduct] continuance of legal proceedings against another State" was redundant because the idea involved was already inherent in the use of the word "refraining" earlier in the sentence. Again, in the English version of alternative B, the expression "existing competence" seemed to be unduly emphatic and was not sufficiently flexible. Similarly, the words "are pending", could give rise to divergent interpretations, for the question would arise every time of whether or not proceedings were pending. Unfortunately, the expression "refraining from subjecting another State to the [its] jurisdiction", in alternative A and in alternative B, was inelegant and difficult to translate into Chinese. Furthermore, the question of including an express reference to all the competent judicial, administrative or police authorities was a delicate matter, since it would be difficult to draw up an exhaustive list of such authorities.

21. Paragraphs 2 and 3 were a great improvement on their earlier equivalents, namely, alternatives A and B of the former paragraph 2 of the article, but paragraph 3 could not constitute an alternative to the text of article 3, subparagraph 1 (a), since the two provisions were quite different from the standpoint of both their purpose and their content. That question should be taken up again when the Commission came to consider article 3, subparagraph 1 (a).

22. In connection with Mr. Riphagen's comments, he wondered whether a State, in order to subject another State to its jurisdiction, could serve a writ of summons on the Minister of Foreign Affairs of the other State.

23. Mr. USHAKOV said that, when it elaborated a set of draft articles, the Commission was in the habit of leaving the definitions until after the substantive articles had been drafted in their final form, for only then could the Commission ascertain which definitions were really necessary. However, it did happen that definitions were proposed earlier on, so as to clarify in which sense certain expressions were being used.

24. Some terms had never been defined, since it would be dangerous, or even impossible, to do so. Thus, the Commission had never attempted to define the term

"State", which appeared in many treaties and conventions of a universal character. Draft article 3, subparagraph 1 (a) sought to clarify the expression "foreign State", which would include, in particular, the sovereign or Head of State, the central Government and its various organs or departments. In his view, such an attempt was pointless and could affect existing treaties and conventions. In fact, the provision did not contain a definition of the State but a reference to certain of its organs, yet a State's organs were instituted in accordance with internal law, and not with international law. Part I of the set of draft articles on responsibility of States for internationally wrongful acts contained an article, namely article 5, entitled "Attribution to the State of the conduct of its organs",¹⁰ in which conduct of any State organ having that status under the internal law of that State was to be considered as an act of that State under international law. The Commission had in that instance referred to the internal law of each State because, generally speaking, it was impossible to establish what a State organ was; reference had to be made to internal law, which varied from one country to another. For that reason, it was useless in draft article 3 to try to define the concept of State by referring to certain organs.

25. The term "immunity" was defined in draft article 2, subparagraph 1 (a), but it had been considered clear enough to obviate any need for a definition in existing treaties and conventions. Any definition of it in the present draft would also have effects on those treaties and conventions. Furthermore, under draft article 2, the expression "immunity" meant the privilege of exemption from, or suspension of, or non-amenability to, the exercise of the jurisdiction, but an immunity could not be assimilated to a privilege. The 1961 Vienna Convention on Diplomatic Relations dealt with immunities, privileges and facilities. The right of the sending State to use its flag and emblem on the premises of the mission was a privilege and not an immunity, and the obligation on the receiving State to help in the acquisition of the necessary premises for the mission was a facility granted to the sending State. Such an example showed that it was not only futile but even hazardous to try to define terms which were employed in international instruments without being defined. Hitherto, the Commission had always been very cautious in that regard.

26. In connection with the advisability of providing States with guidelines on how to give effect to jurisdictional immunity, Mr. Flitan had referred to article 59 of the 1963 Vienna Convention on Consular Relations. His own view was that the article in question did not impose any obligation on the receiving State vis-à-vis its organs. The receiving State was required to ensure the protection of consular premises, and it was for that State to determine how to give effect to its obligation. The way in which it went about doing so and the organ to which it assigned that task were of little importance. For that reason, it would be quite strange to take the view that a

⁸ *Yearbook ... 1981*, vol. I, p. 59, 1653rd meeting, para. 29.

⁹ *Ibid.*, p. 68, 1655th meeting, para. 28.

¹⁰ For the text, see *Yearbook ... 1980*, vol. II (Part Two), p. 31.

State should compel the courts to act or not to act in a particular way. Any obligation incumbent on a State was incumbent not on certain of its organs alone but on the State in its entirety.

27. Mr. THIAM said that he would like to clarify his position on article 7 for some members of the Commission. He was not opposed to the rule on immunity set forth in the article, but was compelled to observe that it did not emerge clearly from the present wording, at least in the French version. For that reason, he had proposed that paragraph 1 should start with a phrase such as: "A State shall refrain from ...".

28. As for the remainder of the text, he hoped that the Special Rapporteur would avoid getting bogged down in rules on proceedings, something which fell within internal law. It would be better to keep to general rules.

29. Mr. KOROMA said that article 7 performed a dual function in that it was definitional and, at the same time, set forth the duty of the State to give effect to State immunity. However, it had to be read in conjunction with article 2, since it was there that the definition of immunity was to be found.

30. He agreed that the article should not seek to interfere in the internal affairs of States by specifying how States should give effect to the rule. Indeed, throughout the text, the Special Rapporteur had consistently placed the onus of giving effect to the obligation on the State itself, rather than on its organs. In other words, it was left to the State, through its own internal mechanism, to prevent its organs from assuming jurisdiction over another State.

31. As to the amendments proposed (1714th meeting) by Mr. Evensen and Mr. Balanda, the text might be expanded to include military tribunals—which sometimes temporarily assumed law-enforcement powers—by inserting the words "and law-enforcement agencies" after the word "authorities" in alternative A for paragraph 1. The provisions of that paragraph would then encompass all law-enforcement agencies, including police and military tribunals. In general, he preferred the wording of alternative A to that of alternative B.

32. Paragraph 2, which was also definitional in character, was based on the principle of the separation of functions, something which could not be accommodated in all legal systems. However, the Special Rapporteur had once again been careful to ensure that the obligation to give effect to State immunity was assumed at all times by the State itself.

33. Lastly, in connection with paragraph 3, he endorsed the suggestion that the words "is designed" should be replaced by "seeks", and also proposed that the word "instituted" should be replaced by "initiated".

34. Mr. CALERO RODRIGUES said that in article 7, paragraph 1 set forth the obligation stemming from the rule laid down in article 6. In his opinion, such an approach was unnecessary, since the obligation was im-

plied by the statement of the rule. Moreover, there was no need to stipulate that the State should give effect to its obligation by refraining from subjecting another State to the jurisdiction of its judicial and administrative authorities and by disallowing the continuance of legal proceedings against another State, since the second course of action was implicit in the first. In addition, it was superfluous to refer to the competence of the courts as a prerequisite for the application of State immunity, for a court could not hear a case if it was not competent to do so. All in all, paragraph 1 could be dispensed with, since the meanings of the terms "jurisdiction" and "immunity", as used in article 6, were clearly defined in articles 2 and 3.

35. Paragraphs 2 and 3 were of a different character. Paragraph 2 sought to make it clear that, whether or not a State was implicated by name, it enjoyed immunity from bearing the consequences of a judicial determination by the competent authorities of another State. Paragraph 3, however, went further and regarded proceedings against organs, agencies or instrumentalities or representatives of the State as tantamount to proceedings against the State itself. The formulation of that provision could none the less be made more succinct, and it should be noted that the phrase "or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control" would be unnecessary if the last part of paragraph 2 was adopted.

36. Mr. YANKOV said that if paragraph 1 was to be regarded as setting forth a general principle concerning the implementation of the general rule of State immunity, it appeared to be simply a reiteration of what was stated in paragraph 2 of article 6, particularly as far as the introductory words were concerned.

37. Paragraphs 2 and 3 were interpretative rather than substantive in nature, and the whole article could well be reduced to one paragraph, since the basic purpose was to lay down a State's general obligation to give effect to jurisdictional immunity, either by refraining from instituting proceedings against another State, or by disallowing the continuance of proceedings which had already been initiated. However, the article did not specify the action to be taken by a State to fulfil its obligation at the stage of execution, an omission which might give rise to difficulties later.

38. The reference to disallowing the continuance of legal proceedings instituted against another State had some merit as a safeguard clause, but in terms of the procedure involved, it might be impossible under some legal systems for a foreign ministry or other government agency to intervene once a matter had been deemed to be within the jurisdictional competence of the State. If the rule was to operate efficiently, the Special Rapporteur might consider whether the statement of the general obligation should not be immediately followed by a statement of an obligation to give effect to that obligation.

39. Mr. QUENTIN-BAXTER said that, in view of the definition contained in articles 2 and 3, he believed, as did Mr. Calero Rodrigues, that article 6 could for the time being be regarded as stating the general rule of State immunity. However, the question of whether the rule was specified in article 6 or article 7 was ultimately unimportant.

40. One practical problem posed by the current draft articles, which had not arisen in respect of the drafts on diplomatic and consular immunities, was that the immunities concerned situations which might arise, without the prior knowledge of anyone in the receiving State, in the innumerable instances in which one State found that another State had manifested itself in some way. The very absence of a balancing of sovereignty or jurisdiction with immunity tailored to the particular situation illustrated the importance of having rules. In that regard, the Commission had, at the outset, made a conscious decision to confine itself to jurisdictional immunities as described in article 3.

41. Throughout its consideration of the draft, the Commission would be confronted with the problem of how far it could go in attempting to provide some direction that would help to unify the practice of national courts. Even within the jurisdiction of a single State, judicial opinions could vary widely. As a number of members had indicated, paragraphs 2 and 3 represented a courageous attempt by the Special Rapporteur to give some guidance in that regard, but in doing so he was entering a very difficult area. Anyone familiar with the common law system would be aware of the enormous difficulties posed by the notions of ownership, possession and control, but he was instinctively opposed to any attempt to deal with the question at the level of national courts or other government organs. The aim of international codification must always be to state principles succinctly and clearly. Accordingly, at the present stage the Commission must endeavour to state the quintessence of the rule, rather than pinpoint situations which were so different that it would be impossible to take account of all of them.

The meeting rose at 1.05 p.m.

1716th MEETING

Friday, 28 May 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/ 343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337,

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

**A/CN.4/L.339, ILC (XXXIV)/Conf. Room
Doc. 3)**

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

ARTICLE 7 (Obligation to give effect to State immunity)⁴ (*concluded*)

1. Mr. MALEK said that he subscribed entirely to the opinion expressed at the previous meeting by Mr. Ushakov, that it was neither possible nor desirable to give a definition of the term "State". It was true that nowhere in any of its sets of draft articles had the Commission defined that term. From the outset of its work, it had adopted an unvarying attitude in that connection: in view of the theoretical and practical difficulties inherent in any definition of the concept of State, it had acquired the habit of using the word "State" in the sense attributed to it in international law, in the sense commonly accepted in international practice. Thus, in its observations concerning the draft Declaration on Rights and Duties of States which it had drawn up at its first session in 1949, it had stated its conclusion that no useful purpose would be served by an effort to define the term "State", and its impression that it had not been called upon to set forth in that draft Declaration the qualifications to be possessed by a community in order that it might become a State.⁵

2. Admittedly, the Commission had attempted, in the commentary to article 2 of the draft articles on diplomatic intercourse and immunities,⁶ to define the category of States which could establish diplomatic relations: it had held that faculty to be reserved for "independent States" and members of a federation empowered by the federal constitution to establish diplomatic relations. Thus, the adjective "independent" was used only in the commentary; on the other hand, its use by the Commission when preparing a draft convention at a time, some quarter of a century ago, when the terms "sovereign" or "sovereignty" had been in quite common legal use, represented considerable progress in contemporary thinking on the concept of the State—in other words, a more realistic conception of the idea of sovereignty. The Commission rarely used the words "sovereign", "sovereignty", or even "sovereign authority", in its work, seeming to do so only when it felt they would greatly improve the

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5: *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the text, see 1714th meeting, para. 6.

⁵ *Yearbook ... 1949*, p. 289, document A/925, para. 49.

⁶ *Yearbook ... 1958*, vol. II, p. 90, document A/3859, chap. III, para. (4) of the commentary.

clarity of texts. Thus, for example, article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone stipulated that “The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea...”⁷ In that context, the term “sovereignty” was very helpful, for it gave the text greater clarity and precision than could any other term, such as “competence”, “political authority” or “territorial authority”.

3. For that reason, he wondered what real function was fulfilled by the expressions “sovereign” and “as a sovereign authority” in draft article 7, paragraphs 2 and 3 respectively. If those expressions were really necessary or useful in that article, why might not the same be true with respect to, say, article 6, where it would then be possible to state that “a State, in its capacity as a sovereign State, is immune from the jurisdiction of another State...”, and to all the other articles? If the Commission wished to affirm the principle of sovereignty in draft article 7, it would be better advised to do so in a special provision, to which he would willingly subscribe; if it wished to make the observation that jurisdictional immunity of States derived directly or indirectly from the principle of sovereignty, it would similarly be better advised to do so in a special provision, which he would be no less willing to support.

4. He proposed, and urged the Special Rapporteur to accept, the deletion from paragraph 2 of draft article 7 of the expression “sovereign”, and from paragraph 3, the words “acting as a sovereign authority”, which were entirely unjustified technically and not very apt politically. Whatever its reception, he wished that proposal to be entered in the summary record of the meeting and, perhaps, in the Commission’s report to the General Assembly.

5. As a national of a small State of whose fate everyone was aware, he would prefer the term “sovereignty” to be used only when absolutely necessary. He would also prefer to see the accent placed less on the concept of sovereignty than on effective respect for a State’s territory, population, frontiers, heritage, and civilization—in short, genuine respect for the State as such.

6. Mr. SUCHARITKUL (Special Rapporteur) expressed his deep gratitude for all the proposals made by members of the Commission concerning points of substance and drafting amendments. He would certainly bear in mind the view expressed by a number of members that the draft in general should be as succinct as possible and should not go into detail regarding points of private international law or internal law.

7. Referring to observations made at the previous meeting by Mr. Ushakov and at the present meeting by Mr. Malek, he said that, from the very outset, it had been his practice to avoid defining the term “State”. Even terms of convenience, such as “territorial State” and “foreign State”, had been dispensed with when it

had become clear that there was no need to identify States in different terms. His original intention in that regard had simply been to give an indication of the type of definitional problems with which the Commission would have to deal.

8. He was grateful to Mr. Ushakov (1714th meeting) for pointing out the necessity of defining the word “jurisdiction” in order to limit the scope of the topic. The time had perhaps come for the Drafting Committee to think of assisting the Commission with the definition of “jurisdiction” and with the drafting of article 3, subparagraph 1 (b).

9. Mr. Ushakov’s comments on matters such as the existing international conventions enumerated in draft article 4 and the Commission’s discussion of that article might prove of assistance to the Drafting Committee in its consideration of the scope of the articles, as defined in draft article 1. That would be particularly the case with respect to the nature of questions relating to immunity.

10. Of the many suggested improvements to draft article 6, he welcomed in particular those relating to the phrase “in accordance with the provisions of the present articles”. He wished to make it clear that that phrase would apply to all the articles in all parts of the draft.

11. Mr. McCaffrey (*ibid.*) and other members of the Commission had referred to the substantive question of the immunities of property. In that connection, he pointed out that immunity from execution would be dealt with in Part IV of the draft. From the outset, he had envisaged the possibility of changing the title of the draft to remove any reference to property. Property itself could not be the beneficiary of immunities, but was simply the object of rights. Only the State could be the proper beneficiary of State immunities.

12. Referring to observations made by Mr. Jagota (*ibid.*) and Mr. Al-Qaysi (1715th meeting) with regard to draft article 7, paragraph 1, he said that that paragraph, as another expression of the rule of sovereign immunity, was necessary to indicate that the right to sovereign immunity was not absolute but was rather, as Mr. Riphagen had pointed out (1708th meeting), a relative right, which required a corresponding obligation. In effect, the paragraph in question was vital to the draft since it stated what the obligation entailed. The importance of such a provision had been emphasized by Mr. Quentin-Baxter (1709th meeting). The problem had been to indicate clearly the nature of the obligation. In that regard, Mr. Flitan had said (1715th meeting) that it was sufficient for the State to take appropriate measures and had referred, in that connection, to article 59 of the Vienna Convention on Consular Relations. However, the obligation to give effect to State immunity was more far-reaching than that provision, in that it was a mixture of an obligation of conduct and an obligation of result. Clarification as to the point at which the obligation to give effect to State immunity was breached had been provided (*ibid.*) by Mr. Ogiso, Mr. Ni, Mr. Koroma and Mr. Riphagen.

⁷ United Nations, *Treaty Series*, vol. 516, p. 206.

The obligation was, by definition, an obligation of conduct and was violated upon the issuing of a writ or the institution of proceedings by the organs or representatives of one State against another. However, in some legal systems, the State might not have the power to intervene once proceedings had been initiated by a private individual. Since the Commission could not interfere in the internal law of States, it was for States themselves to determine how they would perform their obligation to prevent the impleading of a foreign State. That was why it was necessary to specify in what case a foreign State was impleaded, as was done in the closing lines of paragraph 1.

13. Paragraph 2 was designed to shed further light on that point, and paragraph 3 was made necessary by the absence of a definition of the term "State", in order to indicate the beneficiaries of immunity. Referring to the observations made by Mr. Malek regarding paragraph 3, he suggested that the word "official" might replace the word "sovereign".

14. He expressed the hope that, in the light of the proposals made by members of the Commission, the Drafting Committee would be able to arrive at a generally acceptable wording for draft article 7. He proposed that the draft article should be referred to the Drafting Committee for consideration, together with the other relevant provisions of draft articles 2 and 3.

*It was so decided.*⁸

ARTICLE 8 (Consent of State),

ARTICLE 9 (Expression of consent) *and*

ARTICLE 10 (Counter-claims)

15. Mr. SUCHARITKUL (Special Rapporteur) said that he intended to introduce draft articles 8, 9 and 10 together, for they formed a whole.

16. Mr. USHAKOV, speaking on a point of order, said that, as he had had occasion to emphasize, he would prefer the draft articles to be introduced and examined one by one.

17. The CHAIRMAN said that account should be taken of Mr. Ushakov's remark. Since, however, articles 8 to 10 really did form a whole, he suggested that, in order to save time, each member of the Commission might, if he so wished, refer to them all during a single statement. On that understanding, he invited the Special Rapporteur to introduce draft articles 8, 9 and 10, which read:

Article 8. Consent of State

1. [Subject to part III of the draft articles] Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any legal proceeding against another State [as defined in article 7] without the consent of that other State.

2. Jurisdiction may be exercised in a legal proceeding against a State which consents to its exercise.

⁸ For consideration of the texts proposed by the Drafting Committee, see 1749th meeting, paras. 46-56.

Article 9. Expression of consent

1. A State may give its consent to the exercise of jurisdiction by the court of another State under article 8, paragraph 2, either expressly or by necessary implication from its own conduct in relation to the proceeding in progress.

2. Such consent may be given in advance by an express provision in a treaty or an international agreement or a written contract, expressly undertaking to submit to the jurisdiction or to waive State immunity in respect of one or more types of activities.

3. Such consent may also be given after a dispute has arisen by actual submission to the jurisdiction of the court or by an express waiver of immunity, [in writing, or otherwise] for a specific case before the court.

4. A State is deemed to have given consent to the exercise of jurisdiction by the court of another State by voluntary submission if it has instituted a legal proceeding or taken part or a step in the proceeding relating to the merit, without raising a plea of immunity.

5. A State is not deemed to have given such consent by voluntary submission or waiver if it appears before the court of another State in order specifically to assert immunity or its rights to property and the circumstances are such that the State would have been entitled to immunity, had the proceeding been brought against it.

6. Failure on the part of a State to enter appearance in a proceeding before the court of another State does not imply consent to the exercise of jurisdiction by that court. Nor is waiver of State immunity to be implied from such non-appearance or any conduct other than an express indication of consent as provided in paragraphs 2 and 3.

7. A State may claim or waive immunity at any time before or during any stage of the proceedings. However, a State cannot claim immunity from the jurisdiction of the court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim of immunity can be based, in which event it can claim immunity based on those facts if it does so at the earliest possible moment.

Article 10. Counter-claims

1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship or facts [as the counter-claim].

18. Mr. SUCHARITKUL (Special Rapporteur) proposed that draft articles 8, 9 and 10 should be submitted again to the Drafting Committee and should be considered jointly, since they all dealt with the same subject-matter and had been recast in order to follow a more logical sequence.

19. The provisions of draft article 8 had been based on Soviet legislation, according to which action could be taken only with the consent of the foreign State or diplomat concerned.⁹ Under Indian legislation, the consent of the host Government had first to be obtained.¹⁰

⁹ See 1708th meeting, footnote 10.

¹⁰ Sect. 86 of the Indian Code of Civil Procedure, 1908 (*ibid.*, footnote 31).

The provision was a necessary one. As Mr. Calero Rodrigues had pointed out (1711th meeting), there was clearly an absence of consent when a State raised a plea of immunity. Conversely, when consent was given, the question of immunity did not arise. Draft article 9 defined the various ways in which consent could be expressed, including the waiver of State immunity. The question of counter-claims, as dealt with in draft article 10, was a procedural matter, as noted by a number of members of the Commission. It was impossible to go into great detail because of the many different systems existing in different countries. Although the rules contained in draft articles 8 to 10 were of an ancillary nature, they were nevertheless necessary.

20. Mr. AL-QAYSI said that the restructuring of draft articles 8, 9 and 10 represented an improvement, since the provisions were now clearer and the former overlapping had been reduced considerably. If draft article 7 could be seen as a logical progression from draft article 6, then draft articles 8 to 10 represented a logical progression from both of those provisions. Article 6 stated the general principle of State immunity, draft article 7 laid down the obligation to give effect to that principle and draft articles 8, 9 and 10 specified the conditions under which the jurisdiction of one State could be exercised over another State.

21. The requirement of consent would seem to have been very delicately balanced in the two paragraphs of draft article 8. Under normal circumstances, a State could not exercise jurisdiction over another State without its consent and jurisdiction might be exercised against a State which consented to its exercise. That phraseology would seem to have been adopted specifically in order to emphasize the relationship between the element of consent and State immunity, rather than the exercise of territorial jurisdiction. As the Special Rapporteur had pointed out in his fourth report (A/CN.4/357, para. 16), while the consent of a State was not necessarily the foundation of jurisdiction, its absence had been put forward as an essential element of State immunity. Conversely, the presence of consent excluded, removed or extinguished immunity, without itself constituting a basis for jurisdiction, as that was determined by the relevant rules of competence of the court concerned. In that sense, consent would seem to be a purely permissive condition for the exercise of jurisdiction.

22. The relationship between consent and State immunity appeared to have given rise to difficulties for some members of the Commission. The point was indeed very subtle and, though somewhat abstract, was not without value for the structuring of the draft articles. The question of how certain modes of expressing consent, such as waiver or voluntary submission, could be considered as other than true exceptions to the general rule of State immunity when they led to the same result as the exceptions could best be answered within the framework of part III of the draft articles, dealing with exceptions to State immunities.

23. According to the provisions of part III, an exception meant a situation in which, regardless of the notion of consent, a State was not immune from the exercise of local jurisdiction in respect of a certain conduct because, for example, of the nature of that conduct. Accordingly, in such instances the absence of consent did not constitute immunity. The general rule stated in part II was that the immunity of a foreign State was accompanied by a corresponding duty to refrain from subjecting that State to local jurisdiction. That duty could not be said to have been violated if the State possessing immunity had, by expression or conduct, consented to be subjected to the exercise of local jurisdiction. In the former case, jurisdiction was exercised—that is, non-immunity was established—regardless of any permissive condition, because of the nature of the act. In the latter case, it was the permissive condition, namely the extinction of the right of State immunity, which opened the door for the exercise of jurisdiction without necessarily offending the duty correlated to the right. When article 8 was seen in that light, the apparent contradiction disappeared and the words “Subject to part III of the draft articles” contained in square brackets in paragraph 1 and “Unless otherwise provided in the present articles” in the same paragraph became all the more necessary. In that regard, his initial preference was for the wording in square brackets, as it conveyed the intended meaning more precisely.

24. While he found draft article 9 generally acceptable, he felt that there was some repetition in the way in which concepts were expressed. Paragraphs 2 and 3, for example, contained references both to submission to the jurisdiction of the court and to express waiver of immunity. In addition, some notions contained in the earlier text,¹¹ such as the reference to interests in property, had disappeared, for no apparent reason. Conversely, a number of terms, such as “treaty” in paragraph 2, had appeared, although they had earlier been acknowledged to be unnecessary. In that connection, he recalled that, in the Vienna Convention on the Law of Treaties, a treaty was defined, in article 2, sub-para. 1 (a), as an international agreement.

25. Although a number of members of the Commission had pressed for economy in drafting, that objective should not be pursued at the expense of clarity. At the current stage, the important consideration was to ensure that the texts of the draft articles did not conflict with one another. There was great benefit in producing, on first reading, a clear text, however long, since the Commission always had the possibility of shortening articles after hearing the views of Governments.

26. Mr. EL RASHEED MOHAMED AHMED too thought that the phrase “Unless otherwise provided in the present articles ...” should be deleted from article 8 since it did not have any specific meaning and, in any event, a reference to the exceptions to State immunity was afforded by the phrase between square brackets reading “Subject to part III of the draft articles”.

¹¹ See *Yearbook ... 1981*, vol. II (Part Two), p. 155, footnote 663.

Moreover, as the Special Rapporteur had pointed out, article 9 did not deal with exceptions to the general rule, as did article 8, but prescribed the modalities for expressing consent.

27. One point of concern to him related to the word "jurisdiction", which, according to the definition laid down in article 2, subparagraph 1 (g), covered only the judicial aspects of the matter. An amplified meaning of that term was, however, given in article 3, subparagraph 1 (b) (iv). The point might be raised that article 8 did not cover the latter provision, and it might be suggested that there was therefore no need to provide for consent in that particular instance. In his view, that was neither the Special Rapporteur's intention nor the import of article 8 itself.

28. Mr. McCAFFREY said he agreed entirely that there was probably no sovereign immunity in the case of the establishment of legal title to property. Under the Anglo-American system, that was a well-recognized principle, and it applied in probate and other proceedings which were referred to as *in rem* proceedings. The omission of the word "property" in draft article 6 and in the whole of the earlier part of the draft gave rise to a difficulty, since, if the draft was to be divided into two basic parts, the first dealing with the immunity of the State from the jurisdiction of another State and the second with the immunity of the State's property from execution, a problem could arise regarding the use of State property as a basis for jurisdiction rather than for the satisfaction of a resulting judgement. In that connection, there had once obtained in the United States of America a practice whereby a defendant was, in effect, compelled to enter the jurisdiction to defend a case by attaching his property as a basis for quasi *in rem* jurisdiction. In such proceedings a personal action was brought against a defendant, using property as a basis of jurisdiction. In *Shaffer v. Heitner* (1977),¹² the United States Supreme Court held that, subject to certain possible exceptions, such proceedings would no longer be allowed, since actions against property were actually actions against the person's rights in the property and the requisite relationship between the person and the forum must therefore be present before the court could exercise jurisdiction over the property. That technique was also available in certain civil law jurisdictions, for instance, under the German and Austrian Codes of Civil Procedure, which allowed the attachment of property of inconsequential value as the basis of jurisdiction in what was essentially an *in personam* action. It was, of course, also one of the bases of jurisdiction that had created problems in regard to the 1968 European Convention on jurisdiction and the enforcement of civil and commercial judgements.¹³ He raised that point in the hope that it would be taken into account when deciding whether property should or should not be dealt with in that sense.

¹² *United States Reports*, vol. 433 (Washington, D.C., 1979), p. 186.

¹³ EEC, *Supplement to Bulletin No. 2-1969 of the European Communities* (Luxembourg), p. 18.

29. With regard to article 8 itself, he agreed with the underlying principle, but wondered whether it would not be possible to frame the draft article in one paragraph. In his view, paragraph 2 would suffice on its own and, inasmuch as it stated a principle rather than an exception, its proper place was in part II of the draft, rather than part III. Noting that, in article 8, paragraph 1, the phrase between square brackets reading "as defined in article 7" related to the expression "in any legal proceeding against another State", he said that some consideration could appropriately be given, within the context of article 8, to making the definition in article 7, paragraph 2, more general. That would not only serve the purposes of article 7, paragraph 1, but would also enable one idea to be used throughout the draft.

30. Lastly, he agreed that immunity and the exceptions thereto were essentially on the same footing. In addition, immunity should be regarded as not extending to certain situations such as trading and commercial activities. Also, it certainly did not extend to a situation where a State had consented to the exercise of jurisdiction over it. That point was appropriately dealt with in the context of part II of the draft.

31. Mr. USHAKOV said that he would limit his remarks to draft article 8. Although that article appeared in part II of the draft articles, entitled "General Principles", he wondered whether the principle it stated really concerned general consent. If that was the case, it should be stressed that general or customary international law was always based on general consent, as stipulated in article 53 of the Vienna Convention on the Law of Treaties, and that rights and obligations existed only by consent. In that case, the expressions "[Subject to part III of the draft articles]" and "Unless otherwise provided in the present articles" would be entirely pointless. After all, if part III was to contain exceptions to the principle of State immunity, could those exceptions be treated as such without the consent of States? The Commission could establish rules only if it was convinced that the overwhelming majority of States consented to them. Similarly, to retain the expression "Unless otherwise provided in the present articles", would be to indicate that a State was bound to exercise its jurisdiction in proceedings against another State when that other State had not given its consent.

32. If, on the other hand, general consent was not involved, the principle underlying article 8 was that every State was master of its own rights and could waive them if it wished. That possibility was implicit in each and every convention and was so in particular in the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Vienna Convention on Consular Relations. Article 32 of the Vienna Convention on Diplomatic Relations admittedly provided, in paragraph 1, that "The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State", but that was rather in order to indicate that the immunities of diplomatic agents rested not with the agents

themselves but with the State, which alone could take decisions concerning them. He therefore did not believe it necessary expressly to establish a rule of that kind.

33. Furthermore, the wording of article 8 was very vague: which jurisdiction was involved? It should probably be specified, as in article 31 of the Vienna Convention on Diplomatic Relations, that the reference was to civil, administrative, and even criminal jurisdiction. The word “jurisdiction” in article 6 should be similarly qualified.

34. With reference to Mr. McCaffrey’s remark that, for example, civil proceedings could be instituted even against property—that was the case when the State was not expressly named—he believed that it would be useful to indicate, in the present part of the draft articles, that a State and its property enjoyed jurisdictional immunity. After all, there was already a provision within that part, namely article 9, paragraph 5, which spoke of “rights to property”.

35. The CHAIRMAN, speaking as a member of the Commission, said that he did not share Mr. Ushakov’s point of view on article 8. It was, by and large, true that the consent of States lay at the origin of the rules of international law, but that was the case not only for the rules embodying States’ immunity but also for those embodying their non-immunity. Each of those groups of rules was on the same level as the other. According to Mr. Ushakov, there was a primary rule, that of State immunity, and it was only through a second expression of consent that exceptions could be made to that rule. His own position could be illustrated by borrowing an example from an entirely different area, the law of the sea, where there were rules relating to the determination of the outer limits of the territorial sea and the continental shelf. Implementation of the law of the sea, as it had been codified in the four conventions of 1958, had raised the question whether there was a primary rule, that of equidistance, which would automatically have determined the outer limits of those maritime areas, and a secondary and exceptional rule, that of special circumstances. In a well-known and relatively recent decision,¹⁴ already accepted as part of case law, an arbitral tribunal had declared that there was only one rule, the rule of equidistance-special circumstances. In his view, the article under examination set forth a rule whose wording was perhaps imperfect but whose purpose was obviously to be a reminder that jurisdictional immunity and the exceptions thereto were of equal standing and derived from the same phenomenon, the development of international relations on the basis of the consent of States.

36. With regard to property, Mr. Ushakov seemed to be seeking affirmation of a rule that the principle of State immunity went together with a principle of im-

munity of property. For his own part, his willingness to acknowledge the existence, for property, of immunity from execution was matched by his doubts concerning the existence of a rule of immunity with regard to the establishment of legal title to property. There was case law on that matter, too. As a simple example of the kind of situation in question, it might be assumed that foreign States had been granted the right to acquire property in a country according to local law and that, after one such State had acquired a diplomatic residence in that country, a dispute arose over its possession of legal title under local law. Though it was true that a country must have the assurance, particularly in such a case, that its possession would not be disturbed, it could hardly be accepted that legal title to the property should no longer be established by a local jurisdictional authority because it was claimed by a foreign State. That would be going too far. The Commission would probably have to revert to that question when it examined article 9.

37. Mr. USHAKOV, referring to the opinions expressed by the Chairman speaking as a member of the Commission, agreed that the rule of immunity and the exceptions to it were on the same footing from the point of view of consent. The point at issue, however, was States’ freedom to do with their right to immunity as they saw fit, and to submit to the jurisdiction of a particular court. In his view, that faculty, which was not mentioned in other conventions, need not be mentioned in the draft articles, for it was self-evident.

38. In the event of a dispute concerning title to property, it was important to distinguish between the question whether that property was State property or private property and the questions arising subsequently. Once the first question was settled and if State property was involved, the State concerned enjoyed jurisdictional immunity. That being so, the institution of proceedings was dependent on the ownership of the property. According to article 5 of the draft articles on the most-favoured-nation clauses,¹⁵ most-favoured-nation treatment was “treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State”. In that provision, things were taken into consideration only in so far as they belonged to the State; failing that link between State and things, the treatment was granted not to the things, but to the State. It was with that in mind that he suggested the inclusion in article 6 of a reference to State property.

39. Mr. KOROMA wondered whether draft article 8 would suffer if the words “in any legal proceeding” were deleted. He made that comment in the light of article 2, subparagraph 1 (g), which defined the term “jurisdiction”, and of article 3, subparagraph 1 (b), which amplified that definition, and bearing in mind the need for symmetry and consistency, he would also refer to article 1, which made no mention of legal proceedings. The Special Rapporteur might have a special

¹⁴ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 45-46, para. 70).

¹⁵ See *Yearbook ... 1978*, vol. II (Part Two), p. 21.

reason for retaining the words in question, however, and he would welcome his explanation.

40. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said that it was still the practice in certain countries to resort to seizure of property as a basis of jurisdiction. A case decided by the House of Lords in 1981, "*I congreso del Partido*",¹⁶ illustrated the fact that, in the United Kingdom, jurisdiction could be founded not only on seizure, arrest and attachment of property, such as a ship; Admiralty jurisdiction *in rem* was so wide that it could even be invoked against a sister ship which had had nothing to do with the cause of action, but happened to belong to the same fleet as the one that had committed or was responsible for the tortious act. It would, however, be preferable not to introduce the question of property into the draft at the present stage, since the meaning of jurisdictional immunities of States would be clouded by the inclusion of the concept of what was an inanimate object—property—as opposed to a legal fiction such as a beneficiary of State immunity. He agreed with Mr. Ushakov, however, that most-favoured-nation treatment—since it was treatment, as opposed to a right—could be extended to property.

41. With regard to the drafting points raised, he said that Mr. El Rasheed Mohamed Ahmed's suggestion would be taken into consideration. The wording proposed by Mr. Koroma had in fact been used at an earlier point, but Mr. Calle y Calle had argued,¹⁷ very convincingly, that article 8 should not be shortened, since to refer to jurisdiction against a State, rather than over or in respect of it, was not very friendly. It might also be advisable in the interests of clarity to retain the reference to legal proceeding.

42. The CHAIRMAN suggested that the Drafting Committee should be considered as being still seized of draft article 8 and that the Commission should turn to the consideration of draft article 9.

It was so decided.

43. Mr. USHAKOV, referring to the words "under article 8, paragraph 2", appearing in article 9, paragraph 1, said he wondered how a State could give its consent to the exercise of jurisdiction by the court of another State under a provision according to which jurisdiction could be exercised in legal proceedings against a State which consented to its exercise. In other words, a State could give its consent by virtue of its own consent. According to the same paragraph, the State could give its consent either "expressly" or "by necessary implication from its own conduct in relation to the proceeding in progress". Normally, "implicitly" was contrasted with "expressly", but here the contrast was with the conduct, as possible evidence of tacit consent. In his view, that concept should not be mentioned in the article itself, but in the commentary to it. Qualify-

ing conduct as consent should be avoided. Under article 45 of the Vienna Convention on the Law of Treaties, a State might no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty if it must, by reason of its own conduct, be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation. Nothing in that provision said that the conduct of the State implied on its part consent not to invoke a particular cause or ground. It would therefore be preferable, in the case of the article under examination, to specify in the commentary that the fact that a State initiated proceedings before the court of another State meant that it was consenting to submit to the jurisdiction of that court.

44. The case of express consent, which related to a certain action before a court, should be distinguished from cases where there was no express consent. According to article 9, paragraph 2, the consent could be given in advance. That rule was valid for express consent, but it was not applicable to the consent implied by conduct to which reference was made in paragraph 1. As a result, paragraph 1 should not constitute a general paragraph and the provisions of article 9 relating to express consent should be separated from the provisions concerning what was another form of consent. The wording of paragraph 2 was lacking in other respects. It was not satisfactory to provide that consent could be given in advance by an express provision by which a State expressly undertook to submit "to the jurisdiction", for a State did not agree to submit to the jurisdiction in general, but to the jurisdiction of a particular court. It was not correct to add that the State could thus undertake "to waive State immunity", since, in agreeing to submit to the jurisdiction of a court, it was not waiving State immunity in general; to specify that it waived State immunity "in respect of one or more types of activities" was ill-advised, since in principle a specific case was involved and the concept of types of activities should therefore be defined.

45. Since paragraph 3 declared that "consent may also be given after a dispute has arisen", he wondered whether a State could give its consent even several years after that event. The remainder of the paragraph, which specified how that consent could be given, was descriptive in nature and did not set forth specific rules. Paragraph 4 described the conditions under which a State was "deemed to have given consent" to the exercise of jurisdiction by the court of another State. He wondered by whom the State was "deemed to have given consent" and why it should be so deemed. The concept of the right to property, referred to in paragraph 5, was, as Mr. Reuter had stressed, entirely separate from that of immunity. In his own view, the question of the establishment of title to property should be set aside. It appeared from the terms "or any conduct other than an express indication of consent", contained in paragraph 6, that the express indication of consent was considered to be a form of conduct. It was true that all express consent resulted from conduct, but

¹⁶ See 1708th meeting, footnote 34.

¹⁷ *Yearbook ... 1981*, vol. I, p. 78, 1657th meeting, para. 17.

it was not the same conduct as that referred to in paragraph 1.

46. His remarks concerning article 9, although numerous, related essentially to drafting matters. They did not mean, therefore, that he did not find the article generally acceptable. With regard to articles 9 and 10, it should be noted that they contained neither general rules nor general principles, but exceptions. The fact that a State gave its consent to the exercise of jurisdiction by the court of another State constituted an exception to the principle of immunity. It was therefore entirely wrong to include those articles in the part of the draft devoted to general principles.

47. Mr. FLITAN said that he considered the complexity of the topic of State immunity to require provisions as detailed as article 9. He also believed, as he had already indicated (1715th meeting), that in its work on the topic the Commission should draw on certain existing multilateral conventions. It was with these two considerations in mind that he proposed the addition to article 9 of a paragraph specifying that waiver of jurisdictional immunity for a civil or administrative action should not be held to imply waiver of immunity from the execution of the judgement, for which a separate waiver was necessary. Models for such a provision were to be found in article 31, paragraph 4, and article 61, paragraph 4, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

The meeting rose at 1 p.m.

1717th MEETING

Tuesday, 1 June 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR³ (continued)

ARTICLE 8 (Consent of State) *and*

ARTICLE 9 (Expression of consent) (*concluded*) *and*

ARTICLE 10 (Counter-claims)⁴ (*continued*)

1. Mr. NI said that, in view of the rule enunciated in article 6, however incomplete and subject to improvement it might be, and the provisions of article 7, paragraph 1, article 8 was by no means indispensable. The approach adopted by the Special Rapporteur in part II of the draft articles (General Principles) had been made abundantly clear in his third report (A/CN.4/340 and Add.1, para. 45), which stated that article 6 enunciated the rule of State immunity, while article 7 set out its correlative, the corresponding obligation of restraint on the part of the territorial State, as well as a third element of State immunity, namely, the notion of "consent". In his presentation of the draft articles on consent, the Special Rapporteur had said⁵ that the existence of consent could be viewed as an exception to the principle of State immunity and had been so viewed in some national legislation and regional conventions, but that, for the purposes of the draft articles, he preferred to consider consent as a constituent element of State immunity. Articles 6, 7 and 8 as they now stood were in line with the approach adopted by the Special Rapporteur.

2. The meticulous work the Special Rapporteur had done and the logical sequence in which he had presented articles 6, 7 and 8 were greatly appreciated, but the proposition that the notion of consent, or rather, lack of consent, was an ingredient or constituent element of State immunity was not readily understandable, and the arguments adduced by the Special Rapporteur in paragraphs 16 and 19 of his fourth report (A/CN.4/357) were not necessarily conclusive. The question whether consent or lack of consent was an element of State immunity was, however, academic, and it should not prevent the Commission from drafting articles on jurisdictional immunity.

3. Although article 8 was entitled "Consent of State", paragraph 1 merely repeated what had already been stated in substance in article 6, paragraph 1, and article 7, paragraph 1. It was only paragraph 2 that dealt with the substance of the question, namely, the fact that jurisdiction could be exercised in a legal proceeding

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), p.153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the texts see 1716th meeting, para. 17.

⁵ *Yearbook ... 1981*, vol. I, pp. 110-111, 1663rd meeting, para. 3.

against a State which consented to its exercise. Hence, if article 8 was to be retained as a general statement of consent and to be followed by articles of a more specific nature, its paragraph 2 might be all that was needed. If a general statement on consent was to be included in article 8, it should also be made clear that the effect of consent did not apply to interim seizure, attachment or post-judgement execution.

4. The retention or deletion of article 8 might depend to some extent on whether the wording of article 6 could be improved. If State immunity was to be taken as a rule and not an exception to territorial jurisdiction, and if the words "in accordance with the provisions of the present articles", in article 6, were regarded as unsatisfactory, as he tended to think they were, those words might be replaced by the words "except as otherwise provided in the present articles"; that wording had been proposed by Mr. Jagota (1711th meeting) and other members of the Commission, and had the advantage of clearly affirming that State immunity was a rule subject only to certain exceptions. Such wording had, moreover, been used in the United States Foreign Sovereign Immunities Act of 1976⁶ and in the United Kingdom State Immunity Act of 1978.⁷ Indeed, if the rule of State immunity was clearly established, it did not have to be repeated at the beginning of every article or at the beginning of every part of the draft.

5. The Special Rapporteur was to be commended for the improvement he had made by combining the contents of the original articles 8, 9 and 11 in the new article 9, which was generally acceptable, even though it raised some questions of drafting. For example, six of the seven paragraphs of article 9 referred only to "the court" or the "jurisdiction of the court" and they might, for the sake of uniformity, be brought into line with article 7, alternative A of para. 1, which referred to the "judicial and administrative authorities" of the territorial State. The words "in progress" at the end of article 9, paragraph 1, would probably give rise to confusion because different jurisdictions might attach different meanings to the expression "the proceeding in progress", which might mean the opposite of "a stay of proceedings" in the common-law system or signify that a State could give valid consent only when the proceeding was going on. It might also be possible to combine certain paragraphs, such as paragraphs 2 and 3, which referred to the time of giving consent, and paragraphs 4 and 5, which both provided for the voluntary submission of the dependent State. The meaning of the words "in respect of one or more types of activities" in paragraph 2 should also be explained more fully. He would refer at a later stage to article 10, on counter-claims.

6. Mr. EL RASHEED MOHAMED AHMED said that article 9 dealt with the various modalities of consent, which were clearly stated in the Special Rapporteur's fourth report (A/357, para. 17). He fully

agreed with the comments made by Mr. Ni on paragraph 1 of that article. Paragraph 3 dealt with the situation in which proceedings were instituted in the receiving State by a plaintiff, whether a natural or a juridical person, who enjoined the foreign State as a defendant. It provided that consent could be given by "actual submission to the jurisdiction of the court or by an express waiver of immunity". It should, however, also state whether such consent must be given at the stage of the first hearing or at a later stage, since the words "relating to the merit" in paragraph 4 made it clear that the defendant knew what type of case was being brought against him.

7. Paragraph 4 referred to the situation in which a foreign State instituted a legal proceeding and to that in which it took part, or a step, in the proceeding relating to the merit. It did not, however, show in what capacity such participation took place. It might therefore be interpreted to mean that a State took part in the proceeding either as a defendant or as an interpleader or an *amicus curiae*. Paragraph 4 was nevertheless in keeping with article 32, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 45, paragraph 3, of the Vienna Convention on Consular Relations; in that connection, he agreed with Mr. Flitan (1715th meeting) that the articles under consideration should be modeled as closely as possible on the provisions of existing conventions. It was also necessary to specify at what stage failure on the part of a State to enter appearance in a proceeding before the court of another State would bring the provisions of paragraph 6 into play. In municipal law, for example, failure to appear at the first hearing might result in a default decree against the defendant.

8. The words "during any stage of the proceedings", in paragraph 7, were also unclear. Did they refer to proceedings in the court of first instance or to any stage in litigation? If facts on which a claim of immunity could be based were made known to a State after the court of first instance had given its judgement, would that State be prevented from raising a claim of immunity? If "steps in the proceedings" were taken in the court of first instance, how early did such facts have to be made known? In other words, did the words "at the earliest possible moment", at the end of paragraph 7, mean before the first hearing or before the pronouncement of judgement? He raised those questions because they involved practical matters and the Commission had to provide for all the practical situations which could arise, so that conflicting interpretations could not deprive the draft articles of their meaning and intent.

9. Mr. McCaffrey said that the Special Rapporteur had successfully broken down consent into its constituent elements in article 9, which would provide a good starting point for the Commission's discussions. The Commission might, however, subsequently decide that separate articles on implied and express consent should be included in the draft and that it was not desirable to regulate consent in great detail, because detailed terms could be interpreted in different ways in different legal

⁶ See 1709th meeting, footnote 13.

⁷ *Ibid.*, footnote 12.

systems and the use of more general terms would take account of unforeseen circumstances and all legal systems and settings. Since some members believed that consent could be implied simply by the entry of a State into a legal relationship, in the broad sense of the term, with a private or non-governmental entity, the Commission would also have to decide whether such consent was a separate exception to jurisdictional immunity, or simply a species of the genus consent dealt with in part II of the draft.

10. Article 9, paragraph 1, as he saw it, was an attempt to state a general rule to be dealt with in subsequent paragraphs. In order to make that clear, paragraph 1 might specify that a State could give its consent expressly, as provided in paragraphs 2 and 3, or implicitly, as provided in paragraphs 4 and 6. Such a clarification was especially necessary because of the words "by necessary implication", which were not, in his view, self-explanatory, and might therefore be qualified by a reference to the provisions of paragraph 4. The problems raised by paragraph 1 could thus be solved either by treating the entire subject of consent in very general terms, along the lines of the United States Foreign Sovereign Immunities Act of 1976, section 1605 (a) (1), or by continuing to follow the present approach and simply replacing the words "either expressly or by necessary implication from its own conduct in relation to the proceeding in progress" by the words "either expressly or by implication as provided in this article".

11. In paragraph 2 of article 9, the term "treaty" did not overlap with the term "international agreement", which could be an informal agreement, but the use of the words "Such consent" might be ambiguous because, technically, they included consent by necessary implication, whereas paragraphs 2 and 3 really referred to express consent. The words "Such consent" in paragraphs 2 and 3 should therefore be amended. Paragraph 2 would also be clearer if the words "of a State" were added after the word "jurisdiction", and he agreed with Mr. Ni's comment concerning the words "in respect of one or more types of activities" at the end of that paragraph.

12. In paragraph 3 and in paragraph 6, it would be better to refer only to "consent", not to both "consent" and "waiver". In paragraph 4, the word "merit" should be replaced by the word "merits". In paragraph 5, it would be preferable to relate the terms used to the relevant paragraphs of article 9, saying, for example, "voluntary submission under paragraph 4" and "waiver under paragraph 3". Mr. Ushakov (1716th meeting) had rightly pointed out that the reference in paragraph 5 to "property" raised the question whether the Commission should deal with property in part II or in some subsequent part of the draft articles. In view of his earlier comment on the use of the word "waiver", the beginning of the second sentence of paragraph 6 might be amended to read: "Nor is such consent implied by any conduct other than"

13. As to paragraph 7, he agreed with Mr. El Rasheed Mohamed Ahmed that it was necessary to clarify the meaning of the words "stage of the proceedings". Since the second sentence of paragraph 7 did not make it clear whether an initial waiver of immunity would prevent a State from later raising a defence of immunity, the words "it has once waived its immunity and" might be inserted in the third line, between the word "after" and the words "it has taken steps". Lastly, the Commission might wish to consider the possibility, suggested by Mr. Flitan (*ibid.*), of adding another paragraph to article 9 to state expressly the obvious rule that a waiver of jurisdiction for the purpose of the proceeding proper did not amount to a waiver for the purpose of the execution of a resulting judgement.

14. Mr. BALANDA said he believed that the exact scope of article 8 must be evaluated, having regard to the structure of the draft. Part I of the draft was devoted to definitions, part II to general principles and part III to exceptions to the principle of State immunity. Since article 8 was placed in the part relating to principles, one expected it to state an important principle. But the principle it stated seemed to be in contradiction with the principle which followed from the explanation given by the Special Rapporteur in his fourth report (A/CN.4/357, para. 16). According to the Special Rapporteur, consent was not necessary for a State to be able to exercise its jurisdiction against another State. He fully agreed with that view and was surprised that under the terms of article 8 "a State shall not exercise jurisdiction in any legal proceeding against another State without the consent of that other State". According to that provision, a State would have to consent to another State's exercising jurisdiction over it, whereas the basic principle was that of non-consent. That contradiction was all the more troublesome because, unlike international law, which made the consent of the parties a condition for the exercise of jurisdiction, internal law did not require the consent of the defendant for the courts of a State to be able to hear litigation. And in the cases contemplated in article 8, it was the State courts which would have to examine the question of their own competence to try any case involving another State. It should not be forgotten that, in the last analysis, the problem of immunity would arise in the context of the internal law of States. Thus article 8 seemed to introduce an idea which did not appear to be accepted by any State: that of subordinating the exercise of jurisdiction to the consent of the parties. Since the Special Rapporteur had precisely the opposite principle in view, that of non-consent, he suggested that article 8 be drafted in the following terms:

"The consent of States is not required for the exercise of the jurisdiction of another State against them. Nevertheless, a State may consent, either expressly or implicitly, to submit to the jurisdiction of another State."

15. As to article 9, the Special Rapporteur had drafted it in a very detailed way, probably in order to make it more easily understandable. He wondered, however,

whether such a mass of detail would not complicate the task of those looking for the *ratio legis* of that provision. The seven paragraphs of the article were intended to enable a judge to determine, according to internal law, whether consent had been given and, if so, whether that consent had been explicit or implicit. But such detailed provisions might have the opposite effect; since the terms used did not necessarily cover the same real situations in the different systems of internal law, those provisions could be the subject of different interpretations. It would therefore be preferable to state more clearly the basic principles which article 9 was meant to establish, without going into details.

16. Article 10 set out a principle relating to counter-claims, but also sought to define the notion of a counter-claim. In his opinion the Commission should refrain, as far as possible, from defining the expressions used in the draft, with the exception of important expressions used in a sense different from their meaning in the main international conventions concerning related subjects. Article 10, paragraph 1, should be confined to expressing the principle that a party could be permitted to make a counter-claim, without seeking to define the notion of a counter-claim, which was easy to grasp despite the diversity of systems of internal law. As to paragraph 2, it seemed to add nothing to paragraph 1, since it was obvious that a party which could make a counter-claim could act in respect of its principle claim. That provision was probably not indispensable.

17. Mr. EVENSEN said he shared the view expressed by Mr. Ni that articles 6 and 8 dealt with more or less the same subject-matter and could be merged. If the Commission decided to retain article 8 as a separate provision, however, it should bear in mind its consideration of article 7, during which it had decided that immunity should apply not only to court proceedings but also to proceedings before other authorities, such as administrative and police authorities, and should delete the reference to "any legal proceeding" in article 8, paragraph 1, which he took to mean only "court proceedings". Since paragraph 2 seemed to deal with the same subject-matter as paragraph 1, the text of article 8 might be amended to read:

"1. Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any proceeding, as defined in article 7, against another State without the consent of that other State.

"2. If express or implied consent has been given in accordance with article 9, jurisdiction may be exercised against the consenting State to the extent that such a proceeding is covered by that consent."

18. In article 9, the Commission should also try to cover consent to proceedings before courts and consent to proceedings before other authorities as well. Article 9 would then have to be redrafted; it should take particular account of consent to court proceedings, which were probably the most common. Paragraphs 4 and 7 could be combined, because they both related to pleadings on merits. In the second sentence of paragraph 6, it might, moreover, be appropriate to

refer both to express consent and to implied consent, as had been done in paragraph 1.

19. Mr. QUENTIN-BAXTER said he fully agreed with many other members of the Commission that the Special Rapporteur had been right to revise the wording of articles 8 and 9 so that the difference between consent and waiver was not raised to the level of a distinction of substance. It was entirely correct to refer in article 9 not only to consent, but also to waiver. Indeed, the topic under consideration was part of every student's text book. It was black-letter law, an area in which the Commission was concerned not only to state the minimum, but to state it in a form that could be easily recognized by the authorities that normally dealt with such rules of law. While there were obvious reasons for looking carefully at the wording of the individual paragraphs of article 9 and, possibly, amending them, his over-all impression was that that draft article represented very faithfully the kind of rules that were set out in texts of international law and applied by municipal courts.

20. The inclusion of detail in article 9 would, of course, depend on a statement of the principle of consent in article 8. Like Mr. Ni, he was by no means convinced that that principle had to be stated negatively in article 8, paragraph 1, and positively in article 8, paragraph 2; but he found it difficult to be dogmatic about that or any other point of drafting, because there were still so many undecided variables elsewhere in the text of the draft articles.

21. Referring generally to the basic structure of the draft, he observed that, in article 2, subparagraph 1 (*g*), and in article 3, subparagraph 1 (*b*), the Commission was attempting to state the very essence of jurisdiction, namely, the power to adjudicate, to determine questions of law and of fact and to administer justice. To his mind, it would therefore be of great advantage to refer to jurisdiction not in terms of legal proceedings, court proceedings or proceedings before any particular branch of Government, but, rather, in an entirely general manner, so that no State could find in its legal system a means of escaping from the broad principle of international law embodied in article 9. The Commission was concerned with the power to adjudicate and, while that power would normally be exercised by courts or tribunals in the judicial branch of Government, it would sometimes be exercised by a tribunal which depended on the executive branch. He was therefore firmly convinced that the Commission should look carefully at the later context in which it would use such terms as "court proceedings" or "legal proceedings" and make every effort to ensure that the coverage of the draft articles was as general as possible.

22. For much the same reason, he would not be inclined to include in part II of the draft any stipulation about consent to jurisdiction or waiver of immunity from jurisdiction not affecting questions of execution. It was, of course, true that a waiver of immunity from jurisdiction could affect questions of execution or

attachment, but the proper place to deal with such matters was in the part of the draft having nothing to do with the power to adjudicate. Similarly, he did not think it was necessary to mention property in the context of jurisdictional immunities. The immunity of the agents of the State and the immunity of its property were two entirely different things. The Special Rapporteur had attempted to deal with the relationship between agents and property in article 7, paragraphs 2 and 3, in connection with which there were no doubt still many difficult questions to be discussed; but in those provisions, the Commission was speaking quite generally and attempting to deal in a comprehensive manner with property.

23. It therefore seemed to him that, while the Drafting Committee had a great deal of scope for amendments to the wording of the draft articles, it had before it provisions and commentaries that raised all the relevant points; he trusted that it would continue to state the broad principles in ways that would emancipate the draft articles from the effects of any particular legal system.

24. Mr. KOROMA said that, since the principle or rule of jurisdictional immunity could not be classified as *jus cogens*, the State of territorial competence might decide to institute proceedings against a foreign State operating in its territory. Under draft article 8, however, it could do so only with the consent of the foreign State. As the Special Rapporteur had rightly said (A/CN.4/357, paras. 16 and 19), consent of the State over which jurisdiction was to be exercised, or was being exercised, or the lack of such consent, was vitally relevant, if not determinative, in the consideration of any questions relating to jurisdictional immunity. Consent therefore played a dual role in that it was both a legal limit and a legal basis for action. The Special Rapporteur had also said that consent by a foreign State to be subject to the jurisdiction of the territorially competent State was not an exception to the rule of State immunity, but part of that rule.

25. Although the Special Rapporteur had said that article 8 was not an exception to the rule of jurisdictional immunity (A/CN.4/340 and Add.1, para. 51), the provisions of that draft article were apparently subject to part III of the draft articles, which dealt with exceptions. Consequently, the wording of draft article 8 appeared to contradict what the Special Rapporteur himself had said. He agreed that the concept of consent did not constitute an exception and considered that the words "Subject to part III of the draft articles" should be deleted from article 8, paragraph 1.

26. Draft article 8 limited draft articles 2 (subpara. 1 (g)), 3 and 7, from which it flowed. Whereas under article 7 a State must refrain from subjecting another State to the jurisdiction of its competent judicial and administrative authorities, under article 8 it was required to refrain only from instituting legal proceedings against another State. Some harmonization of the texts was called for.

27. Draft article 9, which was largely explanatory, was sufficiently wide-ranging to be comprehensive, if not exhaustive, and should be retained, subject to any drafting changes or other amendments which might be appropriate.

28. Mr. SUCHARITKUL (Special Rapporteur) said that the many comments made by members of the Commission, particularly with regard to the drafting of draft article 9, had been most helpful. While he agreed with the view that the rules set out in part II of the draft should be stated collectively, it would not be possible to include them all in a single article.

29. In draft article 8, the words "Subject to part III of the draft articles" had been included in square brackets to accommodate the view that the rule should not be stated in too absolute or unqualified a manner. Personally, he would be prepared to state the rule without any such qualification, it being understood that any qualifications or exceptions were to be found in the relevant conventions themselves. As Mr. Quentin-Baxter had rightly said, references needed to be made to inter-relationships at certain points. That was a matter of drafting, however. With regard to the comments made by Mr. Ushakov and the Chairman concerning the title of the draft article, he thought the choice of appropriate wording was a matter for the Drafting Committee.

30. He was inclined to agree with the view expressed by Mr. Koroma, that the Commission should not think in terms of one State exercising jurisdiction "against" another State. The expression "jurisdiction over" was used in a number of instances in the Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character. Perhaps the text could be harmonized, where possible, by the deletion of any references to legal proceedings. Such an amendment might also be compatible with the proposal made by Mr. Evensen.

31. The formulation of the principle itself had been based on article 61 of the Code of Civil Procedure of the Soviet Union,^{*} under which the filing of a suit against a foreign State, or the attachment of its property in the Soviet Union, were permitted only with the consent of the competent organs of the State concerned. That was simply another way of stating that jurisdiction could not be exercised against another State without the consent of that State, which was the wording used in draft article 8, paragraph 1. As far as the actual wording of the paragraph was concerned, however, he was prepared to be guided by the view of the majority.

32. Mr. McCaffrey had quite rightly said that draft article 9 was concerned with circumstances in which the question of jurisdictional immunity could be said not to arise, because consent had been given. In drafting paragraph 1 of that article, he had deliberately avoided the use of the expressions "implied consent" or "implied waiver", preferring the terms "expressly" and "by implication", in order to avoid creating confusion

^{*} See 1708th meeting, footnote 10.

when the Commission came to consider part III of the draft, or other exceptions. Mr. McCaffrey's proposal would certainly help to clarify and identify the ways in which consent could be given, either expressly or by implication.

33. Paragraph 2 presented a number of problems, which the explanations provided (1716th meeting) by Mr. Al-Qaysi and Mr. Ushakov had helped to clarify. He had used the expression "international agreement" because some collective term was needed to identify agreements which fell neither into the category of treaties between States or between international organizations and States, nor into that of contracts concluded by State agencies with private individuals within or outside the State. Further clarification could, however, be provided in the commentaries to the draft articles. He agreed that it might be preferable to replace the expression "types of activities" by "spheres of activity" or "areas of activity".

34. Referring to Mr. Quentin-Baxter's comments on paragraph 3, he said that waiver could be considered equivalent to consent when the State itself did not institute legal proceedings. Paragraphs 4 and 5 were intended to indicate the circumstances in which a State could be presumed to have submitted to the jurisdiction of another State by itself bringing an action. In that connection, Mr. Balanda had rightly pointed out that in some jurisdictions the entering of a counter-claim by a foreign State was considered as the institution of proceedings. But since the same might not be true of other legal systems, the idea had to be expressed separately in order to anticipate problems that might arise in connection with cross actions relating to the principal claim, but also constituting independent counter-claims.

35. The question of property had raised a number of difficulties, as was apparent from the wording of draft article 7, paragraphs 2 and 3. When could a foreign State whose property was affected by a civil action be deemed to have submitted to the exercise of jurisdiction by another State or to have waived immunity from jurisdiction? Was the State bound to prove title or give evidence of possession? Practice varied. In the past, the tendency had apparently been towards absolute immunity, it being sufficient for a State to claim ownership for jurisdiction to be terminated. In other cases, however, the court might reserve the power to consider evidence of title or possession, in which case immunity must be upheld before other possible exceptions were considered. But the Commission might consider it unnecessary to go into such detail.

36. As to paragraph 7 of article 9, if the Commission considered that the wording could not accommodate different legal systems, it could be dispensed with. The proposal made by Mr. Flitan (*ibid.*) might provide a satisfactory alternative. It might be possible to stipulate

that waiver of immunity from jurisdiction did not imply waiver of immunity from execution.

37. Referring to the observations made by Mr. Ushakov (1709th meeting) and Mr. Balanda (1712th meeting), he agreed that the definition of "immunity" might be a little confusing. To describe a State as immune from the jurisdiction of another State meant that it was exempt from that jurisdiction. But the word "exempt" could also be used to mean that a State exempted another State from its jurisdiction, or refrained from the exercise of that jurisdiction.

38. He proposed that the Commission should confirm that draft article 9 had been referred to the Drafting Committee.

39. The CHAIRMAN said that if there were no objections, he would take it that discussion on articles 8 and 9 was concluded and that those articles were referred to the Drafting Committee.

It was so decided.⁹

40. Mr. USHAKOV, referring to article 10, said that he had many doubts about its wording and content. First, the words "In any legal proceedings [...] in which a State has taken part or a step relating to the merit, in a court of another State", in paragraph 1, were ambiguous. If they meant that a State was acting as plaintiff, the making of a counter-claim against it was conceivable; but if they meant that it was acting as defendant, that was not conceivable. Similarly, the clause "in accordance with the provisions of the present articles jurisdiction could be exercised, had separate proceedings been instituted before that court" was not clear.

41. Secondly, paragraph 2 of the article raised the question whether a defendant State which had invoked jurisdictional immunity with respect to a court could nevertheless make a counter-claim. In short, the question was whether a State which had tacitly agreed to submit to the jurisdiction of a court by instituting a legal proceeding against another State was deemed to have consented to the exercise of the jurisdiction of that court with respect to a counter-claim. He did not believe that was a generally accepted rule; in the Soviet Union, at least, the making of a counter-claim depended on the express consent of the State concerned. It was true that the rule applied to diplomatic agents, under article 32, paragraph 3 of the Vienna Convention on Diplomatic Relations; but a State could not be assimilated to a diplomatic agent, since it could never act as a private person. It would therefore be advisable for the Special Rapporteur to carry out further research on that question.

The meeting rose at 6 p.m.

⁹ For consideration of the texts proposed by the Drafting Committee, see 1750th meeting, paras. 1-15.

1718th MEETING

Wednesday, 2 June 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

ARTICLE 10 (Counter-claims)⁴ (concluded)

1. Mr. LACLETA MUÑOZ said that in the main he approved of article 10, which was not without its difficulties. Some of them, however, could be removed if paragraph 1 was drafted in negative rather than positive terms. In addition, paragraph 2 could be deleted, for the case of the defendant State which made a counter-claim and thereby consented to submit to the jurisdiction of a court or to waive jurisdictional immunity was covered by some paragraphs of article 9.

2. Mr. McCAFFREY said that the two paragraphs of article 10 appeared to deal with two different situations: first, the situation in which the foreign State was the plaintiff and counter-claims were brought against it by the defendant in the action, and second, the situation in which the foreign State was the defendant and was making the counter-claim. While that structure was sound, the wording might be improved for the purposes of greater clarity.

3. The question dealt with in paragraph 1 was the extent to which the bringing of an action by a State against a private individual operated as a waiver of that State's immunity. Naturally, there was a difference between a situation in which a foreign State was the plaintiff and an action between two private individuals. Generally, under United States law, an individual bringing an action subjected himself to the plenary *in personam* jurisdiction of the court and the court could adjudicate with respect to any counter-claim brought by the defendant, provided it was competent to do so under its own

rules. In paragraph 1, there was a potential distinction between *in personam* jurisdiction for purposes relating to the legal relationship which was the subject-matter of the foreign State's claim, and the foreign State's immunity in respect of any counter-claim which related to the subject-matter of the State's claim or in respect of which the State would otherwise enjoy immunity. Consequently, the tenor of paragraph 1 appeared to be that a foreign State, by initiating proceedings, conferred jurisdiction on the court in respect of counter-claims brought by the defendant, but only those counter-claims which related to the subject-matter of the State's claim or could be brought by the defendant by virtue of the State's consent or under one of the exceptions provided for in part III of the draft. In other words, by bringing an action the foreign State waived its immunity in respect of some, but not all, counter-claims brought by the defendant. Consequently, the article dealt with a form of implied consent.

4. He agreed with Mr. Balanda (1717th meeting) that the wording of paragraph 1 could be refined. Presumably, the words "has taken part or a step relating to the merit" were not intended to indicate that if a foreign State, for any reason of policy, wished to file an *amicus curiae* brief in order to influence the outcome of a proceeding, it would, by so doing, confer jurisdiction on the court in respect of any counter-claim brought against it by any party to the action. That construction should, strictly speaking, be precluded by the very term "counter-claim". It might be preferable, therefore, to replace the words in question with a phrase that would cover all relevant possibilities, such as "or in which a State has intervened". A similar form of language was used in section 1607 of the United States Foreign Sovereign Immunities Act.⁵

5. In addition, the latter part of paragraph 1 could be redrafted to make it clear that they referred to an action by a private party that was covered by consent under part II of the set of draft articles or one of the exceptions provided for in part III. Accordingly, the words, "or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court" could be replaced by "or in respect of any counter-claim as to which a foreign State would not be entitled to immunity under the provisions of parts II or III of the present articles, had such a claim been brought in a separate proceeding against that State". A similar provision could be added to paragraph 2, the purpose being to make it plain that private parties could bring an action against a foreign State in respect of any question involving consent or falling within one of the exceptions in part III.

6. Mr. NJENGA said that, as a statement of the generally applicable principle that a State making a claim could not at the same time insist on retaining its immunities in respect of any counter-claim brought by the defendant in that action, article 10 was quite justified and should be retained. However, the drafting

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the text, see 1716th meeting, para. 17.

⁵ See 1709th meeting, footnote 13.

of paragraph 1 could be improved. In particular, the phrase "has taken part or a step relating to the merit" was somewhat vague and the wording proposed in that regard by Mr. McCaffrey could provide considerable clarification.

7. He encountered considerable difficulty with the latter part of paragraph 1, "or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court". If, as Mr. McCaffrey had affirmed, that provision related to proceedings covered by the exceptions set out in part III of the draft, it would appear to be unnecessary, since the court would have jurisdiction in any event. Moreover, it appeared to relate to jurisdiction in general, rather than jurisdiction in respect of counter-claims in particular. Accordingly, it could be deleted. Paragraph 2 was a logical development of paragraph 1 and should be retained.

8. Mr. KOROMA said that the principle of jurisdictional immunity was itself an exception to the normal rule, and the Commission should be careful not to erode it. He too thought that the words "in which a State has taken part or a step relating to the merit" in paragraph 1 created difficulties, particularly in cases where a State joined in an action between two other parties in order to defend its property or interests. He was not convinced that such a step constituted sufficient grounds for assuming that the State consented to the jurisdiction of the court in respect of any counter-claim brought against it. Further explanation of that point was needed. The wording of the paragraph could also be clarified, although it was an improvement on article 32, paragraph 3, of the Vienna Convention on Diplomatic Relations. He agreed with the comment that, if the last part of the paragraph was intended to refer to part III of the draft, it should be placed there, rather than in article 10.

9. As to paragraph 2, under the common law system the making of a counter-claim was deemed to amount to consent to the exercise of jurisdiction by the court, but the same might not be true of all legal systems. He would welcome further information on that point. Finally, he wondered what would be the position if a court decided that a counter-claim made by a State did not arise out of the same legal relationship or facts as the principal claim. Would the principal claim none the less proceed?

10. Mr. EVENSEN said that he was impressed with the provisions contained in the article, but the wording of paragraph 1 posed a number of problems and, in that regard, he endorsed the comments made by Mr. Njenga and Mr. Koroma. He therefore proposed that the paragraph should be amended to read:

"When a State institutes legal proceedings in the court of another State or takes part in such proceedings or in part thereof with regard to the merits of the case, jurisdiction may be exercised against such State in respect of any counter-claim arising out of

the same legal relationship or the same facts as the principal claim.

"If, in accordance with the provisions of the present articles, jurisdiction might have been exercised by separate legal proceedings against the State concerned with regard to special claims, such claims may likewise be introduced in the pending case to the extent that the court before which the pending claims have been brought is competent to adjudicate such additional claims as mentioned."

Paragraph 2 could remain unchanged except for insertion of the words "according to article 9" after the word "consent".

11. One aspect not covered by the article was the possibility that certain types of counter-claims might arise out of proceedings instituted against other authorities. Accordingly, the following paragraph should be added to the article:

"The provisions of the present article are applicable as appropriate to proceedings before such other authorities as defined in article 7 to the extent that such authorities are competent to deal with such issues and counter-issues."

12. Mr. JAGOTA said that article 10 appeared to deal essentially with the question of the scope of counter-claims in relation to the concept of State immunities. In his view, the scope of counter-claims raised against a foreign State under the provisions of paragraph 1 would be the same as for claims arising out of the same legal relationship or facts as the principal claim. Counter-claims or additional claims that were made against a State instituting proceedings in a foreign court and did not arise out of the same legal relationship or facts as the principal claim might be justified under the provisions not only of part III but of any of the draft articles, depending on the facts of the counter-claim concerned. In either case, the court would have jurisdiction and the question of State immunity would not arise.

13. Conversely, under paragraph 2, a State against which proceedings had been instituted by an individual could claim immunity or raise a counter-claim, in which case the court would have jurisdiction in respect of both the principal claim and the counter-claim. In either instance, the scope of the claims concerned would be the same.

14. The two ideas appeared to be clearly stated in the article and, in his opinion, the last part of paragraph 1 served a useful purpose, although the actual wording must be decided by the Drafting Committee. As to the phrase "or in which a State has taken part or a step relating to the merit", in paragraph 1, the final wording should be in keeping with that to be used in article 9, paragraph 4.

15. The CHAIRMAN, speaking as a member of the Commission, said that some of the expressions used in article 10 posed difficulties. Paragraph 2, for example, provided for the case in which a State was summoned before a court. Counsel would first recommend that the

State should argue that the court lacked jurisdiction by reason of the immunity, and, secondly, if the court did not recognize the immunity, that a counter-claim should be made. In public international law and in certain countries, including France, a counter-claim could in no sense be interpreted as a will on the part of the State to waive immunity. In fact, a waiver of immunity was subject to two conditions: the will of the State to waive the immunity and the granting of the immunity by the national courts with respect to a counter-claim. Hence, article 10, which would set forth a rule of public international law binding on national courts, must be drafted extremely carefully.

16. Mr. USHAKOV pointed out that, in the Soviet Union at least, tacit submission to the jurisdiction of a court by instituting proceedings before it did not necessarily mean acceptance of the exercise of its jurisdiction with respect to a counter-claim: the exercise of that jurisdiction required express consent. As Mr. Reuter had pointed out, government and court practice should be taken into account before a rule could be drawn up. The Special Rapporteur should therefore obtain a broader range of information.

17. Mr. NI, referring to Mr. Njenga's comments concerning the last part of paragraph 1, said that one of the prime concerns whenever legal or judicial reforms were being considered was to reduce the burden imposed on the courts by the multiplicity of suits. One way of achieving that aim was to combine suits involving the same parties, even though they might not arise out of the same legal relationship or facts and the court might not normally be competent to exercise jurisdiction. Under the provisions of paragraph 1, it was possible for a court to exercise jurisdiction in respect of a counter-claim which did not arise out of the same legal relationship or facts as the principal claim, thereby saving much time and expense. Even when the court was not normally competent to hear the counter-claim, it would be convenient if it could assume the necessary jurisdiction. The last part of paragraph 1 was therefore a useful innovation and should be retained.

18. Paragraph 2 clearly reflected the idea of allowing counter-claims to be made on the basis of the concept of implied consent. One question which called for further consideration in that connection was whether a foreign State which instituted proceedings could make an express declaration that it would limit its consent to the proceedings in question and would not be subject to the jurisdiction of the court in respect of any counter-claim.

19. Mr. MAHIU said that he would like first of all to congratulate the Special Rapporteur on the quality and precision of his fourth report (A/CN.4/357).

20. Article 10, paragraph 1, covered a question of principle and the corollary thereto. The question of principle was to what extent a State which instituted legal proceedings or took a step in legal proceedings thereby accepted a counter-claim made by the defendant; the corollary concerned the actual scope of the counter-claim with respect to that State. Perhaps the

answer lay in the way in which the State acted. Paragraph 1 envisaged three cases: the case of a State which itself instituted the legal proceedings; that of a State which took part in legal proceedings; and that of a State which took a step in legal proceedings. When a State instituted legal proceedings or took part in them, it ran the risk of being faced with a counter-claim on the whole of the matter in dispute. On the other hand, when it took a step in legal proceedings—for example, when it supported proceedings instituted by one of its nationals, whether an individual or legal entity—it might take a step only in connection with a particular point of contention of special concern to it. Accordingly, article 10 should specify that a counter-claim must not have the effect of involving a State in the whole of the matter in dispute if the State in question was simply taking a step in the proceedings.

21. Mr. KOROMA said that, although Mr. Evensen had probably intended the words "additional claims" at the end of paragraph 1 of his amended version of article 10 to mean "counter-claims", they might be taken to mean claims added by a plaintiff to an original claim. They should therefore be clearly defined.

22. Referring to the question of the relationship between consent and counter-claims, he cited the example of a case in which a State entered into a contract with a local contractor for repairs to its chancery building in a foreign country and, having paid the entire fee for the repairs, found that the work had not been completed and that the local contractor claimed that all he had contracted for was "habitable occupation". The State therefore decided to sue for lack of complete performance and the contractor answered with a counter-claim to the effect that he had done more work on the building than had been contracted for. It was very doubtful that, by bringing a suit with regard to the original contract, the State concerned could be said to be giving its consent to the counter-claim. He would be grateful to the Special Rapporteur for any possible clarification on that point.

23. Mr. RIPHAGEN, referring to Mr. Koroma's comments, said that, in his own view, article 10 was in no sense based on consent. Rather, it sought to show that, in deliberately using the courts of another State, a foreign State ran the risk that the other State might also make use of those courts, something it was fully entitled to do.

24. The point raised by Mr. Mahiou was covered by article 13 of the European Convention on State Immunity,⁶ which clearly demonstrated that intervention itself did not make a court competent to adjudicate a counter-claim.

25. Mr. NJENGA said that, if reference were made in paragraph 1 to additional and related claims, the Commission would be on dangerous ground, because it would be saying in effect that the defendant State waived all its immunities forever and could be brought

⁶ See 1708th meeting, footnote 12.

to court even on matters not related to the principal claim, including matters not covered by the exceptions dealt with in part III of the draft. The Commission would thus be going much too far if it established in article 10 that a State had no immunities at all when it dared to take part in legal proceedings in the court of another State.

26. He agreed with Mr. Ni that it would be convenient to allow the same court to deal with all related claims by the parties, provided that such claims were justifiable by the court and were not exceptions to the general rule of jurisdictional immunity. Otherwise, States would be penalized every time they brought a suit.

27. Mr. McCaffrey said it was quite apparent from the discussion of the words "taken part or a step relating to the merit" in paragraph 1 that the meaning of the concept of intervention in a proceeding varied from one legal system to another. Hence it might be necessary to engage in further empirical study of what intervention in a proceeding signified; otherwise, it would be difficult to determine how to limit the scope of a counter-claim resulting from intervention. In that connection, he noted that the provision of the European Convention on State Immunity, to which Mr. Riphagen had referred, was limited to intervention for the purpose of asserting a right to or interest in property, while the United States Foreign Sovereign Immunities Act, which was much broader, allowed counter-claims in any instance in which a foreign State intervened.

28. Mr. Flitan suggested that the Special Rapporteur should reconsider the phrase "arising out of the same legal relationship or facts as the principal claim", in paragraph 1. That legal relationship and those facts could not logically be placed on the same footing, since a legal relationship always derived from legal acts or facts. Reference could be made only to the same legal relationship, which derived from the legal act or legal fact which had produced it.

29. Mr. Sucharitkul (Special Rapporteur), summing up the discussion, said that article 10 was concerned exclusively with limiting the scope and consequences of submission by one State to the jurisdiction of another State. It did not seek to expand such jurisdiction. Paragraph 1 dealt with counter-claims brought against a State and, in that connection, he drew attention to the fact that the State's submission to jurisdiction was limited in such cases because it was deemed to have consented only to proceedings arising out of the same legal relationship as the principal claim.

30. In the earlier version of article 10 submitted in his third report (A/CN.4/340 and Add.1, para. 81), in paragraph 1, counter-claims had also been limited as to quantum. At the previous session, Mr. Aldrich had said⁷ that such a limitation would be unfair; but the purpose in proposing it had been to give the State an incentive to submit to jurisdiction because any counter-claims would be limited by the quantum of the principal claim.

The Commission had none the less agreed with Mr. Aldrich that article 10 should provide for a limitation, not as to quantum but as to subject-matter, in other words, claims arising out of the same legal relationship or facts as the principal claim.

31. In that connection, Mr. Mahiou had raised the point that, in article 9, the Commission would also have to decide to what extent a State in fact submitted to jurisdiction when it asserted a right to or interest in property, and Mr. Ni had correctly pointed out that, in such a case, a State could make a claim but specify that it raised a plea of immunity because the property belonged to it and a court of another State should not exercise jurisdiction in respect of the property.

32. With regard to proceedings relating to counter-claims, there were, moreover, various types of intervention, such as *ex parte* proceedings, interpleader proceedings and the participation of a State which succeeded to an inheritance and against which a counter-claim could be brought. All those questions would have to be dealt with in detail in the commentary to articles 9 and 10.

33. In connection with the words "... had separate proceedings been instituted..." at the end of article 10, paragraph 1, Mr. Jagota had properly noted out that they related more to articles 8 and 9 than to part III of the draft because, under article 9, consent to jurisdiction could have been given in a separate written agreement, treaty or contract and a court, as referred to in article 10, paragraph 1, would then be able to exercise jurisdiction in the light of the earlier consent. If the wording of paragraph 1 was unclear, however, he was prepared to consider any possible improvements.

34. Paragraph 2 related to a State which made a counter-claim in proceedings before a court of another State and was deemed to have given consent to the exercise of jurisdiction by that court, which would also have to rule on the principal claim because the counter-claim was necessarily allied to it. The paragraph thus narrowed down the provisions of article 9.

35. Mr. Ushakov stressed the importance of the time factor in matters concerning counter-claims. If a State instituted proceedings before a court of another State and was aware of the existence of a counter-claim before the court considered the merits of the case, there was consent on its part. On the other hand, if the counter-claim was made after the court had begun to deal with the merits, that State could not be deemed to have consented to it in advance. Similarly, the State which acted as the defendant and then made a counter-claim was obviously giving its consent twice, but the situation was different when it made a counter-claim before the court had begun to deal with the merits.

36. Mr. Koroma said that, despite the use of similar wording, article 9, paragraph 4, was predicated on consent but, as Mr. Riphagen had rightly pointed out, article 10 was not. Precisely because express consent was not required under article 10 and because a State against

⁷ Yearbook ... 1981, vol. I, p. 78, 1657th meeting, paras. 21-24.

which a counter-claim was brought might be placed in the position of having to deal with more than it had bargained for, several members of the Commission had requested the Special Rapporteur to shed further light on the words "legal proceedings ... in which a State has taken part or a step relating to the merit" in article 10, paragraph 1.

37. Again, in referring to article 13 of the European Convention on State Immunity, Mr. Riphagen had said that, under that article, intervention by a party in a claim related to the procedure and not to the merits, whereas such intervention did relate to the merits under article 10 of the present draft. That point might also be considered by the Special Rapporteur and the Drafting Committee.

38. Mr. SUCHARITKUL (Special Rapporteur) said that members of the Commission appeared to have greater doubts about the meaning of the words "stage of the proceedings" in article 9, paragraph 7—regardless of whether the proceedings related to the merits—than about the meaning of the concept of intervention as to the merits. Proceedings could, for example, relate both to the procedure and to the merits when a foreign State claimed immunity in respect of a right to property and the court of the territorial State nevertheless required the foreign State to submit to its jurisdiction so that it could decide whether the claim of immunity was valid. Once it was decided that the foreign State's claim of immunity in respect of the property in question was valid, the court of the territorial State should decline jurisdiction and the question of counter-claims would not arise because the case would then be closed.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that draft article 10 should be referred to the Drafting Committee.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/341 and Add.1,⁸ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING⁹ (continued)

* Resumed from the 1707th meeting.

⁸ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

⁹ The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), p. 120 *et seq.*

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)¹⁰ (continued)

40. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that the discussion on article 36 *bis* had been both lengthy and interesting. He did not intend to give an account of all the opinions expressed, and would confine himself to the comments that might lead to a consensus. The discussion had been lengthy and interesting primarily for reasons of law. It was undeniable that the member States of an organization were, strictly speaking, third parties with respect to treaties concluded by the organization. In point of fact, however, it was plain that an organization consisted of States acting collectively, and no organization could exist without the presence and the action of the member States. Indeed, article 36 *bis* had held the attention of the members of the Commission for so long precisely because it could not be affirmed out of hand that the member States of an organization were merely third parties with respect to the treaties concluded by the organization. It was apparent from the observations by Governments on other articles of the draft that agreements concluded between an organization and its member States called for special treatment, for the member States did not have the same relationship to the organization as did States that were completely outside it. Furthermore, even those opposed to retaining a provision on the matter had felt that it should at least be discussed in the commentary. His own view was that the question was too important to be settled in that way.

41. There was also a practical reason for the lengthy discussion on article 36 *bis*. Generally speaking, it could be said that, in modern times, many initiatives by international organizations could be successfully completed only if the member States committed themselves along with the organizations. He himself had alluded to that fact when he had spoken of modern economic problems. The Commission could not be expected to examine all the ways in which a twofold commitment of that kind could be achieved. The question had arisen in connection with only one technical procedure among many others, and the point now was whether it should be mentioned in the draft. It would be regrettable if the Commission decided not to elaborate any text on the matter, since the draft articles were, in the final analysis, but a pale copy of the 1969 Vienna Convention on the Law of Treaties¹¹ and nearly all the other problems particular to international organizations had so far been left aside.

42. The positions adopted during the discussion had differed greatly, but no member of the Commission had come out in favour of retaining article 36 *bis*, even in its latest version (A/CN.4/353, para. 26). One member had been completely opposed to article 36 *bis*, or any other similar text, first, because the article highlighted one international organization which was merely an ex-

¹⁰ For the text, see 1704th meeting, para. 42.

¹¹ Hereinafter called "Vienna Convention".

ceptional case, something that would be absolutely unjustified, and second, because article 36 *bis* would be unnecessary in view of article 35. At least one other member of the Commission had endorsed that second point. Some other members had adopted a less negative position; they had felt that the article was ill-advised and that it would be better to eliminate it, for it had too many implications. Still others had felt that they could accept article 36 *bis*, subject to two changes: subparagraph (a) should be confined to cases in which the organization's constituent instrument itself specified that treaties concluded by the organization were binding on the member States, and subparagraph (b) should establish that the member States must have expressly consented to the fact that the application of the treaty necessarily entailed certain effects for them. As one of those members had also pointed out, in those circumstances article 36 *bis* would be of no value, since the situation would be that envisaged in article 35, which stipulated express acceptance in writing. Again, if subparagraph (a) was to be limited to constituent instruments alone, it would be referring all the more to the special case of the European Communities.

43. Yet other members had pointed out that, when it had examined the situation of third parties with respect to a treaty, the Commission had never envisaged such a special case as that of the member States of an international organization. A proposal had been made to delete article 36 *bis* and to introduce an article reserving any special provisions which could govern the relations between an international organization and its member States in special cases. It had also been pointed out that the effects referred to in article 36 *bis* could result not only from a provision of a constituent instrument but also from a special unanimous agreement by the member States of an organization.

44. The members of the Commission who were favourable to a provision on that subject had generally leaned towards the idea of rendering the consent more flexible. With respect to article 35, that flexibility could take two forms. Either the requirement of express written consent laid down in article 35 could be relaxed, or it could be specified that the consent could have been given previously. The members who had discussed the second possibility had explained that they were not thinking of the special case of the European Communities, in which the consent was given once and for all under the constituent instrument, but the case of an operation which must commit both the organization and its member States. In such a case, it was quite conceivable that the member States would agree to commit themselves under a future agreement of the organization. One example was afforded by the practice followed in international assistance, when it was supplied both to the member States and to a body required to perform certain administrative functions. Finally, it had been proposed that article 36 *bis* should be deleted and that a paragraph should be added to article 35 to allow for some flexibility.

45. The Drafting Committee would inevitably have to consider article 36 *bis*, which was already the subject of at least five formal proposals for amendments. If opposition to the article remained, a solution proposed at the previous session could be considered. The solution was based on the fact that, when an organization was on the verge of concluding a treaty and knew that the treaty would entail obligations for its member States or that the latter had already accepted those obligations, its duty was to so inform the States or the international organizations with which it intended to conclude the treaty.¹² That duty, which emerged from practice, could be set forth in a provision. It was admittedly a minor obligation, but none the less an obligation of good faith and, by mentioning it, the Commission would show that, although it had not been able to resolve all the difficulties, there were at least a few important problems it had discussed.

46. Speaking as the *Chairman*, he said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should still consider article 36 *bis*.

It was so decided.

The meeting rose at 1 p.m.

¹² *Yearbook ... 1981*, vol. I, p. 186, 1678th meeting, paras. 20-21 (Mr. Aldrich).

1719th MEETING

Thursday, 3 June 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)³ (concluded)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1704th meeting, para. 42.

1. Mr. USHAKOV said he was surprised that the Special Representative had not replied at the previous meeting to certain questions he had raised during the discussion on article 36 *bis*. In view of the importance he attached to those questions, he wished to revert to them. He observed, first, that the need for an article on supranational organizations and, in particular, on the EEC, was shown by the numerous interventions which had dealt with that question. In that connection, he wondered whether subparagraph (a) of article 36 *bis* really concerned the conclusion of collateral agreements by States members of a supranational organization. Were States members of such an organization really bound to the party which concluded a treaty with it? A purely hypothetical example would clarify his thinking. If the Soviet Union wished to conclude with France an agreement on fishing in the exclusive economic zone of that country and it approached the French Government, that Government would reply that it was not in a position to conclude the agreement, because competence to conclude all agreements of that kind had been transferred to the EEC. If an agreement was concluded directly with the Community, it would not establish any direct relation between the Soviet Union and France, which would not conclude a collateral agreement. In that respect, the situation was thus quite different from that of States members of an ordinary organization.

2. With regard to the application of such an agreement, it might be imagined that the French coastguard arrested a Soviet trawler in the exclusive economic zone of France. To demand the application of the treaty thus violated, which it had concluded with the Community, the Soviet Union could not approach France directly, since there was no collateral agreement between the two countries. It would have to approach the Community, which would in turn approach France requesting it to release the trawler. Similarly, if the Soviet Union violated certain provisions of the treaty, France must not approach it directly but must approach the Community, which would act as an intermediary. In either case, there were no direct relations between the States concerned deriving from the agreement concluded, since the States members of the supranational organization had delegated to it the power to conclude certain treaties.

3. A question of responsibility arose if the seizure of the trawler caused damage to the Soviet Union. In the absence of even a collateral agreement between France and the Soviet Union, the Soviet Union could not approach France. But what, then, was the responsibility of the Community as a supranational organization? That question had not yet been settled for ordinary international organizations, let alone supranational organizations. In the case considered, the Soviet Union could not sue the Community in an international court either.

4. In that respect, the situation was quite different from that provided for in articles 34, 35 and 36 of the draft, which envisaged the conclusion of collateral agreements. In such cases, the States concerned ac-

cepted, expressly and in writing, the obligations incumbent on them, and direct relations were established between them and the co-contracting party of the organization. When CMEA had concluded a treaty with Mexico,⁴ the States members of that organization had accepted, expressly and in writing, by means of collateral agreements, the obligations which were thus laid upon them. Each of them could have concluded an agreement with Mexico, but they had opted for a treaty accompanied by collateral agreements. That procedure, which could be followed in the case of an organization of the conventional type having no exclusive competence to conclude treaties, was not applicable to supranational organizations. Treaties concluded by supranational organizations created only indirect relations between member States and the co-contracting parties of those organizations. Hence it was wrong to say that article 36 *bis* provided for the conclusion of simplified collateral agreements.

5. Under the terms of article 36 *bis*, subparagraph (a), treaties concluded by a supranational organization were binding on its member States if the relevant rules of the organization provided that those States were bound by the treaties it concluded. In his opinion, those rules were rules of competence, which provided for the transfer to the organization of competence to conclude treaties, without creating any direct relations between the member States and the co-contracting parties of the organization. The situation would be different if the rules provided that member States were "directly bound" by the treaties concluded by the organization, in which case the organization would really represent its member States in the conclusion of treaties.

6. What was more, he doubted whether States members of a supranational organization were free to accept rights deriving from treaties concluded by that organization. If the Soviet Union concluded an agreement with Bulgaria establishing fishing rights in their exclusive economic zones in the Black Sea for members of EEC, the States members of the Community might not be free to accept those rights, for as they had transferred competence to conclude all agreements of that kind to the Community, it might be that they were not even free to accept the rights which could pass to them from an agreement such as that concluded between the Soviet Union and Bulgaria.

7. Personally, he had nothing against supranational organizations, of which there was at least one example, but he found that their legal situation was totally different from that of the conventional organizations to which the draft articles applied. Logically, the whole draft should be recast to take account of the special case of supranational organizations. For example, the provisions relating to acceptance of reservations could not be the same for the two types of organization. He wondered whether EEC could, in the same way as a

⁴ CMEA, *Agreement on Cooperation between the Council for Mutual Economic Assistance and the United Mexican States* (Moscow, 1975).

State, tacitly accept reservations to a treaty, for itself and on behalf of its member States. It seemed essential not to mix the rules relating to conventional organizations and those relating to supranational organizations. For the latter there was no question of relaxing the modalities for expression of consent, since the agreements concluded by a supranational organization were not accompanied by collateral agreements.

8. At the previous meeting, the Special Rapporteur had again emphasized the fact that, strictly speaking, States members of an international organization were third States with respect to the treaties concluded by that organization, whether it was an ordinary organization or a supranational one. He had observed, however, that member States were not entirely third States, but had not explained in relation to who or to what that was the case. He himself had already pointed out (1702nd, 1705th meetings) that in relation to an organization, all States which were not members were third States, but with respect to a treaty concluded by an organization, all States were third States because they were not parties. The Special Rapporteur appeared to consider that States members of an organization were third States with respect to treaties concluded by it, but were not third States in relation to the organization.

9. In conclusion, he maintained that neither article 36 *bis* nor any other provision relating to supranational organizations had a place in the draft being prepared. The situation of supranational organizations should be dealt with in a different draft of articles. It would of course be possible to prepare such a draft, but it would be for the General Assembly to decide whether it was necessary.

10. Mr. JAGOTA said that some of the questions raised by Mr. Ushakov concerning article 36 *bis* had been discussed in detail at the recent session of the Third United Nations Conference on the Law of the Sea and answered in annex IX to the Convention on the Law of the Sea adopted on 30 April 1982.¹ He wished to make it clear at the outset that the provisions of annex IX related only to international intergovernmental organizations. They had, of course, been discussed with EEC in mind, but the question whether EEC was a supranational organization as opposed to an international organization had not been considered at all, the general view at the Conference on the Law of the Sea being that any general provisions adopted would be applicable to EEC and *mutatis mutandis* to other international organizations.

11. With regard to Mr. Ushakov's questions whether the States members of an international organization could be third States with respect to the treaties concluded by that organization, it was worth noting that article 2, subparagraph 1 (*h*), of the draft under consideration, referred to "a State" and to "an international organization", but not to the member States of an international organization. Assuming, however, that

an international intergovernmental organization was an organization of sovereign States, article 2, subparagraph 1 (*h*), could be interpreted to mean that the member States of an international organization did not surrender their sovereignty or their status as States. The definition in that provision might have to be amended to make that point clear.

12. In any event, the general reaction at the Conference on the Law of the Sea to the question whether a member of an international organization could be a third State in relation to the treaties concluded by that organization had been negative, although, as a result of a compromise, the Conference had ultimately decided to include, in articles 305 to 307 of the Convention, references to annex IX. Articles 2 and 3 of that annex, which related to the signature and act of formal confirmation of and accession to the Convention by international organizations, provided that: "An international organization may sign this Convention if a majority of its States members are signatories to this Convention"; and "An international organization may deposit its instrument of formal confirmation or of accession if a majority of its States members deposit or have deposited their instruments of ratification or accession". In other words, if a majority of the States members of an international organization had become parties to the Convention on the Law of the Sea, the organization could also become a party to that Convention. That in itself amounted to an admission that there might be some States members of the organization which had not become parties to the Convention and which would have the status of third States.

13. The question of third State status had arisen precisely in connection with the question of the relationship between the international organization and the member States which were parties to the Convention and the question of the relationship between the organization and the member States which were not parties to the Convention. The first question had been answered in annex IX, article 5. Paragraph 1 of that article provided that "The instrument of formal confirmation or accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its States members which have ratified or acceded to the Convention", and paragraph 2 provided that "A State member of an international organization shall ... make a declaration specifying the matters governed by this Convention in respect of which it has transferred competence to the organization".

14. It had, moreover, been by reference to such competence that the questions of the responsibility of the organization and its member States and the settlement of disputes between them had been answered. In other words, whichever one was competent would be responsible and, if competence was shared, there would be joint and several responsibility. The question of the relationship between the international organization and its member States which were parties to the Convention

¹ See 1699th meeting, footnote 7.

did not involve third State status and was thus outside the scope of article 36 *bis* of the draft under consideration.

15. The only States which would have the status of third States were those which were not parties to the Convention. In that connection, annex IX, article 4, paragraph 5, clearly provided that no member States of an international organization which were not parties to the Convention would enjoy any rights provided for under the Convention. That provision was, in a way, a negation of article 36 *bis*, which related to the rights and obligations of States members of an international organization arising from the provisions of a treaty to which that organization was a party, which rights and obligations had, at the Conference on the Law of the Sea, been regarded as an internal matter for the international organization.

16. The concept of third State status had been accepted at the Conference on the Law of the Sea only in order to enable international organizations to become parties to the Convention on the Law of the Sea, not in order to create rights and obligations for the States members of an international organization which did not become parties to that Convention. The provisions of the Convention relating to third States thus enunciated a particular rule, and the question that had to be asked in regard to article 36 *bis* was whether a more general rule was also needed.

17. He was inclined to suggest that article 36 *bis* should be deleted, for the simple reason that questions relating to the rights and obligations of the member States of an international organization arising from the provisions of a treaty to which that organization was a party were adequately covered by articles 35 and 36. A second option, however, would be to retain article 36 *bis* as it stood, in square brackets, and submit it for consideration to the Sixth Committee or to a conference of plenipotentiaries. A third option would be to make article 36 *bis* a residual rule and leave it to the parties to a treaty to which an international organization was a party to determine which rules applied to the rights and obligations of the international organizations and its member States. If article 36 *bis* was retained in any form, he thought its wording would have to be amended.

18. With reference to subparagraph (a), he drew the attention of the Special Rapporteur and the Drafting Committee to the fact that the Conference on the Law of the Sea had decided that, instead of referring to the relevant rules of the organization “applicable at the moment of the conclusion of the treaty”—in other words, at a definite point in time—a more flexible rule should be laid down to reflect the possibility of a transfer of competence. Such a flexible rule might also be included in subparagraph (a). The Conference on the Law of the Sea had also decided that the rules of the organization relating to the competence transferred to it by its member States should be notified to the depositary of the Convention and to the other parties, so that they

would be aware of the relationship between the organization and its member States. Perhaps a similar provision could be included in subparagraph (a). In subparagraph (b), the word “acknowledged” might be replaced by the word “agreed” in order to introduce the idea of collateral agreements to which Mr. Ushakov had referred.

19. Mr. REUTER (Special Rapporteur) said there were several reasons why he had not answered all the questions raised by Mr. Ushakov. First of all, the answers to his questions were often provided by Mr. Ushakov himself. On one point, however, he must say that he fully agreed with Mr. Ushakov: the Commission was not required to settle, in its draft articles, questions relating to special cases. It was a fact that the European Communities constituted a special case, however they might be described. If article 36 *bis* were considered as relating only to the European Communities, it was unsatisfactory and should be deleted; but in his opinion that provision had a wider scope. The questions raised by Mr. Ushakov all related to EEC alone; paradoxically, Mr. Ushakov blamed him for proposing an article which dealt only with that organization, while at the same time asking him to speak of nothing else. Mr. Ushakov had thought fit to interpret the rules of the Community, but he (the Special Rapporteur) did not feel the need to do so.

20. It should be noted that, following the criticisms made, he had strongly emphasized, starting with the second version of article 36 *bis* (A/CN.4/353, para. 26), the need for consent given through the classical mechanism of the collateral agreement. Mr. Ushakov’s view that that mechanism had nothing to do with the European Communities was quite legitimate, but he did not subscribe to it. It was precisely because the Commission was not called upon to take a position on what EEC was, that he had not answered Mr. Ushakov’s questions about that organization. Similarly, however interesting Mr. Jagota’s comments on the United Nations Conference on the Law of the Sea might be, they were not relevant to the case in point. It mattered little what type of organization that conference had had in mind. In any case, there was no question of re-examining the draft articles as a whole, having regard to organizations to which a transfer of competence had been made.

21. At the previous meeting, he had said that States members of an organization were, strictly speaking, third States in relation to treaties concluded by the organization; then he had added that, for practical reasons, these States found themselves in situations which presented special features. In that connection, he had suggested that no change should be made in the rule in article 35 requiring consent for the creation of an obligation, but that the conditions for expression of consent might be relaxed by providing that it could be given in advance or that it might be expressly formulated without being in written form. If the Commission was opposed to such increased flexibility, article 36 *bis* should be dropped.

22. Mr. Jagota had been right to emphasize one point: if an international organization was a party to a treaty and was determined, together with other parties, to create obligations for third States, and in particular for the States members of the organization, it was clear that the organization must indicate what was, or should be, the procedure for acceptance of those obligations by its member States. Lastly, he remained convinced that it was important, not in the interests of the European Communities but in the interests of all States which had to carry out joint enterprises, to make the procedure for expression of consent more flexible.

23. Mr. USHAKOV explained that it was for lack of other examples that he had constantly referred to EEC. Rather than naming it in the commentary, the Commission might refer to an organization whose member States had given it competence to conclude treaties, but that would change nothing. Other organizations of that kind might be established, and as their position would be quite different from that of ordinary organizations, they would require other articles.

24. Mr. CALERO RODRIGUES said that the example which Mr. Ushakov had given to illustrate his point of view could be regarded as a plea in favour of article 36 *bis*. Indeed, everything Mr. Ushakov had said seemed to indicate that article 36 *bis* was necessary. In Mr. Ushakov's hypothetical example of a violation by French officials of a treaty between the Soviet Union and EEC, the incident could, of course, be settled by the two States concerned. What lay at the root of that incident, however, was a question of rights as between the Soviet Union and EEC, and it seemed to him that the Soviet Union would be in a better position to assert its rights if article 36 *bis* made it clear that, in such a case, France was required to fulfil the obligations assumed by EEC in its treaty with the Soviet Union. Although article 36 *bis* would not expressly require acceptance in writing of the obligations created by the treaty between EEC and the Soviet Union, such obligations would exist *ipso facto*, because of the obligations which France had accepted on becoming a member of EEC.

25. The CHAIRMAN said that if there were no objections he would take it that the Commission confirmed its decision to refer article 36 *bis* to the Drafting Committee, on the understanding that the articles in Section 4 (arts. 34 to 38) must be examined together.

*It was so decided.*⁶

ARTICLE 37 (Revocation or modification of obligations or rights of third States or third international organizations)

26. The CHAIRMAN invited the Commission to consider draft article 37, which read:

Article 37. Revocation or modification of obligations or rights of third States or third international organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

[5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.]

[6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.]

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

27. Mr. REUTER (Special Rapporteur) said that no particular observations had been made on draft article 37 by Governments or international organizations. With regard to that article, he would therefore confine himself to mentioning Mr. Jagota's comment, namely: either the Commission would decide to retain article 36 *bis* in one form or another, and it would then have to decide the question whether the paragraphs of article 37 which related to article 36 *bis* should be retained or amended; or it would decide to omit article 36 *bis* or any text of that kind, in which case paragraphs 5 and 6 of draft article 37 would also be deleted and paragraph 7 would become paragraph 5.

28. Since the question of collateral agreements had been raised at the present meeting, however, he wished to add that article 37 of the Vienna Convention on the Law of Treaties dealt differently with the cases of an obligation and a right. That solution, which had, moreover, been retained in draft article 37, paragraphs 1 and 2 of which dealt with the revocation or modification of a right, seemed somewhat paradoxical at first sight. Indeed, it gave the third State a better guarantee in regard to the obligations than in regard to the rights created for it by a treaty: in the case of an obligation, the consent of the third State was presumed to be re-

⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 21-40.

quired before the obligation could be extinguished, whereas in the case of a right, the third State had to establish that the intention of the parties had been to grant it a right which would be irrevocable without its consent.

29. He believed that that difference was due to the existence in the Commission of two theories on consent and its effects: one group of members believed that it was the theory of the collateral agreement which justified and explained the creation of an obligation and the creation of a right; the other group considered that that theory applied to the creation of an obligation, but not to the creation of a right, which was a clear case of *stipulation pour autrui*. And it was to satisfy those who took the latter position that the case of creation of a right had been treated separately in article 37, paragraph 2 of the Vienna Convention, and also in paragraphs 3 and 4 of the draft article 37 he proposed, though admittedly the situation of the holder of a right appeared at first sight to be less secure than that of the subject of an obligation.

30. With regard to the deletion of paragraphs 5 and 6 of draft article 37 if article 36 *bis* were deleted, and to the retention of those paragraphs in the contrary case, he would refrain from taking a position at the moment; he preferred to await the proposals of the Drafting Committee. He pointed out, however, that the views of members of the Commission differed and that Mr. Riphagen, for example (1705th meeting), considered that even if article 36 *bis* was retained, paragraphs 5 and 6 of draft article 37 should be deleted, or at least greatly amended.

31. He proposed that draft article 37 should be referred to the Drafting Committee so that it could pronounce on that article in the light of its decisions on article 36 *bis*. In that connection he pointed out that among the proposals relating to article 36 *bis* that were before the Drafting Committee, some concerned a text which would refer both to the creation of an obligation and to that of a right. In his eleventh report (A/CN.4/353) he had pointed out that it was clear from the discussions in the Commission that if article 36 *bis* was to be included in the draft, it should deal only with the creation of an obligation. But paragraphs 5 and 6 of article 37 related to both obligations and rights; hence the Drafting Committee might also have to study that question.

32. Mr. USHAKOV said that paragraphs 5 and 6 of draft article 37 would raise a problem if article 36 *bis* was retained, for they provided that an organization, by virtue of its relevant rules, could unilaterally decide the fate of rights and obligations, so that no account was taken of the intention of the parties, as it was in draft articles 35 and 36.

33. Mr. RIPHAGEN said he agreed with Mr. Ushakov: the words “unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide”, in paragraph 5 of article 37, and the words “and of the States members of

the organization”, in paragraph 6, should be deleted, since the revocability or irrevocability of rights and obligations of third States members of an international organization should be determined entirely by the provisions of the individual treaties. Moreover, the parties to a treaty could always change the basis of the rights and obligations of such third States without any need for the subsequent consent of the States concerned. Consequently, if article 36 *bis* was to be retained, the words in question should be deleted. Conversely, the words “unless it is established that the parties to the treaty had otherwise agreed”, in paragraph 5, and the words “unless it is established that they had otherwise agreed”, in paragraph 6, should be retained, since they made it clear that it was the treaty itself which determined the rights and obligations of the parties.

34. Mr. CALERO RODRIGUES agreed that the words “unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide” should be deleted from paragraph 5 of draft article 37. He also agreed that the fate of paragraphs 5 and 6 would depend on the final wording of draft article 36 *bis*. However, if that article was to apply only to obligations, then the reference to rights in paragraphs 5 and 6 should be deleted. He wondered whether it was necessary to give different treatment to the situations contemplated in subparagraphs (a) and (b) or 36 *bis*. If not, paragraphs 1, 2, 5 and 6 of article 37 could be combined, as could paragraphs 3 and 4.

35. Mr. LACLETA MUÑOZ agreed with Mr. Calero Rodrigues. If the words in question were deleted from paragraph 5, that paragraph could be combined with paragraph 6. Similarly, paragraph 1 could be combined with paragraph 2 and paragraph 3 with paragraph 4. That possibility should be considered by the Drafting Committee.

36. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 37 to the drafting Committee under the same conditions as for article 36 *bis*.

*It was so decided.*⁷

ARTICLE 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)

37. The CHAIRMAN invited the Commission to consider article 38, which read:

Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

⁷ *Idem*, paras. 2 and 41.

38. Mr. REUTER (Special Rapporteur) said that article 38 had not been the subject of any comments, either by Governments or by international organizations. He therefore proposed that the Commission should refer it to the Drafting Committee.

39. Mr. USHAKOV pointed out that the word "rule" used in the article could include "the relevant rules" referred to in article 36 *bis*. That being so, he wondered whether the rules of an organization—for example, the provisions of a treaty which was its constituent instrument—could become, for third States or for a third organization, customary rules of international law recognized as such. It would be well for the Drafting Committee to study that problem and perhaps to define what was to be understood by the word "rule".

40. Mr. REUTER (Special Rapporteur) said that the problem raised by Mr. Ushakov had arisen during the drafting of the Vienna Convention on the Law of Treaties. The constituent instrument of an international organization was a treaty to which the Vienna Convention applied. No State, either during the preparation of the draft articles on the law of treaties or during the sessions of the United Nations Conference on the Law of Treaties, had ever considered that a rule which concerned the mechanisms of an international organization and was included in its constituent instrument would become a customary rule. It was true that the United Nations Charter, which was, after all, a treaty, set out substantive rules and principles that had subsequently been codified; but the idea that a rule concerning abstention from voting, for example, could become a general custom had never been put forward—although such a rule was the subject of a special custom in the Security Council, as the International Court of Justice had decided in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.⁹

41. The problem raised by Mr. Ushakov was not a serious one, for in view of the difficulty of creating a customary rule, it had never been considered that a rule concerning the institutional mechanisms of an international organization could be generally extended to all organizations, each of which had its own system and its own rules. The relations between an organization and its member States were not a matter that lent itself to the development of customary rules. But the Drafting Committee could no doubt discuss the problem raised by Mr. Ushakov.

42. Mr. USHAKOV said he agreed with the Special Rapporteur's comments on substantive rules, but in his opinion, rules governing the competence of an organization to conclude certain agreements and which thus removed that competence from its member States, were indeed substantive rules. The problem should therefore be examined by the Drafting Committee, or at least be dealt with in the commentary.

43. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 38 to the Drafting Committee under the same conditions as the other articles in section 4.

*It was so decided.*⁹

ARTICLE 39 (General rule regarding the amendment of treaties)

44. The CHAIRMAN invited the Commission to consider article 39, which read:

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in Part II apply to such an agreement.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

45. Mr. REUTER (Special Rapporteur) reminded the Commission that in his eleventh report (A/CN.4/353, para. 33), he had proposed that paragraph 1 of article 39 be brought more closely into line with article 39 of the Vienna Convention. The paragraph would then read:

"1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

46. As to paragraph 2, some members considered that it was self-evident and therefore unnecessary. In that connection, he pointed out that the Commission had referred in a number of other provisions of the draft articles to the requirement that an organization must comply with its relevant rules in all conduct relating to treaties; that had been done to take account of the frequently expressed concern that organizations might have a tendency to go beyond their normal rules of operation. He himself preferred the text adopted by the Commission on first reading, and believed that paragraph 2 should be retained.

47. Mr. USHAKOV agreed with the Special Rapporteur's comments on paragraph 2 and thought it could only be an advantage to repeat even what was self-evident. In fact, if the expression "except in so far as the treaty may otherwise provide" was adopted in paragraph 1, paragraph 2 would be necessary, since it would provide a guarantee that the rules of an international organization would not be amended merely because the parties to a treaty so desired.

48. Mr. CALERO RODRIGUES said he shared the view that paragraph 2 was unnecessary, particularly in view of what was laid down in article 6 of the draft. The paragraph should therefore be deleted.

49. Mr. EL RASHEED MOHAMED AHMED agreed. Paragraph 2 could be deleted, since it was

⁹ *I.C.J. Reports 1971*, p. 16.

⁹ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 42.

unnecessary to repeat a rule that was already stated in article 6.

50. Mr. JAGOTA said that it was not entirely clear whether the question of the consent of an international organization to an agreement amending the treaty was already covered in part II of the draft. If so, paragraph 2 of article 39 could be deleted. However, part II was concerned with the means of expressing consent to be bound by a treaty. If it was necessary to specify that the same means of expressing consent also applied to agreements amending a treaty, paragraph 2 should perhaps be retained.

51. The Drafting Committee might also consider whether it was useful to retain, in paragraph 1, the words “the conclusion of”, which did not appear in the corresponding provision of the Vienna Convention. If the element of formality they introduced in regard to agreements between States and international organizations was considered necessary, perhaps those words should be included.

52. Mr. AL-QAYSI, referring to Mr. Jagota’s comments, said that even if part II was not considered to cover the question of the consent of an international organization to agreements amending treaties, and bearing in mind the observations made by Mr. Ushakov, it could still be argued that the words “the conclusion of” referred back to part II of the draft.

53. Mr. RIPHAGEN said it might be argued that paragraph 2 of article 39 was necessary because it referred to agreements, whereas part II referred specifically to treaties, a term which was narrower in scope. If part II was in fact intended to refer to agreements, it might be advisable to say so in article 39.

54. Mr. REUTER (Special Rapporteur) said that Mr. Jagota’s comments on paragraph 1 were pertinent: the words “the conclusion of” had been included to introduce an additional formal safeguard.

55. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 39 to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 40 (Amendment of multilateral treaties)

56. The CHAIRMAN invited the Commission to consider article 40, which read:

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

57. Mr. REUTER (Special Rapporteur) said that article 40 had not elicited any comments from Governments or international organizations.

58. The CHAIRMAN said if there were no objections he would take it that the Commission decided to refer article 40 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

59. The CHAIRMAN invited the Commission to consider article 41, which read:

Article 41. Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

60. Mr. REUTER (Special Rapporteur) said that no Government or organization had commented on article 41.

61. Mr. USHAKOV said that the expression “multilateral treaty” should be made more precise, as in the Vienna Convention.

62. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 41 to the Drafting Committee.

*It was so decided.*¹²

¹¹ *Idem*, paras. 2 and 44.

¹² *Idem*.

¹⁰ *Idem*, paras. 2 and 43.

ARTICLE 42. (Validity and continuance in force of treaties)

63. The CHAIRMAN invited the Commission to consider article 42, which read:

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

3. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

64. Mr. REUTER (Special Rapporteur) said that article 42 had not been the subject of any comments by Governments or international organizations. His own view, as he had proposed in his eleventh report (A/CN.4/353, para. 35), was that it might be advisable to combine paragraphs 1 and 2 in a single paragraph, which would read:

“1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles.”

The Commission would probably have to revert to article 42 when it came to examine article 73.

65. During the first reading, the Commission had wondered, with regard to article 42 in particular, whether it should not refer to Article 103 of the United Nations Charter.¹³ That was a problem which would have to be examined at the end of the second reading of the whole draft, when the Commission might consider the addition of an article referring in a general way, in respect of the whole draft, to Article 103 of the Charter.

The meeting rose at 1.00 p.m.

¹³ See *Yearbook ... 1979*, vol. II (Part Two), p. 149, para. (3) of the commentary to article 42.

1720th MEETING

Friday, 4 June 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353,

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ARTICLE 42 (Validity and continuance in force of treaties)³ (concluded)

1. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 42 to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 43 (Obligations imposed by international law independently of a treaty)

2. The CHAIRMAN invited the Commission to consider article 43, which read:

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization, to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

3. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comments regarding article 43. He therefore proposed that the article should be referred to the Drafting Committee.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 43 to the Drafting Committee.

*It was so decided.*⁵

ARTICLE 44 (Separability of treaty provisions)

5. The CHAIRMAN invited the Commission to consider article 44, which read:

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present ar-

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1719th meeting, para. 63.

⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 45.

⁵ *Idem*, paras. 2 and 46.

ticles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

6. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comments regarding article 44. He therefore proposed that the article should be referred to the Drafting Committee.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 44 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

8. The CHAIRMAN invited the Commission to consider article 45, which read:

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty between one or more States and one or more international organizations under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having renounced the right to invoke that ground.

3. The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization.

9. Mr. REUTER (Special Rapporteur) said article 45 had evoked from some Governments criticisms that had indeed already been made in the Commission. Unlike article 45 of the Vienna Convention on the Law of Treaties which consisted of one paragraph, draft article

45 as proposed in its present form was divided into three paragraphs, with paragraph 1 concerning States and paragraphs 2 and 3 concerning international organizations. The criticisms had been in connection with the rules relating to international organizations. With regard to States, subparagraph 1 (b) contained a rule which, as in the Vienna Convention, introduced the idea of acquiescence and of acquiescence by conduct. That idea played quite a large part in the Vienna Convention, for the drafters of that instrument had decided not to include in it an extinctive prescription with respect to the right to invoke a ground for invalidating or terminating a treaty.

10. However, the formulation for international organizations of a rule similar to that of subparagraph 1 (b) had aroused criticism. One member of the Commission had considered that it was not possible to lay down a rule providing that an international organization would, by reason of its conduct, lose the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. It had been said in support of that opinion that their very structure meant that international organizations were not unitary: each organization comprised various organs which were not necessarily strictly co-ordinated among themselves, and some of them met only at intervals. Hence, organizations had more need of protection than States, and the rule applicable to States could not simply be transposed to international organizations. That was all the more true with respect to the most important ground for invalidation, namely that provided for in article 46 of the Vienna Convention and draft article 46: failure to observe the rules of an organization regarding the conclusion of treaties.

11. The Commission had discussed the problem at length and, in elaborating article 45, had taken those objections into account only to a certain extent. If subparagraph 1(b) of the article, concerning States, was compared with subparagraph 2 (b), concerning international organizations, it could be seen that the rule was, in a way, reversed. With regard to States, it was sufficient for the conduct to indicate acquiescence—in other words, a sort of passive attitude—whereas for international organizations, the conduct must be considered as signifying renunciation, which attitude was more active than acquiescence. Those considerations went to explain paragraph 3 of the article, which contained yet another reminder that the agreement and conduct—and the reference to conduct was important—mentioned in paragraph 2, and hence the agreement and conduct of an international organization, were governed by the relevant rules of the organization. Paragraph 3 represented an attempt to stress the need to ensure, when evaluating the effects of conduct, that the conduct did not involve an extra violation, a new breach of the rules of the organization.

12. However, the compromise so reached by the Commission had been considered unsatisfactory by some Governments, which had felt that article 46 should probably not be subject to article 45, paragraph 2, and

⁶ *Idem*, paras. 2 and 47.

that article 45, subparagraph 2 (*b*), should be deleted. On the whole, however, Governments did regard article 45 as a satisfactory compromise that protected the interests not only of a contracting organization, but also of its co-contractors. If no account was taken of conduct, those co-contractors would be liable indefinitely to claims of invalidity, requests for the suspension of the operation of a treaty, etc. In his view, there was no need to modify article 45, which represented quite an acceptable compromise between the interests involved.

13. Mr. USHAKOV agreed that there was no reason to modify the rule applicable to States, which was taken from article 45 of the Vienna Convention; the conduct of a State was also the conduct of each of its constituent organs, since a State was characterized by its unicity. But the case of an international organization was slightly different; its organs were in principle competent within the limits of their powers and functions; they were not subordinated to one another, and some of them, the "administrative" organs such as the secretariat, were permanent. That being so, could an administrative organ which had begun to apply a treaty concluded in violation of the relevant rules of the organization commit the organization as such, and in particular the organ empowered to conclude treaties, which might not have met since the treaty had started to operate? It could hardly be thought so. A State was always master of its internal law, but the procedure for modifying the relevant rules of an organization was complex. For organizations to be free to take refuge behind their relevant rules in order to invoke, at any time, a ground for invalidating a treaty, all reference to article 46 should be deleted from article 45, paragraph 2. That apart, he found the wording of draft article 45 reasonably satisfactory.

14. Mr. JAGOTA remarked that it might well be more difficult to prove that an international organization had renounced its right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty than to prove that a State had acquiesced in the validity of the treaty. It would appear that a State could forfeit its right more easily than could an international organization, particularly if, as stipulated in paragraph 3, the organization's conduct was to be governed by its established practice. He was not clear as to the reasons for the differing treatment of international organizations and States, and felt that the same wording should be used in subparagraph 2 (*b*) as in subparagraph 1 (*b*).

15. Mr. CALERO RODRIGUES said he shared the views expressed by Mr. Jagota. Article 45 was intended to reflect the desirability of stability in treaty relationships. Accordingly, it would seem reasonable to make international organizations subject to the same conditions as States. Admittedly, it might be prejudicial to the member States if an international organization concluded a treaty improperly and was deprived of the right to invoke grounds for invalidating the treaty. Nevertheless, the problem was less serious when seen in the light of the provisions of paragraph 3, for if, in engag-

ing in conduct which indicated acceptance of the treaty, the secretariat or any other organ of an international organization breached the rules of the organization, such conduct could not be regarded as a basis for loss of the right to invoke a ground for invalidating the treaty. Consequently, while his own inclination was to couch paragraphs 1 and 2 in the same terms, he was prepared to accept the wording proposed by the Special Rapporteur as corresponding more closely to the general wish of Governments.

16. Mr. McCAFFREY said that initially he had seen no reason to draw a distinction between the situation of States and that of international organizations. However, in the light of observations by international organizations and the comments made by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 37), his conclusion was that it would be desirable to afford additional protection to the States members of international organizations. That was the purpose of paragraph 2 of the article.

17. He agreed with Mr. Ushakov that the reference to article 46 should be deleted from article 45, paragraph 2, since it was questionable whether an international organization should be able, through its conduct, to assume competence to conclude a treaty when such competence had not been conferred upon it by its relevant rules. That would apply however affirmative or deliberate the conduct of the international organization concerned. Such a provision would again prejudice the interests of States members of the organization.

18. Mr. LACLETA MUÑOZ said that, at first sight, he too had thought that subparagraph 1 (*b*) and subparagraph 2 (*b*) should be couched in the same terms. However, after reflection, he had come to the conclusion that, while such a solution might be feasible in respect of bilateral treaties between a State and an international organization, it might give rise to problems in respect of multilateral treaties. Consequently, it seemed preferable to keep to the existing wording in that regard.

19. As to paragraph 1, the words "between one or more States and one or more international organizations" could be deleted, since the type of treaty to which the draft articles related was adequately defined in articles 1 and 2.

20. Mr. RIPHAGEN, referring to the proposal to delete the reference to article 46 from article 45, paragraph 2, said that paragraph 3 of article 46 was much wider in scope than paragraph 1 of that article, because it did not stipulate that the rules of the international organization concerned should be of fundamental importance, as did paragraph 1 with respect to the internal law of States. Consequently, deletion of the reference to article 46 from article 45, paragraph 2, might mean that an international organization could never lose the right to invoke a ground for invalidating a treaty as a result of its conduct. The reference to article 46 should therefore be retained.

21. Mr. FLITAN said that the reference to article 46 should be retained because the guarantees afforded, more particularly in paragraph 3, which was important, were sufficient. Deletion of the reference to article 46 would have the result of setting up, without any justification, differences between the field of application of that article and of articles 47 to 50. Moreover, limiting the reference only to articles 47 to 50 would mean that international organizations would in every case have to express, explicitly, their acceptance as valid of a treaty concluded in violation of the rules of competence. The application of such an obligation could, in his view, create serious problems, even on the political level.

22. Mr. JAGOTA said that there were many international organizations whose statutes contained no reference to the treaty-making capacity of the organization, to the individuals empowered to conclude treaties on behalf of the organization, or to the organization's competence with regard to the subject-matter of treaties which it might enter into. Nevertheless, in practice, international organizations did conclude treaties. He wondered, therefore, whether article 46 could be invoked to invalidate treaties on the grounds that they had been concluded by persons who had not been competent to do so under the relevant rules of the organization, particularly when those rules did not mention who was competent to conclude treaties. If the established practice of the international organization had been not only to allow treaties to be concluded on its behalf, but even to ratify them or act pursuant to them, then the general provision of article 45 could be invoked to answer a challenge under article 46. Consequently, it was incorrect to say that the treaty-making competence of an international organization did not derive from its conduct and established practice. It would therefore be advisable to retain the reference to article 46 in article 45, paragraph 2.

23. Mr. NJENGA said the associated himself with the views expressed by Mr. Jagota. The constituent instruments of many international organizations contained no reference to the treaty-making competence of the organization and yet it was an established practice for such organizations to conclude treaties. On the other hand, it was not possible to assimilate the consequences of the conduct of States to those of the conduct of international organizations, since States had internal mechanisms for regularizing actions which at first sight might appear invalid, whereas, in the case of international organizations, such action could be taken only by the governing bodies, which in many cases met infrequently. Hence there was good reason to lay down more stringent rules of the conduct of international organizations than for the conduct of States. The rules of international organizations must be regarded as protecting the interests of member States which might be prejudiced by the conduct of officials of the organizations.

24. In paragraph 3 of article 45, it might be advisable to refer not only to the relevant rules, but also to the practice of the organization, for the rules of many inter-

national organizations made no mention of treaty-making competence, still less of conduct, which tended rather to be a matter of established practice. Lastly, the reference to article 46 in article 45, paragraph 2, should be deleted. If an official of an international organization concluded an agreement in violation of the rules of the organization concerned, the consequences should be regarded as invalid, whether the violation was manifest or not.

25. Mr. SUCHARITKUL said that, even in the case of States, the application of the principle of acquiescence had always been difficult, because a State stood to lose, through extinctive prescription, its right to invoke a ground for invalidating a treaty. Consequently, it was very difficult to determine whether a State had acquiesced in the validity of a treaty through its conduct. Nevertheless, international law seemed to have developed in that direction. Since States were presumed to be equal, the rule of acquiescence applied equally to all. However, the application of such a rule to international organizations would be inconceivable, for such organizations could in no sense be considered equal. An understanding of the principle of acquiescence required a knowledge of international law and, although some international organizations enjoyed the services of a large number of legal experts, others, such as ESCAP, had no legal adviser.

26. Mr. AL-QAYSI said he understood that the regional economic commissions were provided with legal services by the Office of Legal Affairs of the United Nations, and consequently received excellent legal advice. Certainly that was true in the case of ECWA. Moreover, the conduct of an international organization could be assessed on the basis of its established practice, as reflected in its rules, resolutions and decisions.

27. Mr. REUTER (Special Rapporteur) said that he wished to preface his remarks with a general comment: article 45 must, of course, be read in conjunction with article 46 and also with article 2, which had the Commission's final approval and contained a definition in subparagraph 1 (j), of the expression "rules of the organization".

28. Replying to Mr. Jagota's question regarding the difference between subparagraph 1 (b) and subparagraph 2 (b) of article 45, he pointed out that at first sight the difference was not great, since acquiescence did, after all, lead to renunciation. But the word "acquiescence" encompassed a number of elements and could imply a purely passive attitude or, more precisely, sustained silence. In the case of States, the Vienna Convention used the word "acquiescence", which did not rule out the possibility that a State, because of its solidity and its sound organizational arrangements, could be bound by a treaty as a result of keeping silent for a certain length of time, under certain circumstances. For international organizations, the word had been discarded and "renunciation" had been preferred, the reasons being a concern for precision and a desire to rule out an ef-

fect due merely to silence. It was, after all, quite possible for an organization to maintain silence, not only silence by an administrative organ for policy reasons, but also silence by an organ made up of governmental representatives, for reasons of a political nature. Silence was a form of complete passiveness, but it was never enough in the case of an international organization.

29. As for Mr. Jagota's second question, which had also been taken up by other members of the Commission and concerned the definition of the expression "relevant rules" with respect to conduct, it should be noted that conduct, as such was not established practice: it preceded such practice, since established practice was conduct which had lasted, which had withstood the test of time.

30. He believed that paragraph 3, the importance of which had been pointed out by Mr. Flitan, should be retained. If the reference to article 46 were to be deleted, that paragraph would lose its *raison d'être*—which was not the agreement, which was subject to the relevant rules of the organization, but the conduct. When first established, many international organizations either had no written rules or had written rules that were inadequate with regard to competence to conclude treaties. To take the case of the United Nations, it might well be supposed that, during the Organization's early years, the Secretary-General had concluded a minor agreement on an administrative matter, although the Charter conferred no power upon him in that area: that was conduct of the United Nations, and when conduct was repeated, it became practice. The General Assembly, the Security Council, or any other United Nations organ could have maintained that the conduct was not in conformity with the Charter, and the United Nations would not have been bound by the agreement, for no established practice would have been involved; in such a case, it was paragraph 3 of article 45 that applied. But if established practice was involved—and, under draft article 2, such practice was part of the rules of the organization—the applicable provision was article 45, paragraph 2; otherwise, impossible situations would arise.

31. In that connection, he referred to the observations made by all the international organizations concerning the representation of States to and in international organizations: the organizations had stated that they accepted the term "established practice", on the understanding that it would not in itself be an absolute obstacle to the emergence of new practices. And in fact, when the Commission spoke of "established practice", it did not mean the practice as established at the time of the conclusion of a convention or any other instrument of that type: it did not exclude future practices. But so long as a practice was not established, it did not have the force of a rule of law, and the organization therefore kept all its rights—and had a certain amount of time available to it in that regard.

32. It was impossible for international organizations to operate if they did not have the opportunity to establish practices, which would in time become rules of

law. For example, the Security Council had developed a practice that was now established, and although not written, it was confirmed by the acceptance of all States and also by the International Court of Justice. Article 45, which struck a very delicate balance, had been elaborated in that spirit. Speaking as a member of the Commission, he said that, in his view, the Commission should refrain from altering the article.

33. Mr. NI said that, in subparagraph 2 (b), the Special Rapporteur might be justified in requiring more than acquiescence in the case of international organizations. There were, of course, differences between the system for States and the system for international organizations, but it was difficult to say how far those differences went. While it was true that acquiescence had passive effects and that the conduct of an international organization must involve actual renunciation, as the Special Rapporteur had pointed out in his eleventh report (A/CN.4/353, para. 38), he was not sure that, if an international organization had actually renounced the right to invoke the ground referred to in paragraph 2, it was absolutely necessary to include a provision to that effect in subparagraph 2 (b). Indeed, if an actual renunciation had been made, the international organization would be prevented by the principle of estoppel from invoking a ground for invalidating a treaty. Since the differences between States and international organizations might not be as great as had been suggested, he thought that international organizations would be adequately protected if the concept of acquiescence embodied in subparagraph 1 (b) was also included in subparagraph 2 (b). The Commission could then simplify article 45 by merging paragraphs 1 and 2.

34. Mr. USHAKOV said that he endorsed the views of the Special Rapporteur, and added that the Commission should treat the notion of the conduct of an international organization with the greatest care. The notion had never been defined, whereas the corresponding notion of the "conduct" ("*comportement*") of a State had been clarified in part 1 of the draft articles on State responsibility for internationally wrongful acts.⁷ Under article 3 of that draft, the conduct ("*comportement*") of a State consisted of an action or omission which was attributable to the State under international law, and under article 5, it could be the conduct ("*comportement*") of any State organ having that status under the internal law of that State, provided the organ was acting in that capacity in the case in question. The conduct ("*comportement*") of any organ of a State or any one of its subdivisions was considered to be the conduct of that State. That was true, for example, of a ministry for foreign affairs and any department of that ministry. On the other hand, it could not be asserted that the conduct ("*conduite*") of any organ of an international organization was attributable to that organization. In a sense, the conduct ("*conduite*") of the International Law Commission could be considered as conduct of the

⁷ For the text, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

United Nations, but it was not binding on the United Nations. For that reason, it would be preferable to keep subparagraph 2 (a), which provided for express agreement, and to discard subparagraph 2 (b), which would inevitably pose difficulties in implementation even greater than those pointed out by Mr. Sucharitkul in connection with subparagraph 1 (b), concerning States.

35. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to refer article 45 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)

36. The CHAIRMAN invited the Commission to consider article 46, which read:

Article 46. Violation of provisions regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty between one or more States and one or more international organizations has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case referred to in paragraph 1, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.

4. In the case referred to in paragraph 3, a violation is manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization.

37. Mr. REUTER (Special Rapporteur) said that article 46 had elicited a number of comments by States. Paragraphs 1 and 2, which concerned States, reproduced paragraphs 1 and 2 of article 46 of the Vienna Convention. Paragraphs 3 and 4, which concerned international organizations, were different in certain respects. In the case of States, paragraph 1 of the draft article required that the violation of a rule should be manifest and that the rule must be of fundamental importance, but the latter condition was not required for international organizations under paragraph 3. The stipulation that any manifest violation of one of the rules of an international organization regarding competence to conclude treaties could be invoked by the organization had been made in order to afford better protection for international organizations.

38. It would be remembered that paragraph 2 of article 46 of the Vienna Convention—which defined the manifest character of a violation—had been added by the United Nations Conference on the Law of Treaties, which had used a definition proposed by the Special

Rapporteur on that topic. When the Commission had examined the application of that definition to the specific case of international organizations, some members had pointed out that the notion of normal practice, which had been used for States, had a very precise meaning. All States were organized in the same way in matters relating to foreign affairs, as could be seen from draft article 7 under consideration, from which it was clear that heads of States, heads of Government and Ministers for Foreign Affairs, as well as certain diplomats, had identical competence under international law, irrespective of which State they represented. The reference to the normal practice of States thus related to the practice of all States. In the case of international organizations, it was not possible to refer to normal practice, for there was no discernible practice common to all international organizations. Some of them, taken individually, might have a normal practice, but many did not have an established practice. For that reason, the Commission had preferred to speak of a violation that was or ought to be within the cognizance of a contracting State.⁹ That requirement covered the common case in which an organization concluded a treaty with one or more of its member States. In that instance, it was inadmissible for a member State to claim that the rules of the organization regarding competence to conclude treaties were not within its cognizance.

39. Lastly, a suggestion had been made to modify the title of article 46, which needlessly departed from the title of the corresponding article of the Vienna Convention. Obviously, it was not possible to use the title “Provisions of internal law regarding competence to conclude treaties”, as did article 46 of the Vienna Convention, and the Commission could therefore simply use the formula “Provisions regarding competence to conclude treaties”, one which would apply both to States and to international organizations and would do away with the word “violation”.

40. Mr. USHAKOV said that he had no comments to make on article 46 itself, but it should be reconsidered in the light of paragraphs 2 and 3 of article 45. Under article 46, paragraph 3, an international organization could invoke a manifest violation of one of its rules regarding competence to conclude treaties. Under article 45, subparagraphs 2 (a) and (b), it could no longer invoke the violation if it had expressly agreed that the treaty was valid or remained in force or continued in operation, or if, by reason of its conduct, it must be considered as having renounced the right to invoke that ground. Under article 45, paragraph 3, the agreement and conduct were governed by the relevant rules of the organization. Undoubtedly, rules regarding agreement did exist, but it was quite unlikely that there were rules on conduct. It was difficult to see how an international organization could, by its conduct, be considered as having renounced the right to invoke a manifest violation of one of its rules of competence to conclude

⁸ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 48.

⁹ See *Yearbook ... 1979*, vol. II (Part Two), pp. 152-153, commentary to article 46.

treaties. The conduct (“*comportement*”) of any State organ was binding on that State, but the conduct (“*conduite*”) of an organ of an international organization was not necessarily attributable to that organization.

41. Mr. LACLETA MUÑOZ noted that, under paragraph 2, a violation was manifest if it would be objectively evident to “any State” conducting itself in the matter in accordance with normal practice and in good faith. Hence, the paragraph seemed to overlook the case of a treaty concluded with one or more international organizations. On the other hand, under paragraph 4, a violation of a rule of an organization was manifest if it was or ought to be within the cognizance of “any contracting State or any other contracting organization”. He wondered whether paragraph 2 spoke only of “any State” simply because it had been taken word for word from the corresponding provision of the Vienna Convention or whether the omission of a reference to international organizations was deliberate. The divergence between paragraphs 2 and 4 could easily be rectified by referring to the “contracting parties” in both of them.

42. Mr. QUENTIN-BAXTER drew the Drafting Committee’s attention to the fact that it might be advisable to bring the English version of paragraph 4 into line with the French and Spanish versions by replacing the word “cognizance” by the word “knowledge”. He wished to suggest that change because legal writings in English often drew a distinction between “cognition” and “cognizance”, “cognition” being mere knowledge and “cognizance” being knowledge from which legal consequences could be drawn.

43. Mr. JAGOTA said that he could agree with the distinction drawn in article 46 between States and international organizations with regard to the violations they could invoke and he agreed with the meaning given to the term “manifest violation”. Nevertheless, the wording of paragraph 2 seemed to be incomplete. In the case of a treaty between a State and an international organization, in connection with which the State invoked paragraph 1 in order to claim that the treaty had been concluded by a person who was not competent to conclude treaties, it would not be clear whether paragraph 2, which referred exclusively to States, or paragraph 4, which referred both to contracting States and to contracting international organizations, would apply as far as the meaning of the term “manifest violation” was concerned.

44. The Drafting Committee would therefore have to decide not only whether paragraph 2 should contain a reference to an international organization, but also whether such a reference would call into question the rationale for the distinction drawn in article 46 between the violations regarding competence to conclude treaties that could be invoked by States and by international organizations on the grounds that the violations vitiated their consent.

45. Mr. BALANDA said that article 46 was unquestionably useful, but its application might well give rise

to problems of interpretation. In connection with paragraph 1, he wondered, for example, when a rule of internal law was to be considered as being “of fundamental importance”. Did that mean a rule of constitutional law, which generally stood above all other rules of law, or did it also mean certain rules stemming from constitutional law or falling within other branches of law? Who would determine whether a rule was of fundamental importance? If that task fell to the State anxious to be released from the treaty, it was to be feared that States would regularly be tempted to attribute fundamental importance to the rule violated. Thus, paragraph 1 would not achieve its goal.

46. Again, the definition of the manifest character of a violation was not very clear. In the case of States, a violation was considered to be manifest if it was objectively evident. An objective criterion applicable to all States would thus be expected. In the case of international organizations, no objective criterion was proposed. A violation was manifest if it was or ought to be within the cognizance of any contracting State or any other contracting State or any other contracting organization. Therefore, cognizance of the right of the co-contracting party was being presumed. In internal law, such a presumption applied only to those who were governed by a certain law and who were supposed to be not unaware of it. It hardly seemed possible to transpose that presumption into international law, for quite often the co-contracting party was not in a position to know whether a treaty with an organization had been concluded in conformity with the relevant rules of that organization.

The meeting rose at 1 p.m.

1721st MEETING

Monday, 7 June 1982, at 3 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*continued*)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)³ (*concluded*)

1. Mr. FLITAN said that, in his view, the text of article 46 was acceptable, but several members of the Commission had rightly drawn attention to the difficulties to which the application of that article and article 45 might give rise. Although he fully supported the appeal for caution made by Mr. Ushakov (1719th meeting), it seemed to him that the difficulties to which attention had been drawn were more of a practical than a theoretical nature. In order to reconcile the interests at stake, account must also be taken of other very important aspects, such as concern to ensure the stability of international legal relations. To that end, he thought that the scope of article 46 must be viewed in the light of article 45 and that the reference to article 46 contained in article 45, paragraph 2, must be comprehensive, in that it must apply both to subparagraph (a) and to subparagraph (b) of that paragraph. Article 46, paragraph 3, did, of course, refer to a very serious and complicated situation, of which the Special Rapporteur (1720th meeting) had given a significant example. If, in violation of its rules regarding competence to conclude treaties, an international organization concluded an agreement to provide technical assistance to a developing country and the general assembly of that organization approved and made available to the beneficiary country the funds earmarked for that purpose, why insist that that organization should expressly accept the text of the agreement? The deletion in article 45, subparagraph 2 (b), of the reference to article 46 would lead to a problem that might be insoluble. On the one hand, the solution would not be the same as for the other serious situations referred to in article 45, paragraph 2, namely, those dealt with in articles 47 *et seq.* and, on the other, the result would be that international organizations would always have to resort to express acceptance in writing, and that might give rise to political or, in any event, practical problems.

2. It was certainly in the interest of the developing countries that international legal relations should be stable. It had rightly been stressed that the interests of international organizations must be safeguarded, but it was just as important to safeguard the interests of their treaty partners. The largest number of international agreements seemed to be concluded by developing countries and it was a fact that those countries were not in as good a position as the industrialized countries to be absolutely certain of the conduct of the international organizations with which they might conclude agreements. Stable international legal relations were thus also in their interest.

3. As to the title of article 46, he would suggest the following wording, which would be more precise than that proposed by the Special Rapporteur (*ibid.*, para. 39): "Provisions of the internal law of a State or of the rules of an international organization regarding competence to conclude treaties".

4. Mr. NI said that the absence of the words "and concerned a rule of its internal law of fundamental importance" in article 46, paragraph 3, could give the impression that, in the case of an international organization, unlike the case of a State, consent could be invalidated without reference to whether or not the rule violated was of fundamental importance. The reasons for that differentiation were not clear. It had been argued that the question of fundamental importance was a highly subjective one; yet the same question arose in paragraph 1 in connection with the violation of the internal law of States. Moreover, the difference in the wording of paragraphs 2 and 4 amounted to begging the question. The argument that, with respect to competence to conclude treaties, there was some kind of normal practice among States, but not among international organizations, was not entirely valid. International organizations had existed for many years and it was difficult to say that there was a complete absence of practice which could serve as a guide for their conduct in their relations with other entities. As had been suggested previously, "normal practice" could also mean a normal standard of conduct in dealings with other entities. Furthermore, paragraph 2 made a requirement of "good faith", which was applicable in all circumstances.

5. With regard to the title of the article, he was inclined to agree both with the suggestion made by the Special Rapporteur (*ibid.*) and with that made by Mr. Flitan. Mr. Flitan's formula was longer, but it had the advantage of being very precise, in that it covered both States and international organizations.

6. Mr. AL-QAYSI recalled that, at the preceding meeting, Mr. Jagota had raised the question of which criterion of a manifest violation applied in the case of a treaty concluded between a State and an international organization when a State invoked lack of competence to conclude treaties. Article 46, which the Commission had discussed at length in 1979, had originally been presented by the Special Rapporteur in the form of a single paragraph and two variants, variant A (paragraphs 2 and 3) and variant B (paragraphs 2, 3 and 4).⁴ The Drafting Committee had adopted variant B and, then, in order to take account of the objection that "normal practice" was not an easy concept to define, had reformulated paragraph 4 and defined a violation as manifest not by reference to the normal practice of States, but in relation to the treaty partners of an organization.

7. Paragraph 2 stated that a violation was manifest "if it would be objectively evident to any State ..." and contained no reference to any international organization that raised the possibility of a lacuna in the text. It seemed to him that paragraph 2 could be read in two different ways. It could be said that, when a State invoked a violation, the standard of a manifest violation that should apply was the standard that applied to States and that, when an international organization

³ For the text, see 1720th meeting, para. 36.

⁴ *Yearbook ... 1979*, vol. I, p. 87, 1550th meeting, para. 22.

invoked a violation, as in the example given by Mr. Jagota, the standard of a manifest violation should be the one laid down in paragraph 4. At the same time, it could be argued that, since paragraph 1 mentioned international organizations and paragraph 2 defined a manifest violation within those parameters, the lacuna was more apparent than real. Even if the words "or any international organization" were added to paragraph 2 after the word "State", the standard applicable would still be the standard applicable to States. However, that change would have the advantage of removing the apparent lacuna in the text; difficulties regarding "normal practice" would not exist, since the normal practice referred to in paragraph 2 was the practice of States. Either way it was viewed, paragraph 2 contained an apparent lacuna and he believed the Government of the United Kingdom had alluded to that problem in its comments.⁵ Perhaps the problem could be solved by the Drafting Committee.

8. Mr. CALERO RODRIGUES said that, in order to preserve the stability of treaty relations, the Vienna Convention provided that the fact that the consent of a State to be bound by a treaty had been expressed in violation of a provision of its internal law regarding competence to conclude treaties could not be invoked by that State unless the violation was manifest and concerned a rule of its internal law of fundamental importance. Draft article 46, paragraphs 3 and 4, provided for several differences with regard to the case of international organizations. The first difference was that the violation merely had to be manifest and did not necessarily have to concern a rule of fundamental importance. He agreed with the members of the Commission who thought that there was not much justification for that difference of treatment. If the latter requirement existed for States, it should also exist for international organizations.

9. The second difference related to the definition of a manifest violation. In his view, the Commission should follow the wording of the Vienna Convention as closely as possible and apply the same standard to international organizations as to States. Paragraph 4 should therefore be brought into line with paragraph 2 and the words "any State" should simply be replaced by the words "any international organization"; in its present form, paragraph 4 was much more difficult to understand than paragraph 2. If, however the Commission preferred to keep paragraph 4 as it now stood, he would agree with Mr. Quentin-Baxter (1720th meeting) that the word "cognizance", which had a specific technical meaning, should be replaced by the word "knowledge".

10. Mr. USHAKOV said that the reason why article 46, paragraph 1, of the Vienna Convention referred to rules of international law "of fundamental importance" was that one State's legislation might go into details of which another State could not be expected to be aware, although that other State must be aware of

such basic provisions as the ones contained in the constitution or legislative texts relating specifically to competence to conclude treaties. Such a differentiation could, however, not be made with regard to international organizations. It would therefore be inappropriate to use the same terminology for States and for international organizations.

11. Mr. REUTER (Special Rapporteur), summing up the debate, said that he would not refer to purely drafting questions and, in particular, those relating to the title, which were matters to be dealt with by the Drafting Committee. In reply to a point that had been raised by Mr. Jagota and referred to by Mr. Al-Qaysi, he said that only a State or an organization which had been the victim of a violation could invoke that violation in the cases provided for in article 46, paragraph 2 of which stated that a violation was manifest if it would be objectively evident "to any State" conducting itself in the matter in accordance with normal practice and in good faith. If the Commission had thus spoken of something that was objectively and generally evident, it was precisely because all States followed a standard practice. In that connection, Mr. Calero-Rodrigues had pointed out that, from the constitutional point of view, that was not entirely true because constitutional rules were not all the same. In his own view, however, reference was not really being made to constitutional rules, but, rather, to practice, by which certain representatives of States had, for the purpose of communications, identical competence under international law. If it was agreed that article 7 of the draft served as a basis for article 46, paragraph 2, the wording of that paragraph was entirely correct and there was no need for it to contain a reference to international organizations. Such a reference would, however, be necessary if it was considered that that paragraph should also refer to constitutional practice in all its complexity. In his opinion, the Commission was not competent to interpret the Vienna Convention, and the slight difference between the English and French texts would not justify an amendment of article 46, paragraph 2.

12. With regard to paragraph 4, it had been pointed out that, basically, there was nothing to prevent the Commission from adopting the same solution for States and for international organizations. In that connection, he recalled that, on first reading, the Commission had found that, although, with few exceptions, there could be said to be an established practice for each organization, there was no general practice common to all international organizations.⁶ Article 7 of the draft showed that there were no qualified representatives of international organizations who could be considered, under a general rule of international law, as having the authority to communicate the consent of those organizations. It was thus clear that article 46, paragraph 4, had to be different from the rule enunciated in paragraph 2. It referred not to something that was objectively evident, but rather to something subjective, namely, whether the

⁵ *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.14, para. 17.

⁶ *Yearbook ... 1979*, vol. II (Part Two), pp. 152-153, para. (4) of the commentary to article 46.

rule was or ought to be known, and it thus introduced an element of responsibility. It might be stated that there was nothing surprising in that since, in the countless theories relating to the circumstances in which a State could invoke the constitutional invalidity of its consent, many writers had pointed out that, even if consent was unconstitutional, a State's responsibility was engaged if it had informed another State that its ratification had been duly deposited by an organ empowered under general international law. The penalty was that that State was bound to execute the treaty even though it was constitutionally invalid.

13. Although paragraph 4 was presented in an entirely different form than paragraph 2, the idea on which it was based was, in the end, not so different. The problem at hand was to decide whether it was agreed that there was no general practice for all international organizations—in which case, article 46 was well-drafted. If it was considered that such a practice did exist or if paragraph 2 was interpreted differently, the question would then be open to further discussion. It must, however, be borne in mind that the lengthy debates on that question had resulted in the wonderfully balanced wording taken from the corresponding article of the Vienna Convention. The objections raised by some members of the Commission did, of course, show that that wording was not perfect; and, as one former member of the Commission had pointed out, the Commission must at all events avoid endless theoretical discussions on monism and dualism. In conclusion, he said he thought that article 46 should be referred to the Drafting Committee, but that its balance should not be upset because, otherwise, it would be necessary to reconsider not only article 7, but also article 47 and perhaps other articles as well.

14. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 46 to the Drafting Committee.

It was so decided.⁷

ARTICLE 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty)

15. The CHAIRMAN invited the Commission to consider article 47, which read:

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the other

negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be, prior to his communicating such consent.

16. Mr. REUTER (Special Rapporteur) said that article 47 had given rise to very few comments. One Government had, however, suggested that the two paragraphs of that article should be merged. That drafting point was, in fact, related to a substantive problem on which a decision had been taken during the consideration of article 7,⁸ in which a distinction was made between the transmission of the consent of a State and the transmission of the consent of an international organization. In the case of a State, the verb "express" had been used, and in that of an organization, the verb "communicate" had been used. That distinction, which had been retained on second reading, made it necessary to divide article 47 into two paragraphs. It had been considered that the verb "express", when applied to consent, indicated that consent was deemed to be given by the person who made it public; it had been stated that that term did not apply to international organizations because the consent of an organization was given by a collective organ composed of Government representatives, and that the person who made consent public was therefore merely communicating consent which derived its legal force from that organ. There were, of course, minor agreements to which the standing executive organ of an international organization or its representative really did express that organization's consent. Those were, however, only minor cases. Thus, although the distinction was not perfect, it would not be appropriate to call it in question now, since it had been approved on second reading during the consideration of article 7.

17. Mr. USHAKOV said that he did not remember how the Commission had come to draft article 47, paragraph 2, in its present form. The starting point for that provision was that no one was empowered to bind an international organization. The organ that was competent to conclude treaties could simply authorize a person to participate in the negotiation and adoption of the text of the treaty, but that organ would always be responsible for deciding whether it intended ultimately to be bound by the treaty. It was from that point of view that paragraph 3 of article 7 had been drafted. Paragraph 4 of that article referred only to the communication of the decision of the competent organ to be bound by the treaty. In that connection, he referred to article 78 of the draft and the corresponding article of the Vienna Convention. He noted that article 47, paragraph 2, of the draft was worded in such a way that it did not refer only to the communication or transmission of the decision of the competent organ. It also provided that, if a "specific restriction" had been placed on the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty, the fact that the representative had failed to observe that restriction could not be invoked as

⁷ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 49-51.

⁸ *Yearbook ... 1975*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B.2, para. (11) of the commentary to article 7.

invalidating "consent". He did not see what restrictions could be placed on communications and how the fact of not communicating a decision on a specific date, for example, could be invoked as invalidating consent, when, in fact, reference was being made only to mere transmission. In the case of the representative of a State who was authorized to bind that State, restrictions on the act that ultimately bound the State were, of course, conceivable, but the situation was different in the case of an international organization, which was bound by a decision taken by its competent organ; that decision was simply communicated by the representative of the organization and, if that representative failed to observe a restriction placed on his authority, that restriction could not be invoked as invalidating consent or, in other words, as conflicting with the decision taken earlier by the organization.

18. Mr. REUTER (Special Rapporteur) said that the use of special wording was the result of the fact that Mr. Ushakov had always been opposed to the idea that a single physical person could express the consent of an international organization. However, the term "communicate", which had been used as a compromise solution, was not synonymous with the term "transmit", in the sense of something done by a messenger who was unaware of the contents of his message, as Mr. Ushakov was now implying. That term was halfway between the term "express" and the term "transmit". It was a somewhat ambiguous term that implied a slight *capitis diminutio* similar to the one involved in the use, in other articles of the draft, of the term "powers" to refer to the representative of an international organization instead of the term "full powers", which applied to the representative of a State. The use of compromise terms could be questioned, but he himself could not agree that no organ of an international organization was ever able to express the consent of the organization.

19. Under article 7 of the draft, the representative of a State could express the consent of that State, whereas the representative of an organization could only communicate such consent. In many cases, however, communication amounted to an expression of consent, because it frequently happened that a single person expressed consent. It was clear from commodity agreements, in particular the Agreement establishing the Common Fund for Commodities,⁹ that a physical person would often conclude minor agreements and be requested to express consent. To deny that fact would be tantamount to claiming that no agreement was ever concluded on behalf of an international organization by a physical person unless a collective organ had been seized of the matter. Such an affirmation was not justified by past history and could not apply to the future. That was why he could agree to the word "communicate" only if it covered both expression and transmission. He referred to the case in which a collective organ of an organization adopted the text of a treaty and definitely decided to express its consent to bind the organization

and in which such consent had not yet been communicated. The organ requested the secretary-general of the organization to communicate such consent, but only once the State parties to the treaty had themselves consented to the treaty. If the secretary-general failed to observe that restriction and the organization's treaty partners were so notified, the communication of consent was not valid. There was thus no doubt that article 47, paragraph 2, was useful.

20. In conclusion, he said that the Commission could either agree that the term "communicate" applied both to the frequent case of mere communication—for example, when the statute of the organization required deliberation by a collective organ—and to the special case in which an organ composed of a single person expressed consent to bind the organization, or it could decide to reconsider the definitions contained in article 2, as well as the contents of articles 7 and 47.

21. Mr. USHAKOV said that what was in fact at issue was article 7, not article 47. It had always been his interpretation that article 7, paragraph 4, referred only to the communication of consent. The situation was, moreover, the same in the case of States. If the Soviet Union ratified an agreement concluded with Switzerland, the Ambassador of the Soviet Union in Berne was, in accordance with international law, authorized to transmit that act of ratification without having to produce full powers, but any other person making such a communication would have to produce full powers. In the case of a treaty concluded by an international organization and a State, the head of the permanent mission of that State to that organization was also authorized to communicate the act of ratification without producing full powers, whereas any other person in that mission would have to produce full powers. If the Commission intended to state that a person could express the consent of an international organization to be bound by treaty, it must amend article 7 accordingly. Indeed, the term "communicate" had an entirely different meaning. In his view, it was highly unlikely that a person would be authorized to express the consent of an international organization to be bound by a treaty before a decision to that effect had been taken by a representative organ of that organization. It was, for example, inconceivable that the Security Council or the General Assembly would authorize someone not only to negotiate and adopt the text of a treaty, but also to bind the United Nations, unless a decision had been taken specifically for that purpose by one of those organs. In the case of States, the categories of persons authorized to express such consent without producing full powers were very limited. Agreements to which a person acting as an organ of an international organization would be authorized to express the consent of that organization to be bound were really agreements of minor importance.

22. Mr. JAGOTA said that the questions raised by Mr. Ushakov in connection with the use of the terms "to express" or "to communicate" consent to be bound by a treaty in article 47 had some bearing on articles 7

⁹ See 1705th meeting, footnote 5.

and 11 to 15 of the draft. Article 7 defined who was competent to express or communicate such consent, while articles 11 to 15 indicated how consent was to be expressed. The words “communicating the consent” of the international organization had been used in article 7, paragraph 4, but not in articles 11 to 15. If a distinction between the words “express” and “communicate” was maintained in article 47, articles 11 to 15 would ultimately have to be altered.

23. The real question at issue in article 47 was, however, a substantive one and, in that connection, Mr. Ushakov had asked whether specific restrictions on authority to express or communicate consent to be bound by a treaty were to be interpreted in terms of who was competent to express or communicate such consent and how such consent was to be expressed or communicated. In his own view, article 47 must be read in conjunction with article 27, and it must be decided when article 27 would apply and when article 46 would apply. It could then be determined what kind of cases would be covered by article 47.

24. One such case would be that in which the head of the permanent mission of a State was authorized, under article 7, subparagraph 2 (e), to sign *ad referendum* a treaty between the accrediting State and an international organization which was to come into force upon signature and forgot to make it clear that he was signing the treaty *ad referendum* only, or, in other words, that a restriction had been placed on his signature. Such a restriction could, of course, also be placed on the authority of a person who was empowered to communicate the consent of an international organization to be bound by a treaty. Failure to observe such a restriction could not, under article 47, later be invoked as invalidating the consent that had been expressed or communicated. Article 47 thus dealt only with specific restrictions on authority to express or communicate consent, not with questions relating to who was competent to express or communicate such consent or how such consent was to be expressed or communicated.

25. Mr. AL-QAYSI suggested that, in order to simplify paragraph 2, the words “to the other negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be” should be replaced by the words “to the other negotiating States or to the other negotiating organizations, as the case may be”.

26. Mr. LACLETA MUÑOZ said that he was entirely in favour of the trend towards simplification that was emerging in the Commission. A distinction between the “expressing” of consent by the representative of a State and the “communicating” of consent by the representative of an international organization had been made in article 7, paragraphs 1 and 4, but not in articles 11 to 15. Such a distinction was, however, unnecessary and, if the words “to express consent” were used both for international organizations and for States, article 47, paragraphs 1 and 2, could be merged.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 47 to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 48 (Error)

28. The CHAIRMAN invited the Commission to consider article 48, which read:

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

29. Mr. REUTER (Special Rapporteur) said that article 48 had not given rise to any comments by Governments or international organizations and that he himself had no comment to make.

30. Mr. EVENSEN said that, in article 48, paragraph 3, the words “An error relating only to the wording of the text” probably meant a typing or similar error, not a substantive error. He therefore proposed that paragraph 3 should be amended to read:

“3. An error in the text of a treaty does not affect its validity; such an error shall be corrected in accordance with the provisions of article 79.”

31. Mr. AL-QAYSI said that the point made by Mr. Evensen could be covered in the commentary to article 48.

32. Mr. BALANDA said that, in his view, article 48 was explicit enough and that there was no need to try to improve it.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 48 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 49 (Fraud)

34. The CHAIRMAN invited the Commission to consider article 49, which read:

Article 49. Fraud

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating organization, the State or the organization may invoke the fraud as invalidating its consent to be bound by the treaty.

¹⁰ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 52-53.

¹¹ *Idem*, paras. 2 and 54.

35. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comment on article 49.

36. Mr. AL-QAYSI said that, in his view, article 49 would be clearer if the word "international" were added before the word "organization" in the third line, in keeping with the wording proposed by the Special Rapporteur at the Commission's thirty-first session in 1979.¹²

37. Mr. REUTER (Special Rapporteur) said that the general rule followed throughout the draft articles had been to use the words "international organization" the first time they appeared in a paragraph and then to use the word "organization" only.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 49 to the Drafting Committee.

*It was so decided.*¹³

ARTICLE 50 (Corruption of a representative of a State or of an international organization)

39. The CHAIRMAN invited the Commission to consider article 50, which read:

Article 50. Corruption of a representative of a State or of an international organization

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

40. Mr. REUTER (Special Rapporteur) said that article 50 had not given rise to any observations either by Governments or by international organizations.

41. Mr. USHAKOV said that, if the Commission decided, in the case of international organizations, to continue to use the words "expression of consent", it should make it clear that consent could be expressed only by a person who had been given full powers for that purpose. Unlike the case of States, whose head of State, head of Government or Minister for Foreign Affairs were authorized to express consent without producing full powers, no such practice existed in the case of international organizations. The Drafting Committee would therefore have to amend article 7, paragraph 4.

42. Mr. AL-QAYSI noted that at the thirty-first session, the Special Rapporteur had said that, in view of the way the problem of terminology had been dealt with in article 7, he had had the choice of dividing article 50 into two parts or of resorting to subtlety of drafting in order to keep that provision as close as possible to the corresponding provision of the Vienna Convention.¹⁴ In the text of article 50 as it now stood, the term

"expression" applied both to the consent of international organizations and to that of States, whereas the term "communication" should be used to refer to the consent of international organizations. He therefore suggested that the beginning of article 50 should be amended to read: "If the expression by a State, or the communication by an international organization, of consent to be bound by a treaty ...".

43. Mr. NJENGA said that in his view, the question of the expression or communication by an international organization of consent to be bound by a treaty was not as important as some members of the Commission thought. Indeed, in practical terms, the expression and communication of consent amounted to much the same thing. For example, when the head of the secretariat of an international organization and an ambassador representing his country negotiated an agreement of mutual benefit to that organization and that country, they were both regarded as competent to express or communicate consent to be bound by that agreement. There was thus no need to clutter the draft with a term such as "communication", which was of no practical significance. The Secretariat might, however, provide the Commission with some guidance on the practice of the United Nations and the specialized agencies in that regard.

44. Mr. ROMANOV (Secretary of the Commission) said that the practice of the United Nations was not merely one of communicating consent that had already been expressed. For example, when the United Nations negotiated an agreement for the holding of a seminar in country X, the Legal Counsel expressed the consent of the Organization to be bound by that agreement, but when an agreement was concluded by the United Nations pursuant to Article 43 of the Charter, consent to that agreement was expressed by the Security Council and communicated by the Secretary-General or by the President of the Security Council, as the case might be, to the State or States concerned. The procedures followed by the United Nations could, however, be explained in greater detail by the Office of Legal Affairs at Headquarters. If the Commission so wished, a telegram might be sent to the Office of Legal Affairs requesting it to carry out an inquiry on the matter and to communicate the results of its inquiry as rapidly as possible.

45. Mr. REUTER (Special Rapporteur) drew attention to the fact that, just as there was no difference between the words "full powers" and the word "powers", the Commission having used the former for States and the latter for international organizations, there was no difference between the word "ratification" and the words "formal confirmation", the Commission having used the former for States and the latter for international organizations.

46. The comments by the Secretary of the Commission confirmed what he himself had already stated, namely, that there were cases in which the United Nations Secretariat itself had expressed the consent of the United Nations and cases in which it had merely transmit-

¹² Yearbook ... 1979, vol. I, pp. 123-124, 1557th meeting, para. 10.

¹³ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 55.

¹⁴ Yearbook ... 1979, vol. I, p. 126, 1557th meeting, para. 29.

ted consent that had been expressed by another organ. The entire wording was based on the deliberately ambiguous meaning of the term “communicate” agreed on as a result of a laborious compromise. The question at issue was thus one of semantics and it was therefore unnecessary to request the Secretariat to provide information. That being so, he would obviously not object if the Drafting Committee had another look at article 7, as well as all the other articles in which the words “communicate” and “express” were used to refer to consent. With regard to article 7, however, the task would be far from easy, because a basic disagreement seemed to divide the members of the Commission.

The meeting rose at 6 p.m.

1722nd MEETING

Tuesday, 8 June 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*continued*)

ARTICLE 50 (Corruption of a representative of a State or of an international organization)³ (*concluded*)

1. The CHAIRMAN drew the Commission’s attention to the fact that the comments by the United Nations on the draft articles, in particular, on article 2, subparagraphs 1 (c) and (c bis), provided detailed information on the practice of the United Nations concerning the expression and communication of consent to be bound by a treaty.⁴

2. Mr. BALANDA said he understood from the explanations given by the Special Rapporteur (1721st meeting) that, while recognizing that the fact of consent was identical whether a State or an international organization was concerned, the Commission had

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1 to 80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1721st meeting, para. 39.

⁴ See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.1, II.

wished to designate the mode of expression of consent by two different words, using the word “express” for a State and the word “communicate” for an international organization. The suggestion made by Mr. Al-Qaysi (*ibid.*, para. 42) at the previous meeting that the words “the communication by” should be added before the words “an international organization”, was therefore pertinent. But in order to end the controversy that had arisen over a question of terminology, it might perhaps be advisable to simplify the text of article 50 by amending it to read: “If the consent of a State or of an international organization to be bound by a treaty has been procured through the corruption ...”.

3. Mr. REUTER (Special Rapporteur) said he thought the Drafting Committee should determine, in the context of article 7, the exact scope of the words “express” and “communicate” and, in the light of its decision on that point, decide to retain unchanged or to amend article 50, and also article 47. Article 50 could therefore be referred to the Drafting Committee, since any further discussion in plenary meeting would be sterile.

4. Mr. USHAKOV said that the danger of corruption of a representative of an international organization by direct or indirect action was hardly conceivable unless the representative was authorized to bind the organization by treaty, by his signature. The word adopted to designate the mode of expression of consent by an international organization was therefore of very great importance. He reminded the Commission that he preferred the word “express”, because he considered the word “communicate” to be synonymous with “transmit”. The Drafting Committee would therefore have the task of finding an adequate formulation that would make it possible to overcome the difficulties which had arisen in regard to both article 50 and article 47 and which would arise in regard to other articles also.

5. The CHAIRMAN said that if there were no objections he would take it that the Commission agreed to refer article 50 to the Drafting Committee.

*It was so decided.*⁵

ARTICLE 51 (Coercion of a representative of a State or of an international organization)

6. The CHAIRMAN invited the Commission to consider draft article 51, which read:

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

7. Mr. REUTER (Special Rapporteur) said that no Government or organization had submitted comments on article 51 and he himself had none to make.

⁵ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 55.

8. The CHAIRMAN proposed that draft article 51 be referred to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 52 (Coercion of a State or of an international organization by the threat or use of force)

9. The CHAIRMAN invited the Commission to consider draft article 52, which read:

Article 52. Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

10. Mr. REUTER (Special Rapporteur) said that article 52 had not been the subject of any comments by Governments or by international organizations.

11. Mr. USHAKOV observed that the title of article 52 did not entirely correspond to the text of that article, which was good. It might be possible to simplify the title to read: "Coercion by the threat or use of force", or to use only the word "Coercion" as the title. Although it was possible to imagine that a State might be a victim of a threat or use of force, it was difficult to conceive that an international organization could be placed in such a situation. He would like the Drafting Committee to consider that suggestion.

12. Mr. REUTER (Special Rapporteur) said that the title of article 52 of the Vienna Convention, "Coercion of a State by the threat or use of force", did not correspond either to the text of the article, which referred to the case in which a State was the author of a threat or use of force and to the case in which a State was the victim. It was true that the title of draft article 52 referred only to coercion against a State and not by a State and to coercion against an organization, not by an organization, whereas in the relevant commentary adopted by the Commission, unlawful coercion by an international organization was also contemplated.⁷ That possibility had not been challenged, at least during the first reading. The title of draft article 52 was obviously not in conformity with the commentary and, that being so, it would be well to amend it as proposed by Mr. Ushakov, even though that would mean departing from the title of article 52 of the Vienna Convention.

13. On the other hand, he doubted whether Mr. Ushakov's comment was justified. Without going so far as to imagine large-scale military operations or acts of aggression against the headquarters of an international organization, he could conceive that a representative of an international organization might be subjected to physical coercion and that popular demonstrations might be made against the headquarters of an international organization in order to obtain certain measures from it. In that connection, he referred to the case of an

official of an international organization who had been roughly handled when on mission to a certain country and to the case of representatives of international organizations who had been murdered. It was unlawful acts of violence of that kind which were contemplated in draft article 52.

14. Mr. JAGOTA, referring to the suggestion made by Mr. Ushakov, said that, although it would be possible to amend the title of article 52 to read: "Coercion by the threat or use of force", and thus maintain the distinction between the titles of articles 51 and 52, he himself would have no objection if the title of article 52 was retained as it stood. The real distinction between the titles of articles 51 and 52 would, however, be made on the basis of the text of article 52, which referred to the "principles of international law embodied in the Charter of the United Nations". It seemed to him that the principles in question were probably those mentioned in Article 2, paragraph 4, of the Charter, and in that connection it could be asked whether the text of article 52 covered the question of the coercion of an international organization and, if so, how. In other words, were the principles of international law embodied in Article 2, paragraph 4, of the Charter broad enough to cover the question of the coercion of an international organization?

15. Mr. REUTER (Special Rapporteur) replied that the Commission had preferred to avoid an express reference to the text of the Charter, so that nullity of certain treaties concluded before the Charter could be justified. That was why it had adopted the expression "in violation of the principles of international law embodied in the Charter of the United Nations". It had thus avoided the difficulties which might arise from a reference to article 2, paragraph 4, of the Charter. Moreover, it was perfectly conceivable that an international organization as such might suffer coercion by armed force which induced it to conclude an agreement.

16. Mr. AL-QAYSI, referring to Mr. Jagota's question concerning Article 2, paragraph 4 of the Charter, said he thought that Article 1, which stated the Purposes of the United Nations referred to in Article 2, provided a very general context that could serve as a basis for a sound argument in favour of draft article 52 as it stood. The wording of Article 1 of the Charter was very general and was not addressed to States only. Indeed, what were international organizations if not institutions designed to promote the purpose referred to in Article 1, paragraph 3, namely, the achievement of international co-operation? He therefore believed that it would be unwise for the Commission not to model article 52 on the corresponding provision of the Vienna Convention, which had, as members would recall, been very carefully worded to take account of the question of peace treaties.

17. Mr. YANKOV said that since it was extremely difficult to find examples of the coercion of an international organization, that problem was a somewhat artificial one. Moreover, an international organization's

⁶ *Idem*, paras. 2 and 56.

⁷ *Yearbook ... 1979*, vol. II (Part Two), pp. 155-156, para. (6) of the commentary to article 52.

decision-making power depended entirely on the activities, positions and resolutions of its member States and any pressure on an international organization to conclude a particular treaty would be exerted not by its secretariat, but by the States which composed it and could use their influence to determine the decisions it took. Thus, when reference was made to the coercion of an international organization, what was, in fact, meant was the coercion of that organization by its member States.

18. He had raised that point because he did not think the substantive problem raised by article 52 could be solved simply by amending its title. Nor was it easy to see what practical effect article 52 would have, since specific examples of the coercion of an international organization by the threat or use of force certainly did not abound. Although he did not think that article 52 needed to be included in the draft, he would not formally propose its deletion. He would merely suggest that the meaning of the words "Coercion ... of an international organization by the threat or use of force" should be further clarified.

19. Mr. FLITAN expressed reservations about the explanations given by the Special Rapporteur, namely, that draft article 52 referred not only to the case in which a State or an international organization had been a victim of the threat or use of force, but also to the case in which a State or an international organization had resorted to the threat or use of force. What concerned the Commission was not so much the fact that a State or an international organization had resorted to the threat or use of force as the fact that consent had been invalidated by the very fact that a State or an international organization had been subjected to the threat or use of force. In other words, the Commission should deal with the case in which a State or an international organization had been a victim of the threat or use of force. In that respect, the title of article 52 of the Vienna Convention, "Coercion of a State by the threat or use of force", was perfectly appropriate, and the same applied to the title of draft article 52. As to the substance of the article, he thought the Commission could retain the very controversial case, even though it was improbable, of an international organization which was subjected to the threat or use of force, and therefore could retain draft article 52.

20. Mr. AL-QAYSI said that the Commission could not afford to omit article 52, for, without it, the draft would give the impression that the coercion of an international organization to procure the conclusion of a treaty was allowed. Moreover, article 52 referred to an international organization as a separate legal entity from the States which composed it and did not raise the question of how pressure could be exerted by such States on the organization. It raised only the theoretical question whether, if such pressure were exerted, an international organization could be made to agree to the conclusion of a treaty and whether such a treaty would be valid.

21. Mr. STAVROPOULOS said that he supported Mr. Ushakov's suggestion that the words "of a State or of an international organization" in the title of article 52 should be deleted. It was unnecessary to distinguish between States and international organizations, because the title of the article itself made it quite clear that such a distinction was intended. Moreover, articles were given titles only for convenience and titles did not constitute legal rules. Although he agreed with Mr. Yankov that coercion of an international organization by the threat or use of force was unlikely to occur, life was so full of surprises that the possibility of such a case should be provided for in the draft.

22. Mr. YANKOV said he wished to make it clear that he had no objection to the general rule stated in article 52. He had had some difficulty with that provision only because he did not think that coercion of an international organization by the threat or use of force was actually possible. That difficulty might be overcome by specifically stating the rule in the title of article 52 and merely providing in the text that the treaty would be void if its conclusion had been procured by any kind of coercion.

23. Mr. NJENGA said that without article 52 the draft would be incomplete. It was true that the threat or use of force against an international organization was not a frequent occurrence and that specific examples were hard to find. But the possibility of such a threat or such use of force could not be ruled out, and article 52 should provide for it. It would, for example, be quite possible for the organs of an international organization that were competent to conclude treaties, such as its secretary-general or secretariat, to be coerced by the threat or use of force into acceptance of a treaty relationship. In the case of a convention on the privileges and immunities of an international organization, which was almost always concluded by the head of the organization's secretariat and the host country, it was not inconceivable that unlawful pressure or force could be used against the head of the organization with a view to limiting its privileges and immunities. Another pertinent example had been given in paragraph (5) of the commentary to article 52 adopted at the Commission's thirty-first session.⁸

24. Mr. REUTER (Special Rapporteur), said he accepted Mr. Flitan's comments on the title of draft article 52; in fact, he was willing to accept any title, whatever it might be. He was rather surprised that Mr. Yankov had difficulty in imagining cases to which article 52 would apply. In that connection, he pointed out that pressure exerted on an organ of an international organization consisting of representatives of States, was in fact pressure on the international organization itself, and not pressure on a State.

25. He would refer as an example, since it was unfortunately suggested by present circumstances, to the case of a United Nations peace-keeping force and the powers of the Secretary-General in regard to it. He then quoted

⁸ *Ibid.*, p. 156.

article 15 of the Regulations for the United Nations Emergency Force (1957) which read:

15. *Authority of the Secretary-General.* The Secretary-General of the United Nations shall have authority for all administrative, executive and financial matters affecting the Force and shall be responsible for the negotiation and conclusion of agreements with Governments concerning the Force. He shall make provisions for the settlement of claims arising with respect to the Force.⁹

It was possible to imagine that the Secretary-General might be induced, perhaps in order to save human life, to conclude agreements amending certain other agreements concerning a peace-keeping force concluded by the United Nations. The new agreements would thus be concluded under coercion by armed force; some States might perhaps challenge them as being contrary to the principles of the Charter, and they would have the right, under article 52, themselves to invoke the nullity of those agreements, which, unlike that in cases of error or fraud, was a nullity *erga omnes*.

26. The CHAIRMAN said that if there were no objections he would take it that the Commission agreed to refer article 52 to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))

27. The CHAIRMAN invited the Commission to consider article 53, which read:

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

28. Article 53 had not been the subject of any comments by Governments or by international organizations. If there were no observations by members, he would take it that the Commission decided to refer article 53 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)

29. The CHAIRMAN invited the Commission to consider article 54, which read:

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

⁹ ST/SGB/UNEF/1.

¹⁰ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 57.

¹¹ *Idem*, paras. 2 and 58.

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

30. Mr. AL-QAYSI suggested that the Drafting Committee should try to simplify the text of subparagraph (b) by regrouping the different classes of parties.

31. Mr. USHAKOV said he was not sure how article 54 should be interpreted if article 36 *bis* was retained in its present form. When the States members of an international organization had consented to be bound by the Treaties it concluded, must they give their consent, in accordance with subparagraph (b) of article 54, to the termination of a treaty or the withdrawal of a party? Other articles of the draft would raise similar questions if article 36 *bis* was retained.

32. Mr. REUTER (Special Rapporteur) said that was one of the reasons why he had stipulated in article 73, paragraph 2, that the draft did not prejudge any question that might arise in regard to a treaty from "the termination of participation by a State in the membership of the organization".

33. Mr. USHAKOV said that the situation referred to in article 73 was quite different. In the case he had in mind, the member State retained its status as a member and assumed obligations in conformity with article 36 *bis*; as it was bound by the obligation deriving from the treaty, although that did not make it a party to the treaty, must it be consulted in the case of termination of the treaty or withdrawal of a party, or did the organization decide in its place? Article 73 would apply, for example, in the different case in which an international organization saw the number of its member States decreased by half.

34. Mr. REUTER (Special Rapporteur) explained that, in the case considered by Mr. Ushakov, if the member State was not a party to the treaty it would not be included among the other contracting States, and hence would not be consulted in a case of termination or withdrawal; it was the organization that would be consulted in its place. As a member, it might be consulted under the rules of the organization, but that was a different question. A problem might arise if one accepted the existence of a collateral agreement that created direct relations between a State member of an international organization and the contracting entity of that organization. Article 54 did not specify whether the member State must then be consulted, any more than the Vienna Convention dealt with the question of the effects on a collateral agreement of amendments made to the main agreement. Moreover, the term "collateral agreement" did not even appear in that instrument. Both the Vienna Convention and the draft articles being prepared left aside all questions which might be raised by situations of that kind.

35. Mr. USHAKOV thought that the question raised was quite different. Article 37 of the draft did not con-

cern the treaty as such or the termination of the treaty or withdrawal of a party, but the obligations and rights of third States and third international organizations. The question regarding article 54 was whether, in the case referred to in article 36 *bis*, a member State was free to announce its withdrawal from a treaty with the consent of all the other parties, or whether it was the organization of which it was a member that must take such a decision.

36. Mr. RIPHAGEN pointed out that the Vienna Convention had provided for the situation of third States that had rights and obligations under a treaty to which they were not parties, but had not taken the matter any further. The question whether those States could withdraw from a treaty, like many other questions raised by treaties, was not settled by the Vienna Convention. The Commission was not called upon to try to settle that point, since it was following the Vienna Convention.

37. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 54 to the Drafting Committee.

*It was so decided.*¹²

ARTICLE 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

38. The CHAIRMAN invited the Commission to consider article 55, which read:

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

39. Article 55 had not been the subject of any comments by Governments or international organizations. If there were no observations by members, he would take it that the Commission decided to refer article 55 to the Drafting Committee.

*It was so decided.*¹³

ARTICLE 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal).

40. The CHAIRMAN invited the Commission to consider article 56, which read:

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

41. Mr. REUTER (Special Rapporteur) said that neither the title nor the text of article 56 had attracted any comments by Governments or international organizations, but the commentary to the article had been criticized in the Sixth Committee of the General Assembly. The Commission had been reproached for citing headquarters agreements as examples of treaties to which subparagraph 1 (b) of article 56 would apply. According to the representative who had made that criticism, it was not customary for the Commission to give concrete examples of the application of the rules it enunciated. In his opinion, that custom was not well established, though the Commission had on several occasions referred to fundamental human rights as examples of *jus cogens*. It should also be noted that in the advisory opinion of the International Court of Justice on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*¹⁴ the example of headquarters agreements, mentioned by the Commission, had been cited. It was also interesting to note that the Court had attached some importance to draft articles which had only been adopted on first reading.

42. Mr. USHAKOV said he was not sure whether the international organization referred to in article 36 *bis*, which bound its members when concluding a treaty, could subsequently denounce the treaty on their behalf. Since obligations arose for the member States as a result of the conclusion of the treaty, it might well be thought that the treaty could not be denounced without their consent. Those questions had not yet been answered.

43. The CHAIRMAN proposed that draft article 56 be referred to the Drafting Committee.

*It was so decided.*¹⁵

ARTICLE 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties).

44. The CHAIRMAN invited the Commission to consider draft article 57, on which there had been no comments, and which read:

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

45. Mr. USHAKOV, referring to article 36 *bis*, said he was not sure whether a decision taken by an organiza-

¹⁴ *I.C.J. Reports 1980*, p. 73.

¹⁵ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 58.

¹² *Idem.*

¹³ *Idem.*

tion to suspend the application of a treaty entailed suspension of the obligations of its member States.

46. Mr. AL-QAYSI said the comments he had made on article 54, subparagraph (b) also applied to article 57, subparagraph (b). Perhaps the Drafting Committee could simplify the text of that subparagraph.

47. Mr. JAGOTA said he would like some clarification of Mr. Ushakov's comments on article 54, subparagraph (b), and article 57, subparagraph (b), particularly with regard to the effects of article 36 *bis*. Both article 54, subparagraph (b) and article 57, subparagraph (b), used the word "parties": if article 36 *bis* was adopted, would the member States of an organization, which had rights and obligations under a treaty, become parties to the treaty? If not, how did articles 54 and 57 concern them? The termination, denunciation or suspension of a treaty could only be effected by the parties, which for the purposes of article 36 *bis*, meant the international organization. Article 36 *bis* treated the member States of an international organization as third States, and hence as not being parties; the question whether the treaty created rights and obligations for member States was a separate matter. Perhaps Mr. Ushakov could define the meaning he ascribed to the word "parties" in articles 54 and 57.

48. Mr. USHAKOV pointed out that, with reference to article 36 *bis*, he had maintained that the member States of an organization enjoying exclusive competence to conclude treaties were not formally parties to its treaties, but that in practice they were not really third States. That was the core of the problem. In his opinion, it was clear that member States which transferred to an organization exclusive competence to conclude treaties relating to certain matters were no longer free to act in those matters. The organization might thus have exclusive competence in regard to denunciation or suspension, for example. But article 36 *bis* did not deal with these points, so that all the questions raised by article 54 and the subsequent articles remained unanswered. Article 36 *bis* mentioned only the relevant rules of the organization providing that member States were bound by the treaties it concluded, and did not mention all the other acts which the organization might perform on behalf of its member States. By reason of other existing rules, the member States might truly be third States. There might, for instance, be relevant rules of the organization on reservations, under which member States transferred their competence in that matter to the organization. But in the absence of such rules, it might be asked whether the member States could formulate their own reservations.

49. He therefore considered it essential to settle the many questions raised by the case dealt with in article 36 *bis*. That provision concerned only one aspect of the matter; the other aspects should be dealt with in the corresponding articles of the draft, or, otherwise, in a separate draft, which would be preferable. All the questions to which he had drawn attention were thus of a very real nature. The draft contained no answers, but

perhaps they could be found in the practice of organizations.

50. Mr. JAGOTA said that, if he understood Mr. Ushakov's argument correctly, the question at issue concerned the exclusive competence to conclude treaties, which States members of an international organization might have transferred to it; Mr. Ushakov believed that the real situation in the international community was that, in some cases, although an international organization was competent to conclude a treaty, the rights and obligations deriving from the treaty, as well as other matters relating to responsibility and liability, were the direct concern of its member States. Either the point should be clarified in general terms, by stating that the competence of the international organization was exclusive, or, if a duality subsisted, all ambiguity should be removed wherever the problem arose in the draft articles. That was why Mr. Ushakov was concerned, in regard to articles 54 and 57, about the effects, for member States of an international organization, of the termination of a treaty or the suspension of its operation.

51. What was not clear to him was how the effects of formal termination of, withdrawal from, or denunciation of a treaty by an international organization were relevant to articles 54 and 57. Those articles dealt with conditions under which a treaty continued to produce its effects. What happened to the rights and obligations of member States when the treaty was terminated was a separate question. Unless that issue somehow arose from the definition of the word "parties" it was not relevant. Referring to his earlier question, he said that if the word "parties" meant parties to the treaty, the question of the relations between an international organization and its member States was irrelevant. The member States were treated under article 36 *bis* as third States, and, according to article 2, subparagraph 1 (h), third States were not parties to the treaty. Therefore, the only party to a treaty competent to give consent to terminate, withdraw from or denounce that treaty was the international organization. The question of a change in the original membership of the organization was also irrelevant, since that matter was regulated by the treaty which had constituted the international organization. If, however, the word "parties" was understood in a broad sense as including the States members of an international organization, then the concept of third States would have to be reconsidered in article 36 *bis* and article 2, subparagraph 1 (h). Perhaps Mr. Ushakov could give some specific examples to illustrate his remarks.

52. Mr. REUTER (Special Rapporteur) noted that Mr. Ushakov was urging the Commission to deal with organizations to which exclusive competence had been transferred. However, as Special Rapporteur he had said from the start that that special case would not be considered. Mr. Ushakov was free to deplore the fact and make comments, which, moreover, were very pertinent and interesting, but they were not relevant to the subject being studied by the Commission.

53. Mr. USHAKOV said that the answer would be easy if the Commission really dealt, in a general way, with international organizations having exclusive competence. However, it had confined itself to the case in which the rules of the organization provided that a treaty it concluded created obligations for member States. If an ordinary organization, having concluded a treaty that created obligations for its member States which they had explicitly accepted in writing, then withdrew from the treaty, it was clear that the obligations accepted by the member States under collateral agreements, would subsist. But the draft did not say what would happen in such a case to the obligations assumed by States members of an organization to which they had transferred exclusive competence to conclude treaties. It was because article 36 *bis* dealt with the case in which that competence had been transferred, that it was necessary to solve the problems arising from that case in other articles of the draft.

54. Mr. LACLETA MUÑOZ said that the question whether States members of an international organization were third parties with respect to a treaty concluded by the organization had been discussed extensively at the Third United Nations Conference on the Law of the Sea, in connection with the legal nature of the exclusive economic zone. Technically, member States were third parties, yet substantively, they had the same rights and obligations as if they were parties. However, article 36 *bis* was worded in such a way as to dispel doubts. From a technical-legal point of view, the member States were third parties, and for that reason articles 57, 56 and 54 should be read technically: it was the conduct of the international organization which was decisive in matters of termination of, withdrawal from, or denunciation of a treaty. Read in that way, those articles raised no difficulties.

The meeting rose at 1.00 p.m.

1723rd MEETING

Wednesday, 9 June 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (continued)

ARTICLE 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)³ (concluded)

1. The CHAIRMAN, noting that members of the Commission had no further comments to make, suggested that article 57 should be referred to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)

2. The CHAIRMAN invited the Commission to consider article 58, which had not given rise to any comments by Governments or international organizations and which read:

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty, and:
(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

3. Mr. USHAKOV said that, if article 36 *bis* was retained in its present form, article 58 would give rise to the same type of difficulties as the preceding articles. Under articles 35 and 36 of the draft, it was by means of a collateral agreement that a third State could assume obligations arising for it from a treaty. Direct relations were thus established between the parties to the collateral agreement and the rights and duties deriving from it subsisted, regardless of the fate of the treaty. There was obviously nothing to prevent the parties to the collateral agreement from deciding to amend that agreement. It could be asked whether collateral agreements also existed in the case covered by article 36 *bis*. If so, the rights and obligations of the member States would not depend on the fate of the treaty. If, however, the treaties concluded by the organization really automatically gave rise to rights and obligations

² The draft articles (arts. 1 to 80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1722nd meeting, para. 44.

⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 58.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

for the member States of that organization and if the organization then decided to suspend the operation of those treaties, the rights and obligations of the member States might also be suspended. That problem had not been solved because article 36 *bis* referred only to the relevant rules of the organization providing that the member States were bound by the treaties concluded by the organization. Reference would therefore have to be made to the relevant rules of the organization relating to the denunciation of treaties.

4. Mr. JAGOTA said that the Special Rapporteur could perhaps clarify the question to which Mr. Ushakov had repeatedly drawn attention, namely, that of the correlation between article 36 *bis* and other articles of the draft. Article 58 dealt with the suspension of the operation of a multilateral treaty as between some of the parties, which could be States or international organizations. If some of the parties wished to modify certain of the treaty provisions in their relations *inter se*, they could temporarily suspend the general provisions and then modify them by concluding a collateral agreement as between themselves. A specific example was provided by the Convention on the Law of the Sea,⁵ to which an international organization such as EEC could become a party. It was his understanding that, if EEC wanted to suspend the operation of the provisions of that treaty, it was free to do so under article 58. It could conclude a collateral agreement regarding certain matters with, for example, Morocco. The question whether the members of EEC had surviving rights and obligations or whether the suspension applied *ipso facto* to the members of the international organization was not regulated by article 36 *bis*, and was thus covered by article 58. As he saw it, once EEC concluded a separate agreement with Morocco suspending certain provisions of the Convention on the Law of the Sea, that suspension applied to all members of EEC. If that was not the case, the provisions of article 36 *bis* should be re-examined. Otherwise, the Commission ran the risk of interfering in the internal relations of the members of an international organization, a matter that was not governed by the law of treaties concluded between States and international organizations or between international organizations.

5. Mr. REUTER (Special Rapporteur) said that he had no intention of repeating the explanations he had already given on several occasions. As to the comments made by Mr. Jagota, he said he agreed that, at the present stage of drafting, the definition of the member States of an international organization was such that those States were not parties. Accordingly, the article under consideration could be referred to the Drafting Committee. The question how article 36 *bis* would be interpreted in its final form was one with which the Commission would deal later, because that article was now before the Drafting Committee. He wished to make it clear that he found it inappropriate to take particular account of the case of organizations to which exclusive

competence had been transferred. He was therefore of the opinion that all the problems that had been raised related to a case which the Commission did not have to consider.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 58 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

7. The CHAIRMAN invited the members of the Commission to consider article 59, which had not given rise to any comments by Governments or international organizations and which read:

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

8. The CHAIRMAN, noting that no member of the Commission wished to speak on article 59, suggested that it should be referred to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 60 (Termination or suspension of the operation of a treaty as a consequence of its breach)

9. The CHAIRMAN invited the Commission to consider article 60, which had not given rise to any comments by Governments or international organizations and which read:

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it, either:

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organizations;

⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 58.

⁷ *Idem.*

⁵ See 1699th meeting, footnote 7.

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

10. The CHAIRMAN noting that no member of the Commission wished to speak on article 60, suggested that it should be referred to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 61 (Supervening impossibility of performance)

11. The CHAIRMAN invited the Commission to consider article 61, which had not given rise to any comments by Governments or international organizations and which read:

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

12. The CHAIRMAN, noting that no member of the Commission wished to speak on article 61, suggested that it should be referred to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 62 (Fundamental change of circumstances)

13. The CHAIRMAN invited the Commission to consider article 62, which read:

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

14. Mr. REUTER (Special Rapporteur) said that a lengthy commentary had been devoted to article 62.¹⁰ Without referring to specific paragraphs of that commentary, several Governments had expressed the view that too much equality had been established between States and international organizations. It was to be noted that the Commission had spent a great deal of time on the drafting of article 62, paragraph 2, and that it had ultimately referred to a treaty between "two" or more States and one or more international organizations in order to draw attention to a boundary problem that could arise only in connection with a boundary between States. That meant, not that an international organization could not be a party to a treaty establishing a boundary between States, but rather, that at least two States must also be parties to such a treaty. In the commentary to article 62, the Commission had explained why it had not been possible to expand the meaning of the term "boundary". He therefore saw no reason to amend that article.

15. Mr. NI said that article 62 involved a problem of structure. Paragraph 2 of the corresponding article of the Vienna Convention provided for two exceptions: (a) if the treaty established a boundary; or (b) if the fundamental change was the result of a breach of an obligation by the party invoking it. In draft article 62 as it now stood, paragraph 2 of the Vienna Convention had been divided into two separate paragraphs, paragraphs 2 and 3. That change could have been made for either of two reasons: in order to highlight the presence and participation of international organizations in the treaty-making process, or in order to deal with questions of a different nature in two separate paragraphs. There might have been other reasons as well, but the result was not very satisfactory. The wording of paragraph 2 was somewhat unclear and an explanation of the implications of that provision in its present form would be desirable. Because of the absence of the introductory part of the corresponding provision of the Vienna Convention, the present wording of paragraph 3 was, moreover, necessarily repetitive and cumbersome. Perhaps the Commission could use the same wording as the Vienna Convention; although it did not specifically mention international organizations, they were amply covered by the definition of the term

⁸ *Idem.*

⁹ *Idem.*

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), pp. 81-83.

“treaty” contained in article 2, subparagraph 1 (a), of the draft.

16. Mr. CALERO RODRIGUES said that he shared the views expressed by Mr. Ni. According to paragraph 2, the Special Rapporteur considered that a treaty between two or more States and one or more international organizations represented the only case in which the type of treaty being dealt with in the draft articles could apply to the establishment of a boundary. It was, however, obvious that a boundary could not be established by a treaty to which an international organization was a party unless two or more States were also parties to that treaty. Article 62, paragraph 2, of the Vienna Convention fully covered that case, and its structure and wording should therefore be retained.

17. Mr. FRANCIS said that article 62, paragraph 2, referred to the situation before the entry into force of the Convention on the Law of the Sea. Since a sea-bed Area would come under the jurisdiction of the International Sea-Bed¹¹ Authority and each State was entitled to delineate its territorial sea within given limits, he wondered whether a boundary problem could arise between a State and the Authority, thus calling in question the scope of paragraph 2.

18. Mr. USHAKOV said that, in his view, the *rebus sic stantibus* rule, which had given rise to many difficulties in the Vienna Convention, gave rise to even more in the draft under consideration. Article 62, paragraph 2, of the draft was based on article 62, subparagraph 2 (a), of the Vienna Convention, which provided that a fundamental change of circumstances could not be invoked as a ground for terminating or withdrawing from a treaty if the treaty established a boundary. Although it was not the Commission's task to interpret the term “boundary” within the meaning of the Vienna Convention, it could be said that that term meant a boundary between the respective jurisdictions of two States. The term “boundary” should probably have the same meaning in the draft under consideration. A problem nevertheless arose because an international organization had no boundaries and could not conclude a treaty establishing a boundary between the jurisdictions of States. That was why it had not been possible to use the term “treaty” in article 62, paragraph 2, of the draft without specifying that such a treaty was a treaty concluded between at least two States, with the participation of one or more international organizations. Although practice did not appear to offer any examples of a treaty of that kind, the Commission had been of the opinion that such a treaty was possible, and it had drafted article 62, paragraph 2, accordingly. If such a treaty was thought to be inconceivable, that view would have to be explained in the commentary and paragraph 2 would have to be deleted.

19. Mr. SUCHARITKUL thanked Mr. Ushakov and Mr. Francis for raising a very interesting point, of which he would like to give examples. Whether or not the

Commission was called upon to interpret the Vienna Convention, it had to be acknowledged that the notion of boundaries between States had changed fundamentally and taken on a new dimension, namely, that of maritime boundaries. In addition to a possible maritime boundary between a State and the sea-bed, there were also maritime boundaries between adjacent States and between opposite States. Specific examples were provided by the various coastal States of South-East Asia, which had concluded maritime boundary treaties, and by the European States of France and Spain, which shared a certain undelimited area of the sea-bed that was operated by a joint authority. It would therefore be neither impossible nor inconceivable for a treaty establishing a maritime boundary between, for example, Viet Nam, Thailand and Malaysia, to be signed by the three countries and the joint authority, which would have to become a party to that treaty since it would exercise a great deal of sovereignty collectively within that limited sea-bed area. In cases such as the ones he had just mentioned, article 62, paragraph 2, might be useful.

20. Mr. JAGOTA said that he was in favour of retaining article 62, paragraph 2, in its present form. Although paragraphs 2 and 3 had been combined in the Vienna Convention, the separation in article 62 of the draft was justified on the ground that the parties were different for the two purposes mentioned. Article 62, paragraph 2, like article 63, referred to a specific type of treaty, namely, a treaty between two or more States and one or more international organizations. That specification was intended to emphasize the boundary element in the two provisions. If paragraphs 2 and 3 were combined and no reference was made to the parties to the treaty, the provision might be open to a different interpretation. Some doubt had also been expressed about the utility of paragraph 2. It had been argued that, if that paragraph referred only to boundaries between States, it was confusing and that it was the rule laid down in the Vienna Convention that should apply. If, however, the concept on which that paragraph was based was broader and it could refer to a boundary situation involving an international organization, then it should be retained and it should not be limited to boundaries between States.

21. In article 62, no specific reference was made to boundaries between States, whereas article 63 did refer to the severance of diplomatic or consular relations between States. There were two reasons for that omission: first of all, no reference to boundaries between States had been included in the Vienna Convention and, secondly, the omission made it possible to apply that provision to other situations, such as the ones resulting from the new concepts that had emerged from the Third United Nations Conference on the Law of the Sea. All the work carried out at the United Nations Conference on the Law of the Sea since its first session in 1973 had aimed at defining the limits of national jurisdiction in maritime matters. After years of discussion, the Conference had agreed on specific limitations, which were provided for in detail in the Convention. Those limita-

¹¹ Part XI of the Convention (see 1699th meeting, footnote 7).

tions would be defined precisely by the coastal States concerned in consultation with an international boundary commission. Beyond those limits, the international sea-bed area would be under the control of the International Sea-Bed Authority. Apart from questions of boundaries between States, therefore, there would be the question of boundaries between States and an international organization, namely, the Authority. In such a case, paragraph 2 would prove to be useful.

22. Mr. FLITAN said that he fully endorsed the commentary to article 62. The Commission must, in so far as possible, confine itself to transferring the provisions of the Vienna Convention to the draft. With regard to treaties which established boundaries, it had reached the conclusion that there could be treaties concluded between two or more States and one or more international organizations in connection with a boundary. In the commentary to article 62, it had even referred to the case in which an international organization guaranteed the boundaries between certain States. The Vienna Convention obviously did not cover such cases, since it dealt only with relations between States.

23. However important the trends which had emerged from the Third United Nations Conference on the Law of the Sea might be, the Commission should be careful not to interpret the term "boundary", within the meaning of the Vienna Convention, too narrowly or too broadly, because that term could not have a broader meaning in the draft than it did in the Vienna Convention. The draft should therefore relate only to boundaries between States.

24. Mr. REUTER, speaking as a member of the Commission, said that the Commission was dealing with a rule which had a bearing on the particular legal effect of boundaries and was quite plainly based on a desire for peace: any treaty establishing a boundary had a definite stabilizing effect. The Vienna Convention obviously dealt with terrestrial boundaries; at the very most, it could also relate to the boundaries of the territorial sea. A political problem nevertheless arose as a result of the fact that there were other lines of delimitation and lines would probably separate the jurisdiction of States from that of an international entity. It remained to be seen whether the international community also intended to make those lines stable. None of the members of the Commission who had closely followed the work of the Third United Nations Conference on the Law of the Sea had affirmed that intention, and it was not for the Commission to take a stand on that point. In his own view, the Commission must be extremely cautious. It would be very bold to say that the rule that boundaries could not be changed would be a basic element of the position of an international organization which concluded with two States a treaty establishing a boundary. Although he could agree that the organization might make a commitment, the most typical being a commitment to guarantee a boundary, and that the exception of article 62 would apply to each State with respect to the other, he did not think that that exception would apply to the guarantee by the organization because, if there

was a fundamental change of circumstances, would the organization have to consider that its commitments were also immutable? If so, article 62, paragraph 2, could not be retained, but he would not go as far as that. Perhaps the commentary could indicate that, even though it had still had some doubts, the Commission had not wanted to delete paragraph 2.

25. Speaking as the Special Rapporteur, he said that there were several possible solutions. Despite the serious doubts they had expressed, neither he, as a member of the Commission, nor Mr. Ushakov had proposed such a radical solution as the deletion of paragraph 2. Some members of the Commission had stated that they were in favour of retaining paragraph 2 in its present form. Others, thinking of the future, had suggested that reference should not be made only to treaties concluded between "two" or more States, because that would imply a reversion to the wording of article 62 of the Vienna Convention. That solution would nevertheless make it necessary to include in the commentary quite a few of the comments made during the discussion, in the view expressed by Mr. Calero Rodrigues that the article under consideration quite obviously applied to a boundary between States.

26. Mr. USHAKOV stressed the fact that the term "boundary" must have the same meaning in the draft and in the Vienna Convention. It was States, and not the Commission, that must interpret that term.

27. Mr. JAGOTA said that, if the present paragraph was retained, all his earlier comments would have been reflected. Any further comments he might make should be included in the commentary.

28. Mr. SUCHARITKUL said he agreed with Mr. Ushakov and Mr. Jagota that the term "boundary" must be interpreted as including maritime boundaries. The International Court of Justice had already taken a position on that question in the *Aegean Sea Continental Shelf* case,¹² indicating that the term "boundary" included maritime boundaries.

29. Mr. RIPHAGEN said that, if paragraph 2 really related only to boundaries between States, the situation was covered by article 3, subparagraph (c), of the Vienna Convention. He would, however, not rule out the possibility that an international organization and a State might conclude a treaty relating to the boundary of the State in the case, of course, in which the international organization was responsible for the administration of a territory. In such a case, the same reasons would prevent a fundamental change of circumstances from being invoked with regard to a treaty establishing a boundary. He agreed with the Special Rapporteur on that point.

30. Perhaps it would be advisable to divide the text drawn on article 62, paragraph 2, of the Vienna Convention into two paragraphs, since the two cases referred to in that paragraph had nothing to do with each

¹² *I.C.J. Reports 1978*, p. 3.

other. Stability of international relations, to which the Special Rapporteur had referred, was in no way involved in the second case.

31. Mr. FLITAN said he did not think that the Vienna Convention applied to a treaty concluded between two States and an international organization and establishing a boundary between those States. The effect of the participation of the organization in such a treaty was that legal relations were established not only between the two States, but also between the organization and the two States. The organization was thus under an obligation to respect the boundary established by the treaty. By way of example, he referred to a regional multilateral treaty which related to certain activities that could be carried out in boundary areas and to which the parties were the Danube Commission and the member States of that Commission. The Vienna Convention, which governed only relations between States, did not provide for a case of that kind. He was thus in favour of retaining paragraph 2 of the article under consideration.

32. Mr. RIPHAGEN pointed out that, in the case mentioned by Mr. Flitan, the Danube Commission, which was an international organization, was not a party to the treaty at all. Neither was the Central Commission for the Navigation of the Rhine a party to the Act of Mannheim.¹³ A different situation was involved. The international organization which had been established by the treaty had no specific obligations as a party. If it was a party to the treaty, in the sense that it assumed certain obligations in certain situations, then it could be asked whether a fundamental change of circumstances was really excluded. The boundaries between States were inviolable and a fundamental change of circumstances could not be invoked to alter them, but, as the Special Rapporteur had pointed out, a fundamental change of circumstances was accepted as far as the functions or obligations of an international organization were concerned.

33. Mr. REUTER (Special Rapporteur) said the Commission had always considered that the draft must, in all cases, embody the rules of the Vienna Convention that applied to relations between States. Indeed, the fate of the draft was not known and it was possible that it would be intended for entities other than the States parties to the Vienna Convention. There was nothing to prevent the Commission from referring in the commentary to article 3 (c), of the Vienna Convention, on the understanding that that provision was binding only on the States parties to that instrument.

34. With regard to the *Aegean Sea Continental Shelf* case, it should be made clear that the International Court of Justice had taken a position on the term "boundary" only within the framework of a specific arbitration treaty. It was, for the time being, not possible to know what meaning States would attribute to the

term "boundary" as used in the Vienna Convention or what other lines of delimitation would be regarded as absolutely stable. Referring to the case of an arbitral award relating to a boundary question, he said that it could be asked whether the rule that boundaries could not be changed also applied to such an award. Could a *rebus sic stantibus* clause be invoked to claim that an arbitral award was a legal act resulting from the treaty by which the jurisdiction of the arbitral tribunal had been accepted and that, consequently, article 62 might or might not apply?

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 62 to the Drafting Committee.

*It was so decided.*¹⁴

ARTICLE 63 (Severance of diplomatic or consular relations)

36. The CHAIRMAN invited the Commission to consider article 63, which read:

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

37. Mr. REUTER (Special Rapporteur) said that article 63 defined the treaties in question as treaties concluded between two or more States, since diplomatic or consular relations existed only between States, and not with international organizations. At its thirty-second session in 1980,¹⁵ however, the Commission had considered the question whether article 63 should not also apply to the severance of relations which might be described as "organic" or "institutional" and were established between international organizations and their member States and, sometimes, non-member States, through missions, whose role was, of course, very different from that of embassies or consulates. Although the Commission had found that idea acceptable, it had noted that it should already have been taken into account in the Vienna Convention itself. Since that was not the case, there had been some hesitation about including in the draft articles under consideration a text which would, in a way, draw attention to a gap in the Vienna Convention. No formal objection had, however, been raised in the Commission, and one Government had even requested the Commission to explore the possibility of making the rule enunciated in article 63 applicable to the case of the specific institutional relations that were established between international organizations and States; another Government had joined in that request. He pointed out that that question

¹³ Revised Convention for the Navigation of the Rhine, signed at Mannheim on 17 October 1968 (text in Council of Europe, *Annuaire européen, 1956* (The Hague), vol. II, p. 258).

¹⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 59.

¹⁵ See *Yearbook ... 1980*, vol. I, pp. 19-20, 1588th meeting, paras. 17-20 (summary of the debate by the Special Rapporteur).

would also arise indirectly in article 74, but that there was nothing to prevent the Commission from settling it now in connection with article 63.

38. Mr. USHAKOV said he also did not think that relations between an international organization and its member States, or non-member States, could be described as “diplomatic relations” or “consular relations”. It was therefore neither possible nor necessary to deal with such relations in the present title of article 63, namely, “Severance of diplomatic or consular relations”. He also pointed out that relations between the host State of an international organization and the sending State were governed by the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, article 82 of which was a safeguard clause. Lastly, he said that, in this opinion, it was not really necessary to expand the scope of article 63, whose present wording was entirely satisfactory.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 63 to the Drafting Committee.

*It was so decided.*¹⁶

ARTICLE 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

40. The CHAIRMAN invited the Commission to consider article 64, which read:

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

41. Mr. REUTER (Special Rapporteur) said that article 64 had not given rise to any comments by Governments or international organizations and that he himself had none to make.

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 64 to the Drafting Committee.

*It was so decided.*¹⁷

ARTICLE 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

43. The CHAIRMAN invited the Commission to consider article 65, which read:

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground

for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

44. Mr. REUTER (Special Rapporteur) said that the Commission had been of the opinion that the procedure provided for in article 65 was the minimum that could be done and the maximum that could be envisaged. That article introduced a procedure which related to all of part V of the draft and was based on an obligation of notification, of grounds and, in the case of an objection, on an obligation to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

45. Perhaps the most important legal effect of article 65 was that it established a moratorium: when a party considered that it had grounds for invoking the invalidity, termination, withdrawal from or suspension of the operation of a treaty, it must make a notification to that effect to the other parties, and the date of the notification would be the starting point for a minimum period of three months during which that party could not, except in cases of special urgency, take any action. If, upon expiry of the period in question, no objection had been raised, the party was free to act or, in other words, to make a unilateral assessment of the situation. It was precisely that period that had given rise to controversy. Within the Commission,¹⁸ it had been asked whether a period of three months was not too short for an international organization, whose governing bodies and, in particular, the organs authorized to take a decision relating, for example, to an objection, might not be meeting during that period.

46. The three-month period had nevertheless been retained because the Commission had been of the opinion that there was always, within an organization, one organ which was permanently in session and could duly raise an objection; such an objection would, of course, give rise to a dispute and to the right to contest the measure taken, but since it could also very easily be

¹⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 60.

¹⁷ *Idem.*

¹⁸ *Yearbook ... 1980*, vol. I, pp. 21-23, 1588th meeting, paras. 34, 43 and 46.

withdrawn, it could serve as a safeguard measure and enable the organ that was competent to take a final decision to do so later. One Government had, moreover, been of the opinion that it would be very difficult to provide in article 65 for two different periods: a three-month period for a State and a period of at least one year for an international organization. That would amount to creating serious discrimination against States and in favour of international organizations. The Commission therefore had to choose between a single period—three months or more—both for States and for international organizations and a period of three months for States and a longer period for international organizations.

47. Mr. NI said that it was unclear whether paragraph 4, which did not appear in article 65 of the Vienna Convention, referred to the general idea of a notification or objection made by an international organization or only to aspects such as the need for such a notification or objection and the form and circumstances in which such a notification or objection could be made. That lack of clarity might enable international organizations to adopt measures that were inconsistent with the practice provided for in the draft as a whole. He would therefore like to know whether the Special Rapporteur thought that the addition of the words “which are not inconsistent with the provisions of the present section” at the end of paragraph 4 would make that provision clearer.

48. Mr. REUTER (Special Rapporteur) said that paragraph 4 dealt primarily with observance of the rules of competence by an international organization and not with existence of rules which would give specific effects to notification or objection. That provision, which the Commission had considered important because it constituted a reminder, was to be found in many other articles, but, in fact, it added nothing. If the Commission so wished, it could specify that the rules in question were the relevant rules governing the competence of the organs of an international organization.

49. Mr. USHAKOV said that, in his opinion, no problem of discrimination between a State and an international organization arose, because States and international organizations were two entirely different subjects of law. It was, however, true that the determination of the period that would be applicable to international organizations gave rise to many difficulties because the machinery of an international organization was slower to get under way than that of a State and because, apart from the secretariat, some of its organs were not permanently in session. In paragraph 2, it might therefore be appropriate to use words such as “a reasonable period” to refer to international organizations on the understanding that, in each case, account would be taken of the particular circumstances of each international organization. Perhaps it would also be appropriate to delete, in that same paragraph, the words “except in cases of special urgency”, which did not appear to apply to the case of international organizations.

In any event, it would be for the Drafting Committee to propose the appropriate wording.

50. Mr. BALANDA said that he endorsed the comments by Mr. Ushakov. In his own view, the Commission should take account of the special nature of international organizations, which was, of course, different from that of States, without fear of creating discrimination between States and international organizations. The Commission had, moreover, already agreed, provisionally at least, to introduce some flexibility in the means of the expression of the consent of international organizations. The real problem was, in fact, one of determining how much time international organizations should have, since their organs obviously did not all meet at the same time.

51. Mr. REUTER (Special Rapporteur), speaking as a member of the Commission, said that, in his view, the comments by Mr. Ushakov and Mr. Balanda were not justified, because an extension of the period would amount to denying the competence of international secretariats—permanent organs—on the basis of the principle that only intergovernmental organs could raise an objection.

52. An international organization must, moreover, not be denied the benefit of the special urgency rule, because, as a party which might, for example, have invoked a ground for the invalidity of a treaty relating to the establishment of a peace-keeping force, to security matters or even to economic matters, an organization must be able to denounce such a treaty immediately and be entitled to take measures immediately. In the opposite situation, when it was a State that had taken the initiative of invoking a ground of invalidity, the problem was one of determining how much time the organization would have to raise an objection, or in other words, to give rise to a dispute. He did not see why an intergovernmental organ should not instruct a secretariat to raise an objection automatically when a State tried in some way to attack a treaty. There would be an objection, and thus a dispute, whose settlement would be delayed until the competent organ met and took the necessary measures either to settle the dispute or to withdraw the objection; but, in such a case, the objection would be only a safeguard measure and nothing more. Organizations could adapt perfectly well to the situation provided for in article 65 because they were protected by the provision of paragraph 4. The words “a reasonable period” proposed by Mr. Ushakov might create discrimination between two organizations whose situations were different.

53. Mr. USHAKOV said that, in his mind, the period related only to the objection and not to the notification. Accordingly, he would not press his proposal for the use of the words “a reasonable period”.

54. Mr. REUTER (Special Rapporteur) said that, if his understanding was correct, the words “except in cases of special urgency” would be retained in the case where it was an organization which made a notification of its ground for terminating a treaty. In other words,

an organization could, in such a case, make a notification without any time limit and take action before the expiry of the three-month period. It could act in the same way as a State, which was, in cases of special urgency, entitled to take the measure in question before the expiry of the three-month period.

55. Mr. RIPHAGEN said he did not think that paragraph 2 meant that an objection could not be made after the expiry of the three-month period. An objection could, in fact, be made at any time. Paragraph 2 also did not mean that a party which took unilateral action was justified in that action, to which an objection could always be made. Legally speaking, paragraph 2 was therefore not of any great importance, particularly in the light of paragraph 6, because if a party considered a treaty to be invalid, it could simply stop performing that treaty. Paragraph 2 could therefore be modelled on the corresponding provision of the Vienna Convention.

56. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 65 to the Drafting Committee.

*It was so decided.*¹⁹

The meeting rose at 1 p.m.

¹⁹ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 61.

1724th MEETING

Thursday, 10 June 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*continued*)

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation) *and*

ANNEX (Procedures established in application of article 66)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

1. The CHAIRMAN invited the Commission to consider draft article 66 and the annex thereto, which read:

Article 66. Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

ANNEX

Procedures established in application of article 66

I. ESTABLISHMENT OF THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

(a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint:

- (i) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) one conciliator chosen from among those included in the list who has not been nominated by that organization or any of those organizations.

The organization or organizations constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) In the case referred to in article 66, paragraph 3:

- (i) the State or States constituting one of the parties to the dispute shall appoint two conciliators as provided for in subparagraph (a). The international organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b).
- (ii) The State or States and the organization or organizations constituting one of the parties to the dispute shall appoint one conciliator who may or may not be chosen from the list referred to in paragraph 1 and one conciliator chosen from among those included in the list who shall neither be of the nationality of that State or of any of those States nor nominated by that organization or any of those organizations.
- (iii) When the provisions of subparagraph (c) (ii) apply, the other party to the dispute shall appoint conciliators as follows:
 - (1) the State or States constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (a);
 - (2) the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b);
 - (3) the State or States and the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (c) (ii).

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

2bis. The appointment of conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

II. FUNCTIONING OF THE CONCILIATION COMMISSION

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within 12 months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission,

including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

2. Mr. REUTER (Special Rapporteur) said that on first reading, the Commission has adopted for article 66 the text and commentary reproduced in its report on its thirty-second session.³ At the time, the Commission had had to consider, among other things, the question whether to propose an article on procedures for judicial settlement, arbitration and conciliation, although in most of the draft articles it prepared it did not deal directly with the settlement of disputes, leaving it to Governments, at diplomatic conferences, to decide on the procedures they preferred. In any case, if the Commission decided not to adopt such an article, the annex to the draft articles (Procedures established in application of article 66) would disappear *ipso facto*. But the Commission had thought that it should be guided, as far as possible, by the Vienna Convention and that it could therefore retain article 66 without committing itself, and draw the attention of Governments to the possibilities for adapting article 66 of the Vienna Convention to the draft articles under study.

3. Many Governments considered that, in the case in point, questions of procedure had some connection with substance, and it was thus that, at the United Nations Conference on the Law of Treaties, the majority of Governments had considered that acceptance of the articles in part V of the Vienna Convention, in particular, depended on the establishment of suitable procedures. The fact remained that draft article 66—but perhaps not draft article 65—would be justified only if the Commission recommended the General Assembly to give the draft articles the form of a convention, since procedures could only be established within a treaty framework. That had, moreover, been pointed out by one Government in its comments (A/CN.4/350/Add.9, para. 9). Consequently, the Commission could now discuss the question whether it should recommend the General Assembly to make the draft articles into a convention or simply to adopt a resolution recommending compliance with the rules stated in the draft—although he did not think the time had yet come to do that.

4. In his eleventh report (A/CN.4/353, para. 45) he had proposed, though without insisting on the point, that paragraphs 2 and 3 of draft article 66 should be merged in a single paragraph—in other words that the article should be reduced to only two paragraphs.

5. One Government held the view (A/CN.4/350/Add.8) that when a dispute arose between States—which was the case referred to in paragraph 1 of draft article 66—recourse to the International Court of Justice was possible only with the consent of all the par-

³ Yearbook ... 1980, vol. II (Part Two), pp. 85-88.

ties to the dispute; but that was a radical change from the Vienna Convention, which appeared to permit reference to the International Court of Justice by unilateral application. Nevertheless, that comment could be mentioned in the commentary adopted on second reading.

6. At least two other Governments (A/CN.4/350/Add.1, para. 5, and A/CN.4/350/Add.9, para. 5) had asked the Commission to reconsider the solution it had adopted which consisted, in the cases referred to in paragraphs 2 and 3 of article 66, in not mentioning that an international organization could ask the International Court of Justice for an advisory opinion. It was certain that an international organization could not be a party to a case brought before the Court, but it could, of course, request the Court for an advisory opinion. In the first draft he had proposed, in his ninth report,⁴ he had considered mentioning several possibilities in that connection. He had suggested saying that an international organization which was a party to the dispute could ask the International Court of Justice for an advisory opinion if the General Assembly of the United Nations had accorded it the right to do so. He had also suggested indicating that an international organization entitled to do so could ask the Court for an advisory opinion even if it was not a party to the dispute.⁵ The Commission had decided not to include any mention of those procedures, because it must either be possible or not possible to ask for an advisory opinion, irrespective of the will of the parties, so that there was no need to mention the matter in the draft article; and in any case, any international organization which asked for an advisory opinion did so by virtue of an authorization given through certain procedures which the Commission was not in a position to change, even if the draft articles became a convention. He had also suggested stipulating in advance that the advisory opinion, if given, would be binding on the parties to the dispute. That provision was technically difficult, however, and the Commission had rejected it too.

7. Though glad that paragraph 1 of draft article 66 reproduced the provisions of the Vienna Convention relating to disputes between States, one Government had taken the view (A/CN.4/350/Add.9, para. 6) that the paragraph should be strengthened: it feared that if the draft articles became a convention, the parties to the Vienna Convention and to the new convention would be the same, or at least that problems would arise under article 40 of the draft and that a dispute which arose between two States might degenerate into a dispute to which international organizations were also parties—in which case paragraph 1 would not be safeguarded. He thought that such scruples were honourable, but rather exaggerated. If the draft articles became a convention and a dispute arose between two States concerning a question of *jus cogens* and it was referred to the Interna-

tional Court of Justice, any international organizations that were parties to the treaty could ask to intervene and state their views before the Court. That was very fortunate, because it was impossible to imagine that a judgement by the International Court of Justice on a dispute between two States concerning a question of *jus cogens* would not have repercussions, in fact first, and perhaps also in law, which would go beyond the case of the two parties.

8. Mr. USHAKOV said that, compared with States, which in the event of a dispute about a multilateral treaty to which at least one international organization was a party could apply to the International Court of Justice or ask for arbitration, the position of international organizations was difficult, to say the least. For an international organization, which a dispute could concern just as much as the State involved, could not be a party to a case before the International Court of Justice, even though it could state its views before the Court. Perhaps, therefore, paragraph 1 of article 66 should be brought into line with paragraphs 2 and 3. It was precisely with regard to paragraphs 2 and 3, however, that he wondered why, in the event of a dispute, two international organizations, neither of which was the United Nations, in order to set the proposed conciliation procedure in motion must submit a request to that effect to the Secretary-General of the United Nations. That procedure was quite understandable in the case of States, nearly all of which were Members of the United Nations, but it could be troublesome for some international organizations. For international organizations, the Commission could perhaps consider the possibility of starting the conciliation procedure in a manner different from that provided for in the draft article.

9. With regard to the final treatment of the draft articles, he saw no reason why the Commission should not recommend the General Assembly to give them the form of a convention; but perhaps the Commission could decide that question after it had examined the whole of the draft. In any case, he thought that draft article 66 could be retained for the time being.

10. Mr. REUTER (Special Rapporteur) pointed out to Mr. Ushakov that the case in which the United Nations was a party to, or was included in one of the parties to, the dispute was provided for in the annex as a special case, at the end of section I, paragraph 2. In that connection, he wondered whether it would not be advisable to include a reference to the annex in draft article 66.

11. Mr. JAGOTA said that the question of the settlement of disputes was a sensitive one on which the views of States differed. Some States maintained that a procedure allowing one party to a treaty to take unilateral action and invoke a ground for impeaching the validity of the treaty, terminating it, withdrawing from it or suspending its operation, might be subject to abuse and undermine the treaty in question. Others, which did not accept the compulsory settlement of disputes, argued that, in order to avoid unnecessary delay or expense,

⁴ *Yearbook* ... 1980, vol. II (Part One), p. 137, document A/CN.4/327.

⁵ *Ibid.*, pp. 138-139, paras. (6) to (8) of the commentary to article 66.

any dispute arising in connection with the application or interpretation of a treaty should be settled by negotiation between the parties concerned or by any other means on which they agreed.

12. Those two conflicting views had nearly caused the breakdown of the United Nations Conference on the Law of Treaties. Ultimately, however, a compromise solution had been found and it had been agreed not only that a dispute concerning the application or the interpretation of articles 53 or 64 of the Vienna Convention might be submitted to the International Court of Justice, unless the parties by common consent agreed to submit the dispute to arbitration, but also that any dispute concerning the application or the interpretation of any of the other articles in part V might be submitted to the conciliation procedure specified in the annex to the Vienna Convention. That compromise had saved the Conference on the Law of Treaties and had also paved the way for the drafting of annex V to the Convention on the Law of the Sea,⁶ concerning compulsory conciliation procedures. Thus, although many States still held the view that they could not be compelled to submit to arbitration, they tended, by and large, to accept compulsory conciliation, and the draft under consideration should reflect that trend. Article 66 and the annex should therefore be included in the draft for the guidance of a conference of plenipotentiaries, which would, of course, be free to amend those provisions if it so wished.

13. In his view, article 66 as it now stood was entirely acceptable. With regard to the substance, however, Mr. Ushakov had raised an interesting question: he had asked whether, in the case of a treaty to which both States and international organizations were parties and whose validity was being impeached, all the parties, States and international organizations alike, should not have the right to submit the dispute to the International Court of Justice. In the case of a treaty between States, article 66, subparagraph (a), of the Vienna Convention provided that any of the parties to a dispute concerning the application or the interpretation of a rule of *jus cogens* could submit the dispute to the Court. That provision did not explicitly state that all the parties to the treaty in question had to agree to submit a dispute concerning articles 53 and 64 to the Court. But if the International Court of Justice decided that the treaty violated a rule of *jus cogens* and was void, it would be void for all the parties to that treaty, whether or not they were parties to the dispute.

14. If that interpretation of article 66, subparagraph 1 (a), of the Vienna Convention was correct, it seemed to him that that provision should also apply *mutatis mutandis* to a dispute concerning a rule of *jus cogens* embodied in a treaty to which States and international organizations were parties. Subparagraph 1 (a) of draft article 66 should therefore provide that international organizations were entitled to be parties to cases brought before the International Court of Justice as a

result of disputes concerning the application or the interpretation of articles 53 or 64 of the draft. They should also be so entitled in the cases covered by paragraphs 2 and 3.

15. Referring to paragraphs 2 and 3, Mr. Ushakov had also asked why the procedure specified in the Annex to the draft articles should be set in motion by the submission of a request to the Secretary-General of the United Nations. Although he himself had no definite opinion on that matter, he would point out that the procedure in question could be set in motion only if the parties had been unable to agree on any other procedure after negotiating for 12 months as from the date on which the objection had been raised. He did, however, think that the compulsory conciliation procedure specified in the Annex was merely a means to an end and would not entail the involvement of the United Nations in the dispute in question.

16. At the preceding meeting, Mr. Riphagen had said that article 65, paragraph 2, could be interpreted to mean that an objection could be raised even after the expiry of "a period which ... shall not be less than three months after the receipt of the notification". That three-month period was only a minimum period, and it would have to be decided how long the maximum period could be. That question was relevant to article 66, paragraphs 1 to 3, which stated that "If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised ...". Since that "date" was unknown, because an objection could be raised even after the expiry of the three-month period referred to in article 65, paragraph 2, it would not be clear when the 12-month period provided for in article 66, paragraphs 1 to 3, would begin. To avoid any confusion or controversy arising from that uncertainty, he thought the word "reasonable" should be added before the word "period" in the first line of article 65, paragraph 2. It would then be unnecessary to amend the wording of article 66, paragraphs 1 to 3.

17. With regard to the question whether reference should be made in article 66 to the advisory opinion procedure in disputes relating to treaties between States and international organizations or between international organizations only, he noted that, although precedents for such a procedure did exist, it was the interpretation of the constituent instrument of an international organization that would determine whether it could request the International Court of Justice for an advisory opinion. It would therefore be enough to refer in article 66 to the procedure specified in the Annex and applicable to disputes concerning any of the articles of part V of the draft.

18. Mr. REUTER (Special Rapporteur) said he did not think that a treaty declared invalid between two States parties to a dispute because it was contrary to *jus cogens* would also be invalid for all the other parties to the treaty. He pointed out, in that connection, that article 66 of the Vienna Convention had been drafted in

⁶ See 1699th meeting, footnote 7.

special political circumstances and perhaps did not cover all the possibilities. Two of the comments made by Mr. Jagota followed from the Vienna Convention, which the Commission was not in a position to review.

19. It was, indeed, incorrect to say that the treaty would be invalid for all parties, since Article 59 of the Statute of the International Court of Justice—which was an integral part of the United Nations Charter and therefore took precedence over any other treaty provision—provided that “The decision of the Court has no binding force except between the parties and in respect of that particular case”. As an example it might be supposed that two States, parties to a treaty which had four parties, referred a dispute concerning a rule of *jus cogens* to the International Court of Justice and that the other two States did not intervene. The Court would declare the treaty invalid with respect to relations between the two States parties to the dispute referred to it; the treaty would remain in force for the other two States. Those two States could, at that point, assert that if the treaty was not valid between two States it was not valid between them either, and they could then ask for radical amendment of the treaty. But it might also be supposed that the International Court of Justice, when seized by a State of a dispute with another State concerning a rule of *jus cogens* in a treaty which had two other parties that did not intervene, might refuse to give judgement and settle the matter, because to do so would inevitably produce certain effects for the other States. Consequently, the Commission should not take sides in the matter—which it would be doing if it accepted Mr. Ushakov’s proposal to abandon compulsory recourse to the Court. Nevertheless the comments by Mr. Ushakov and Mr. Jagota should certainly be included in the commentary to article 66.

20. Following the intervention made at the previous meeting by Mr. Riphagen, Mr. Jagota had raised a question relating to draft article 65. The Vienna Convention merely provided that a State which invoked a ground for invalidating a treaty *might* take the corresponding measures if no objection was raised within a period which, except in cases of special urgency, must not be less than three months. Mr. Riphagen’s view was that an objection could be raised after the expiry of that period of three months; but that might have consequences if damages were involved. Mr. Jagota had suggested providing that the objection must be made within a “reasonable period”. But draft article 45 would then apply; and it was not possible to suppose that a State must “by reason of its conduct” be considered as having renounced the right to object; that was a question of fact. It would certainly be advisable to include those observations in the commentary and to call attention to the imperfections, and even uncertainties, of the Vienna Convention. The uncertainty of article 45 was that there was no basis for affirming that the Vienna Convention had established a period of limitation for the right to raise objections. The Vienna Convention merely provided that a State which invoked a ground for invalidating a treaty must wait for a certain time before

taking the measure contemplated, and that after that time it *could* act.

21. Mr. USHAKOV said that even in regard to the Vienna Convention, he could endorse the logic of article 65, but much less that of article 66. According to article 65, paragraph 1, a party which invoked one of the provisions relating to invalidity of treaties must notify “the other parties” of its claim. It was obvious that it must notify all the parties of that claim, since they were all concerned. If an objection was raised, it was paragraph 3 that applied, under the terms of which “the parties” must seek a solution through the means indicated in Article 3 of the Charter of the United Nations. In that case, too, it was obvious that all the parties must seek such a solution. But article 66 of the Vienna Convention, like article 66 of the draft, referred only to the case of a dispute between two parties. The logic of article 65 had been abandoned in article 66. It was not conceivable, for instance, that a court seized on a dispute would declare a treaty invalid between two of the parties only, the other parties remaining bound by the treaty contrary to articles 53 and 64. In the case of the draft articles, where it was impossible to imagine a dispute between two States without an international organization being involved—since then the Vienna Convention would apply—it was all the more logical to consider that all the parties were concerned. As the cases dealt with in the draft necessarily differed from those covered by the Vienna Convention, the Commission was not bound by the Convention on that point, and it could assume that the dispute concerned all the parties to the treaty.

22. With regard to article 65, paragraph 2, he was convinced that it referred to the time-limit for raising objections. In a case of urgency, the party which made the notification might run the risk mentioned by Mr. Riphagen, but it could not be affirmed that an objection could be raised at any time, within any time-limit. A State which took the measure it intended within a period of less than three months, exposed itself to the danger of a dispute if an objection was raised during that period. If there was no objection, consent to the notification was presumed. Nor did it appear possible to affirm that an objection could be made at any time, in view of the period of 12 months provided for in article 66, paragraphs 2 and 3, in regard to international organizations.

23. Mr. LACLETA MUÑOZ said that article 66 introduced a special difficulty: that of discrimination between the parties to a treaty according to whether they were States or international organizations. As the Special Rapporteur had observed, international organizations could not be parties to cases before the International Court of Justice. There were several solutions to that problem. Mr. Ushakov had suggested excluding judicial settlement and the jurisdiction of the Court in cases involving article 53 or 64; both States and international organizations would then simply submit to a conciliation procedure.

24. Perhaps there was another means of placing States and international organizations on an equal footing. Just as in the Vienna Convention care had been taken to provide a really compulsory procedure for the settlement of disputes involving interpretation of *jus cogens*, perhaps a compulsory settlement procedure could be prescribed for the same purpose, to which international organizations could submit. That solution would certainly be difficult and would require additional work, but it was not impossible and it would best respect the spirit of the Vienna Convention. Any other solution would either introduce a marked difference between the draft articles and the Vienna Convention or would involve discrimination between the parties according to whether they were States or international organizations.

25. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov's interpretation of article 65, paragraph 3, was possible, but not necessary. Moreover, the expression used in that provision was not "all the parties" but "the parties", and that expression might apply only to the parties in the dispute. Once again the Commission should refrain from interpreting the Vienna Convention.

26. Mr. BALANDA said he wondered whether it would not be possible to delete paragraph 1 of article 66, which only concerned relations between States, since the draft articles under consideration dealt with treaty relations between States and international organizations or between two or more organizations.

27. Mr. REUTER (Special Rapporteur), referring to Mr. Ushakov's comments, pointed out that if the words "the parties" were understood to mean all the parties, it was not only article 66, but also the annex to the draft articles that would suffer the repercussions. At the stage of second reading, he did not think it possible to consider recasting the annex. As to the deletion of paragraph 1 suggested by Mr. Balanda, that would increase the fears expressed by one Government (A/CN.4/350/Add.9, para. 6) regarding the possible disappearance of the safeguards already provided by the Vienna Convention in regard to *jus cogens*. If it took that course, the Commission would have a further reason for asking that the draft should become not a convention, but a recommendation. Personally, he would be willing to see the General Assembly adopt a resolution approving the substantive rules of a draft from which all provisions concerning the settlement of disputes had been removed. But the Commission must take account of the compromise—imperfect, it was true—reached by the Conference on the Law of Treaties, to which great importance was attached by the States that had ratified the Convention.

28. Mr. CALERO RODRIGUES said he thought that article 66 should be retained with some changes; he agreed with the Special Rapporteur's proposal (A/CN.4/353, para. 45) that paragraphs 2 and 3 should be merged into a single paragraph. From a logical viewpoint, Mr. Jagota's analysis of the present structure of the article was correct. Paragraphs 2 and 3 were prac-

tically the same, however, and the draft articles were already fairly difficult to read. Whenever possible, the Commission should try to make them more easily readable, without sacrificing clarity. If paragraphs 2 and 3 were combined, nothing essential would be lost, and the provision would be clearer.

29. The two questions which had been raised were very interesting, but as the Special Rapporteur had pointed out, technically, there was not much that could be done to overcome the difficulties. With regard to the point raised by Mr. Lacleta Muñoz, since the Vienna Convention made a distinction between disputes involving interpretation of article 53 or 64 and other disputes, it would be wrong not to do likewise where international organizations were concerned. It was not enough to rely, in their case, on an international conciliation procedure to settle questions involving *jus cogens* and its effects on a treaty; more must be done. Since a judicial procedure could not be applied because of the Statute of the International Court of Justice, perhaps an arbitral procedure could be established. Disputes concerning articles 53 or 64 in which States were involved would be submitted to the Court, whereas those involving international organizations would be submitted to an arbitral procedure. All other cases would be subject to the procedures provided for in the annex. It was true that those procedures already applied in the absence of any other agreed procedure. However, disputes involving questions of *jus cogens* were so important that it would be unreasonable to leave their settlement to a procedure of compulsory conciliation.

30. Mr. RIPHAGEN said he agreed with Mr. Lacleta Muñoz and Mr. Calero-Rodrigues that a compulsory arbitration procedure should be provided for in cases concerning *jus cogens*. That would require the drafting of another annex setting out the arbitration procedure and its modalities, which should not be technically difficult.

31. Mr. REUTER (Special Rapporteur) said he thought that article 66 could be referred to the Drafting Committee, but that the suggestion made by Mr. Lacleta Muñoz and endorsed by two other members of the Commission should be formally submitted to that Committee.

32. Mr. LACLETA MUÑOZ said that he was prepared to make his suggestion into a formal proposal.

33. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 66 to the Drafting Committee, together with the proposal to be submitted by Mr. Lacleta Muñoz.

*It was so decided.*⁷

ARTICLE 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

34. The CHAIRMAN invited the Commission to consider draft article 67, which read:

⁷ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 69-78.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers.

35. Mr. REUTER (Special Rapporteur) said that article 67 had not been the subject of any particular comments by Governments or international organizations. He pointed out that the Vienna Convention was strict in regard to the powers of the author of the instrument which set in motion the procedures referred to in the title of article 67. If the instrument was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it might be called upon to produce full powers. No exemption based on practice or on special circumstances was permitted. It was obvious that the same rule should be applied in regard to an instrument emanating from an international organization; a sentence to that effect had been added to paragraph 2 of the article under consideration.

36. Mr. USHAKOV compared the "communication" referred to in article 67 with that referred to in article 7, paragraph 4. He proposed that the latter provision should be amended.

37. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov was quite right. The Vienna Convention also used the word "communicating" in regard to the representative of the State. Paragraph 4 of article 7 would have to be recast and the word "communicating" must be deleted from all provisions of the draft based on provisions of the Vienna Convention in which that word did not appear.

38. Mr. NJENGA said that the provision in article 67, paragraph 2, that: "If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers" was perfectly logical in view of international law. But where an international organization was concerned, the competent authority was usually the head of the organization. The secretary-general of an international organization, who generally had wide freedom of action, was sometimes merely required to notify the organization that an agreement had been concluded. Hence the requirement in the last sentence of paragraph 2 that "If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers" could create a situation in which the representative of the organization was called upon to produce powers signed by himself. In

those circumstances, perhaps the production of appropriate powers should not be required in all cases.

39. Mr. REUTER (Special Rapporteur) said he thought that in practice the provision would not raise any difficulties, since it referred to "appropriate powers". If the secretary-general of an international organization had obtained all the necessary authorizations in conformity with the constituent instrument of that organization to proceed to the acts, he would communicate the text of the authorizations. If the act depended on him alone and he did not need any authorization, he would instruct an official to whom he would give powers. On the other hand, if he wished to make the communication himself, it would be curious if he gave himself appropriate powers. It should be noted, however, that the Vienna Convention did not require any particular form for the powers. The secretary-general of an organization could write a letter in which he justified his making of the communication.

40. Mr. NJENGA pointed out that under article 2, subparagraph 1 (*c bis*), which he read out, the secretary-general of an organization would still have to produce a document designating himself as the representative of the organization. How to avoid that rather embarrassing situation was perhaps a matter that the Drafting Committee could look into.

41. Mr. CALERO RODRIGUES said that, despite the explanation given by the Special Rapporteur, he agreed with Mr. Njenga's comment. Since it was provided, for a State, that unless the instrument was signed by persons who were supposed to represent the State, full powers were necessary, it would be logical also to provide that, in the case of an international organization, if the instrument was not signed by a person considered, according to practice or by virtue of other circumstances as representing the organization, full powers must be produced. The situation envisaged by Mr. Njenga could exist and would be rather ridiculous; but it would be easy to overcome the difficulty by appropriate drafting.

42. Mr. FRANCIS suggested that the Drafting Committee be asked to clear up that point.

43. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 67 to the Drafting Committee, which would try to find an appropriate form of words for the powers of international organizations.

*It was so decided.**

ARTICLE 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

44. The CHAIRMAN invited the Commission to consider draft article 68, which read:

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

* *Idem*, paras. 2 and 62.

45. Draft article 68 had not been the subject of comment either by Governments or by international organizations. If there were no objections, he would take it that the Commission decided to refer that article to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 69 (Consequences of the invalidity of a treaty)

46. The CHAIRMAN invited the Commission to consider draft article 69, which read:

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

47. Draft article 69 had not been the subject of comment either by Governments or by international organizations. If there were no objections, he would take it that the Commission decided to refer that article to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 70 (Consequences of the termination of a treaty)

48. The CHAIRMAN invited the Commission to consider draft article 70, which read:

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

49. Draft article 70 had not been the subject of comment either by Governments or by international organizations. If there were no objections, he would

take it that the Commission agreed to refer that article to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 71 (Consequences of the invalidity of a treaty which conflicts with a preemptory norm of general international law)

50. The CHAIRMAN invited the Commission to consider draft article 71, which had not been the subject of any comment by Governments or international organizations, and which read:

Article 71. Consequences of the invalidity of a treaty which conflicts with a preemptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the preemptory norm of general international law; and

(b) bring their mutual relations into conformity with the preemptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new preemptory norm of general international law.

51. Mr. USHAKOV said that, unlike the Special Rapporteur, he did not believe that the judgement of a court on the invalidity of a treaty took effect only for the two parties to the dispute.

52. The CHAIRMAN proposed that draft article 71 be referred to the Drafting Committee.

*It was so decided.*¹²

ARTICLE 72 (Consequences of the suspension of the operation of a treaty)

53. The CHAIRMAN invited the Commission to consider draft article 72, which had not been the subject of any comments by Governments or international organizations, and which read:

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

⁹ *Idem*, paras. 2 and 63.

¹⁰ *Idem*.

¹¹ *Idem*.

¹² *Idem*.

54. Noting that no member of the Commission wished to speak on that article, he proposed that it be referred to the Drafting Committee.

*It was so decided.*¹³

ARTICLE 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

55. The CHAIRMAN invited the Commission to consider draft article 73, which read:

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

56. Mr. REUTER (Special Rapporteur) said that article 73 had elicited comments from Governments wishing to enlarge its scope. Moreover, several members of the Commission had already had occasion, during the current session, to comment on paragraph 2 of the article, expressing the hope that various terms would be clarified. For his part, he did not really feel the need for clarification, especially as he had initially proposed more easily understandable wording.

The meeting rose at 1 p.m.

¹³ *Idem.*

1725th MEETING

Friday, 11 June 1982, at 11.15 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (*continued*)

ARTICLE 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)³ (*concluded*)

1. The CHAIRMAN suggested that, since no member of the Commission wished to speak on the article, it should be referred to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 74 (Diplomatic and consular relations and the conclusion of treaties)

2. The CHAIRMAN invited the Commission to consider draft article 74, which read:

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

3. Mr. REUTER (Special Rapporteur) recalled that, in first reading, the Commission had decided not to deal with the idea of the specific organic relations, permanent or otherwise, that could be established between an organization and a State. However, one international organization had suggested that such cases should be covered by articles 63 and 74. As the Commission had not acted on that suggestion during its consideration of article 63 in second reading, it should probably refrain from acting on it at the current stage.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 74 to the Drafting Committee.

*It was so decided.*⁵

ARTICLE 75 (Case of an aggressor State)

5. The CHAIRMAN invited the Commission to consider draft article 75, which had not given rise to any observations on the part of either Governments or international organizations and which read:

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1724th meeting, para. 55.

⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting paras. 2 and 63.

⁵ *Idem.*

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

6. He suggested that, since no member of the Commission wished to take the floor on the article, it should be referred to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 76 (Depositaries of treaties)

7. The CHAIRMAN invited the Commission to consider draft article 76, which had not given rise to any observations on the part of either Governments or international organizations and which read:

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

8. Mr. BALANDA said that the first sentence of paragraph 1 could be made less unwieldy by placing the words "as the case may be" after the word "made", or perhaps by deleting those words altogether. According to the second sentence of paragraph 1, a number of States could be designated as depositaries of a treaty. While, in theory, there was obviously nothing to prevent such a designation being made, he wondered whether it was desirable in practice.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 76 to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 77 (Functions of depositaries)

10. The CHAIRMAN invited the Commission to consider draft article 77, which read:

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations; or

(b) where appropriate, the competent organ of the organization concerned.

11. Mr. REUTER (Special Rapporteur) said that article 77 had given rise to no observations by either Governments or international organizations, except perhaps in connection with article 80. The provision which had caused the Commission most difficulty was that contained in subparagraph 1 (g) which concerned the registration of treaties with the Secretariat of the United Nations. The term "registration" seemed to have been taken in a broader sense in article 77 than in article 80. One Government had stressed the need to avoid impinging on the right of the United Nations to deal with matters of registration. However, the Commission had taken due account of that right in drafting article 77, and it would be difficult to improve upon the text.

12. Mr. USHAKOV said that, according to article 77, subparagraph 1 (g), one of the functions of depositaries was to register treaties with the Secretariat of the United Nations. Under Article 102 of the Charter of the United Nations, no treaty or international agreement which had not been so registered could be invoked by a party before any organ of the United Nations. That provision applied not only to treaties between States, but also to treaties between States and international organizations and possibly also to treaties between international organizations. If that were the case, did it attach the same consequences to the non-registration of treaties between organizations? If draft article 80 imposed no obligation to register treaties in that category, no corresponding obligation devolved upon the depositary under article 77. It might be as well to avoid using the

⁶ *Idem.*

⁷ *Idem.*

word “registration”, as it was the word which had the consequences provided for in Article 102 of the Charter.

13. Mr. STAVROPOULOS, referring to Mr. Ushakov’s comments concerning article 80, pointed out that, while every treaty entered into by any Member of the United Nations had to be published in accordance with Article 102 of the Charter of the United Nations, international organizations were under no such obligation. Article 80 should be amended accordingly. The United Nations Treaty Section had established a practice whereby treaties entered between international organizations were registered but not published. The distinction between the obligations of States and those of international organizations in that respect should be made clear. The matter should be examined further with the Treaty Section with a view to bringing article 80 into line with United Nations practice.

14. Mr. REUTER (Special Rapporteur) said that all the questions raised had already been discussed at length on first reading⁸ and that subparagraph 1 (g) of article 77 was identical to the corresponding provision of the Vienna Convention. It was clearly understood that, under the Charter of the United Nations, international organizations were not obligated to have their treaties registered. It was for that reason that the Commission had contemplated stipulating, in subparagraph 1 (g) of article 77, that only where appropriate would the functions of depositaries include registration of treaties. That proviso would have applied to treaties concluded between international organizations. It had been maintained, however, that such a provision entailed no obligation to have treaties registered, but simply described the functions of depositaries. Any obligation which might exist regarding registration derived from some other source. The explanations provided by Mr. Stavropoulos were correct. The Secretariat of the United Nations agreed to register treaties concluded between international organizations, but it was for the organizations involved to decide whether they wished to transmit such treaties to the Secretariat. For its part, the Secretariat was not obligated, under article 80, to publish the full text of all treaties transmitted to it and, in practice, it drew a distinction as far as the texts of treaties concluded between States were concerned. In his view, it was unnecessary to insert the words “where appropriate” in subparagraph 1 (g) of article 77. Members of the Commission wishing to make amendments to that provision or to article 80 should submit specific drafting proposals.

15. Mr. STAVROPOULOS said that it was not article 77, but article 80, which he proposed should be amended. A distinction should be made in article 80 between the situation of States, which must register treaties, and that of organizations, which might do so if they so wished.

16. Mr. JAGOTA said he was not certain that any decision taken by the Commission with respect to article

80 would involve an amendment of Article 102 of the Charter of the United Nations. It was true that that Article referred to registration and publication of treaties entered into by Members of the United Nations, which obviously could only mean States. Treaties might be concluded between Members of the United Nations, between a Member and a non-member of the United Nations, between a Member of the United Nations and an international organization or between international organizations. If a Member of the United Nations was a party, it would be subject to the requirements of Article 102, paragraph 1, of the Charter, and to the consequences of paragraph 2 of that Article in the event of non-registration. If it was United Nations practice to register, but not to publish, treaties concluded between international organizations, the distinction between registration and publication in such cases was made by the United Nations Secretariat itself. It did not derive from Article 102 of the Charter, and entailed no amendment of that Article. The decision not to publish such treaties had probably been made for financial reasons and to avoid the need to recruit additional staff which publication would entail. Any decision by the Commission involving registration and publication of treaties between international organizations would be tantamount to requesting the Secretary-General of the United Nations to perform additional functions. The Secretary-General’s acceptance of such functions would not necessarily imply the amendment of Article 102 of the Charter, which, in its existing form, would have to be interpreted as being applicable only to Member States. The question of additional functions, and consequent additional expenditures, would have to be settled by the Secretary-General. If there were any objections from the Secretariat, the matter might be reviewed later; but if the Secretariat was prepared to perform the functions in question, articles 77 and 80 would enable it to do so.

17. Mr. VALENCIA OSPINA (Deputy-Secretary of the Commission) read out the relevant provisions of the regulations to give effect to Article 102 of the Charter (General Assembly resolutions 97 (I) and 33 (141)), explaining that the Commission might find them useful for an understanding of the situation.

18. Mr. JAGOTA said that he would like to be certain whether or not registration and/or publication of treaties concluded between States and international organizations or between international organizations *per se* would come under article 4 of those regulations. He therefore requested the Deputy-Secretary to read out the relevant article once again.

19. Mr. VALENCIA OSPINA (Deputy-Secretary of the Commission), in response to Mr. Jagota’s request, read out article 4 of the regulations (General Assembly resolution 97 (I)).

20. Mr. STAVROPOULOS observed that the article referred to registration and not to publication. That confirmed the point he had raised.

21. Mr. VALENCIA OSPINA (Deputy-Secretary of the Commission) said that, although article 4 of the

⁸ See *Yearbook ... 1980*, vol. I, pp. 50-52, 1593rd meeting, paras. 8-31.

regulations referred only to registration, publication was covered by article 12, as amended by General Assembly resolution 33 (141).

22. Mr. JAGOTA said that the point he had made appeared to be covered by article 4, but since that article was subject to the terms of article 1 of the same regulations, he would like to be certain that draft articles 77 and 80 were covered by article 4 and that the United Nations would therefore have no difficulty in accepting the functions in question. He requested that the text of General Assembly resolutions 97 (I) and 33 (141) should be circulated to the Commission and considered by the Drafting Committee, with a view to determining whether the provisions of draft articles 77 and 80 were covered by existing United Nations provisions or whether they would entail an amendment to Article 102 of the Charter.

23. The CHAIRMAN said that the Secretariat would circulate the texts of the resolutions in question.

24. Mr. REUTER (Special Rapporteur) said that, quite apart from the question of drafting, a question of substance was involved. When article 77 had been considered in first reading, the understanding of the Commission appeared to have been that the depositary, as well as perhaps other entities under article 80, performed his international obligations on the basis of texts other than the draft articles. In no instance had the Commission sought to amend the Charter by means of the draft or to impose a rule on the United Nations Secretariat. If the Commission was agreed on that point, article 77 could be referred to the Drafting Committee. At the very most, it could be modified to clarify or expand on paragraph 1 (g). After all, some treaties had to be registered with bodies other than the United Nations. There were at least four or five international organizations, such as the Council of Europe, for example, to which certain treaties must be transmitted for registration. Article 77 simply stated that, in the event of an obligation, the function of the depositary was to register treaties. Perhaps it would be preferable not to reproduce the wording used in the Vienna Convention as it stood.

25. The CHAIRMAN suggested that, in the light of the explanation provided by the Special Rapporteur, draft article 77 should be referred to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 78 (Notifications and communications)

26. The CHAIRMAN invited the Commission to consider draft article 78, which had given rise to no observations from either Governments or international organizations, and which read:

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

27. He suggested that, since no member of the Commission wished to take the floor, the draft article should be referred to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 79 (Correction of errors in texts or in certified copies of treaties)

28. The CHAIRMAN invited the Commission to consider article 79, which had given rise to no observations from either Governments or international organizations and which read:

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

⁹ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 64.

¹⁰ *Idem*, paras. 2 and 65.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

29. Mr. JAGOTA said that paragraphs 1 and 2 gave the impression that errors in the text of a treaty could be corrected after the text had been authenticated, but not yet signed or ratified. Perhaps the Drafting Committee could examine those paragraphs in conjunction with paragraphs 5 and 6, which appeared to take account of the fact that errors in the text of a treaty could be corrected at any time after the authentication of the text, even once the treaty had entered into force.

30. Mr. REUTER (Special Rapporteur) said that the concerns expressed by Mr. Jagota would appear to be dealt with in draft article 48, paragraph 3.

31. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 79 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 80 (Registration and publication of treaties)

32. The CHAIRMAN invited the Commission to consider article 80, which read:

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

33. Mr. REUTER (Special Rapporteur) said that the most significant observations regarding the article had already been made in connection with article 77. He therefore had nothing to add.

34. Mr. USHAKOV said that article 80 obligated the parties to all treaties—whether concluded between States and international organizations or between two or more international organizations—to transmit such treaties to the Secretariat of the United Nations for registration or filing and recording, as the case might be, and for publication. However, it was quite clear that, in the final analysis, the Secretariat was free to perform or not to perform those acts. While he was quite prepared to accept that obligation in the case of treaties concluded between States and international organizations, he found it more difficult to do so in the case of treaties concluded solely between international organizations. It might be preferable if the procedure

were to be made optional in the case of international organizations, including the United Nations itself, and if the two different cases were dealt with in separate subparagraphs of paragraph 1.

35. Mr. STAVROPOULOS said that, after looking closely at article 80, he thought that paragraph 1, and in particular, the words “for registration or filing and recording, as the case may be” were broad enough to cover all the cases that could possibly arise.

36. Mr. REUTER (Special Rapporteur) said that, under article 35 of the draft (Treaties providing for obligations for third States or third international organizations), the United Nations would not be bound by the obligation provided for in article 80, since it, too, would have to accept it expressly in writing. In any event, the obligation concerned only the transmission of treaties to the United Nations Secretariat: the United Nations would undoubtedly record and file them, but it might refuse to register them and it would certainly refuse to publish them because of lack of financial resources. Nevertheless, the observation made by Mr. Ushakov was not without significance if it was to be interpreted as meaning that it was not good form to invoke article 35, which created an obligation for a third party and afforded it the opportunity of accepting or not. However, from the legal point of view, article 80 presented no difficulty.

37. Mr. USHAKOV said that it was rather the obligation to transmit treaties that caused him difficulty. While he understood that such an obligation should be imposed in the case of treaties concluded between States and international organizations, in the case of treaties concluded solely between international organizations, such transmission should be optional.

38. Mr. NI said that the explanations provided by the Special Rapporteur and by Mr. Stavropoulos, and General Assembly resolutions 97 (I) and 33 (141) as read out by the Deputy-Secretary of the Commission during the consideration of article 77, had enabled him better to understand the situation with regard to the registration of treaties by the United Nations. In view of the importance of the implementation of Article 102 of the Charter, however, he suggested that the Commission should have more time in which to study the General Assembly resolutions read out by the Deputy-Secretary.

39. The CHAIRMAN suggested that the Commission should suspend its consideration of article 80 until its following meeting and resume its consideration of the annex to the draft articles.

It was so decided.

ANNEX (Procedures established in application of article 66)¹² (*continued*)

40. Mr. REUTER (Special Rapporteur) said that no detailed observations had been submitted in respect of

¹¹ *Idem*, paras. 2 and 66.

¹² For the text, see 1724th meeting, para. 1.

the annex. The square brackets around the words "and any international organization to which the present articles have become applicable", in paragraph 1, were there simply to indicate that the wording would be inaccurate if, for example, international organizations became parties to the instrument arising out of the draft articles. The square brackets must be retained, since it was not for the Commission to stipulate the manner in which the draft articles would apply to international organizations.

41. A number of States had stressed that, under the conciliation procedure provided for in the annex, States and international organizations should be regarded as on a completely equal footing. That might concern a number of provisions with regard to which doubts had been expressed, particularly the drawing up of a list of conciliators. If the Commission decided that, in the case of disputes concerning the application or interpretation of articles 53 or 64 to which an international organization was a party, provision should be made for a settlement procedure other than judicial settlement by the International Court of Justice, it would be necessary to consider the possibility of providing for an arbitration procedure, as well as a conciliation procedure, in the annex.

42. Mr. USHAKOV recalled that, in the first reading, he had stressed the need to draft the annex in terms which were easily intelligible.¹³ However, such was not the case as far as the text under consideration was concerned. While it was true that conciliation, as a means of settling disputes provided for in article 66, was compulsory, did that mean that the parties to a dispute, particularly international organizations, were obliged to apply the procedure described in the annex? It was possible that they might agree jointly on some other procedure, instead of being obliged to apply to the Secretary-General of the United Nations. The problem raised, in particular, by the establishment of the list of conciliators referred to in paragraph 1 of the annex would thus be solved, since the list in question, like that provided for in the Vienna Convention, would be drawn up solely on the basis of a proposal by the States.

43. Mr. REUTER (Special Rapporteur) said that while, admittedly, it was possible to allow international organizations, with their consent, to resort to an alternative procedure, their consent was nevertheless necessary. As the conciliation procedure was compulsory, the text must be retained. Mr. Ushakov's difficulty was that he was opposed in principle, rather than because of the complexity of the text, to the idea that international organizations could designate conciliators. In the case of a compulsory conciliation procedure, the advantage of pre-established conciliation machinery was undeniable. Indeed, experience showed that, if the parties were left to set up the machinery without any obligation other than to reach agreement on it, and they actually failed to reach such agreement, the compulsory character of the conciliation procedure disappeared.

44. Mr. USHAKOV said that he was not questioning the obligation to resort to conciliation. He simply wished the parties to a dispute to be allowed to decide either to apply the procedure provided for in the annex, or to make use of some other machinery.

45. Mr. REUTER (Special Rapporteur) agreed that it was possible to argue that the obligation to resort to conciliation existed, even in the absence of pre-established conciliation machinery. However, there was no guarantee that the parties to a dispute would agree on the establishment of conciliation machinery.

46. Mr. LACLETA MUÑOZ said he thought that the possibility to which Mr. Ushakov had referred, namely, that the parties to a dispute should be able to agree to a procedure other than the one specified in the annex, was clearly provided for in article 65, paragraph 3. He also fully agreed with the Special Rapporteur that there could be no compulsory conciliation without a clearly defined procedure for the establishment of a conciliation commission.

47. Mr. STAVROPOULOS said that the words:

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period.

in the last part of paragraph 2 of the annex proved that the annex was necessary because, if, in the case referred to by Mr. Ushakov, the four conciliators could not agree who should be appointed as the fifth conciliator and chairman, there would be no conciliation procedure at all until the Secretary-General had appointed the chairman.

48. Mr. JAGOTA said that the Commission would not be able to finalize the text of the annex until the Drafting Committee had solved the problems in article 66 arising from the difference between the respective situations of States and international organizations that were parties to a dispute concerning the application or the interpretation of a rule of *jus cogens* under articles 53 or 64, and until it had decided whether there would be one single annex or two different ones, one relating to States and the other to international organizations.

49. Referring to Mr. Ushakov's objection to the institutionalization of the compulsory conciliation procedure through the intermediary of the Secretary-General of the United Nations, he said that the institutional aspects of compulsory conciliation, which had been provided for in the Vienna Convention, were residual in nature and were applicable only if the parties to a dispute could not agree on any of the other procedures provided for in article 65, paragraph 3, and article 66, paragraphs 2 and 3.

50. Although the words "The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission", in the last part of

¹³ Yearbook ... 1980, vol. I, p. 66, 1595th meeting, paras. 14-20.

paragraph 2 of the annex, had been based on the corresponding wording of the Annex to the Vienna Convention, he thought that it might be presumptuous for the Commission itself to propose such wording to a conference of plenipotentiaries and that the wording used in subparagraph 2 (a) (i) of the annex was more appropriate. The Drafting Committee might also consider whether the words "of the dispute" should not be added, for the sake of clarity, at the end of paragraph 4 of the annex.

The meeting rose at 1.05 p.m.

1726th MEETING

Monday, 14 June 1982, at 3.10 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ANNEX (Procedures established in application of article 66)³ (concluded)

1. Mr. USHAKOV said that, since the annex also dealt with the conciliation procedure, he thought that, in article 66, paragraph 1, subparagraph (b), and paragraphs 2 and 3, the words "the procedure specified in the annex to the present articles" should be replaced by the words "the conciliation procedure specified in the annex to the present articles". It would thus be clear that recourse to that procedure was compulsory. If they so agreed, however, the parties to the dispute and, in particular, international organizations, might set that conciliation procedure in motion otherwise than by submitting a request to that effect to the Secretary-General of the United Nations. It was only in the absence of such agreement that they would submit a request to the Secretary-General. In that case, the procedure should be

much simpler, both in drafting and in practical terms, than the one described in the annex and it should be provided that the list of conciliators would be drawn up exclusively on the basis of nominations by States.

2. Mr. NI said that he understood the difficulties encountered by some members as a result of the complex wording and numbering of the various parts of the annex. Such complexity was, however, unavoidable because of the many different cases covered, particularly in subparagraph 2 (c), where he wondered whether it might not be possible simply to allow the parties to agree among themselves on arrangements for conciliation. Referring to the question of the right of international organizations to nominate conciliators to be included in the list, he said that, since international organizations had the capacity to conclude treaties, they could be parties to disputes arising from such treaties and should therefore be entitled to nominate conciliators. Accordingly, he proposed the deletion, in the second sentence of paragraph 1 of the annex, of the square brackets around the words "and any international organization to which the present articles have become applicable".

3. Mr. CALERO RODRIGUES said that, if his own understanding was correct, Mr. Ushakov was not questioning the compulsory nature of the conciliation procedure under consideration, but, rather, seeking only to make that procedure more flexible. Mr. Ushakov's point was well-taken, because the main value of conciliation as a means for the settlement of disputes lay precisely in its flexibility and in the freedom it gave the parties to choose the conciliators who would settle the dispute. There was at present a deplorable tendency to make conciliation more rigid and to turn it into something like a system of judicial settlement imposed upon States.

4. In the procedure under consideration, the principle of compulsory conciliation could be combined with the freedom of the parties to choose the conciliators as they wished. To that end, however, it might be necessary to make some changes in the wording of article 66 and the first part of the annex. In that connection, he drew attention to the provisions of annex V of the recently adopted Convention on the Law of the Sea.⁴ Those provisions applied to two different situations: first, to the ordinary conciliation procedure, which was voluntary, and, secondly, to compulsory submission to the conciliation provided for in Part XV, section 2, of that Convention. That system of compulsory conciliation was identical with the one now under discussion. He drew particular attention to annex V, article 10, of the Convention on the Law of the Sea, which stated that the parties could by agreement modify any provision of that annex. The parties could thus not reject conciliation itself, but they could by agreement modify the provisions governing conciliation in matters such as the composition and functions of the conciliation commission.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1724th meeting, para. 1.

⁴ See 1699th meeting, footnote 7.

5. He nevertheless noted that there was one important procedural difference between the system now under discussion and the one which had been adopted by the Third United Nations Conference on the Law of the Sea. In the system under discussion (and, of course, in that of the 1969 Vienna Convention, from which it derived), provision was made for the submission of a request to the Secretary-General of the United Nations for the purpose of setting the conciliation procedure in motion. In the system embodied in the Convention on the Law of the Sea, notification had to be made to the other parties, and the Secretary-General was called upon to take action only in the event of failure by the parties to appoint conciliators. He proposed the adoption of a system such as the one embodied in the Convention on the Law of the Sea, which left the parties freedom of choice of procedures and methods without allowing them to evade their obligations under the system of compulsory conciliation.

6. Mr. LACLETA MUÑOZ said he agreed with Mr. Calero Rodrigues that the Secretary-General of the United Nations should be called upon to act only if the parties had failed to appoint conciliators. He saw no reason why the actual request for conciliation should be submitted to the Secretary-General. Any request by a party for arbitration or conciliation should be submitted to the other party or parties, not to the Secretary-General.

7. Mr. REUTER (Special Rapporteur) said that, from the legal point of view, there was not necessarily any link between the two comments made by Mr. Ushakov. The first related to the introduction of some flexibility in the conciliation procedure, which Mr. Ushakov had proposed with the support of Mr. Calero Rodrigues and Mr. Lacleta Muñoz. The introduction of such flexibility would, in theory, be possible, but only in the context of article 66, not in the annex. It could, in fact, be said that article 66 offered the parties to a dispute an opportunity to agree on a kind of "tailor-made" conciliation procedure. Technically, however, it would then be absolutely essential to set a time limit by which the parties must agree; otherwise, there would obviously be no further possibility for the parties to set in motion an automatic procedure for compulsory recourse to conciliation, one of the basic elements of the Vienna Convention.

8. There was nevertheless something to be said for making the conciliation procedure more flexible and it was quite understandable that the members who had taken part in the Third United Nations Conference on the Law of the Sea should want to share their experience and new ideas with the Commission. He would merely point out that the system provided for in the Convention on the Law of the Sea was absolutely contrary to the Vienna Convention. Since it had been impossible to establish compulsory jurisdiction, the intention of the Vienna Convention had been to provide for compulsory conciliation, but by means of a conciliation procedure designed to ensure some uniformity in the decisions of conciliation commissions; that, in particular, explained

the role assigned to the Secretary-General of the United Nations. The choice between the law of the sea approach and the law of treaties approach was a political matter about which he had nothing to say. The Commission had, however, already decided to do away with the submission to the International Court of Justice of disputes relating to rules of *jus cogens*. That would seriously jeopardize the recourse procedures established by the Vienna Convention, and it was something to which the States that had accepted that Convention would probably not agree. The Commission could nevertheless deal with technical matters and propose alternatives, but the question was still one that would, basically, have to be decided by an intergovernmental conference. If there was no intergovernmental conference, article 66 and the annex would obviously disappear.

9. Mr. Ushakov had made a second proposal, unrelated to the first, to the effect that international organizations should not be placed on an equal footing with States and should not take part in the nomination of the conciliators who would be included in the list. Although that position of principle was a legitimate one, it was contrary to the wishes of many States and, moreover, absolutely contrary to the principle of equality in the establishment of conciliation procedures. If the Commission agreed that there should in any event be an automatic conciliation procedure when the parties to a dispute could not agree within a reasonable period of time and if it decided that international organizations were not entitled to nominate members of the list for conciliation procedures in which they themselves would take part, it would be making a political choice. It would thereby simplify the text, but its decision would be much more far-reaching.

10. Mr. CALERO RODRIGUES said that he fully agreed with the Special Rapporteur that international organizations should be allowed to nominate conciliators. He pointed out that, under the provisions on conciliation contained in the Convention on the Law of the Sea, any party to a dispute could institute proceedings by making a notification to the other party or parties concerned; the other party must then submit to conciliation. That system was not far removed in substance from that of article 66 and the annex of the 1969 Vienna Convention.

11. Mr. RIPHAGEN said that, throughout its discussions of the item under consideration, the Commission had never really deviated on any major point from the provisions of the Vienna Convention and that he saw no cogent legal reason to deviate from that convention in the matter of conciliation. He therefore urged the Commission to accept the proposed text of the annex. He also supported Mr. Ni's proposal for the deletion of the square brackets around the words "and any international organization to which the present articles have become applicable" in paragraph 1.

12. Mr. BALANDA said that the suggestion for the introduction of flexibility in the conciliation procedure

which had been made by Mr. Calero Rodrigues and Mr. Lacleta Muñoz further to Mr. Ushakov's comments was somewhat puzzling. It was apparent from the comments by States that almost all of them wanted the Commission to follow the Vienna Convention as closely as possible. It would be contrary to that wish to follow the procedure adopted by the Third United Nations Conference on the Law of the Sea and, thus, quite unlikely that, at a conference of plenipotentiaries, States would agree to depart from rules that were as fundamental as the ones contained in the annex.

13. He interpreted the provision in paragraph 1 stating that "A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph" to mean that, upon expiry of the five-year period for which they were nominated, conciliators would continue to carry out the task assigned to them until they had completed it. If that was so, that provision might be brought into line *mutatis mutandis* with the second sentence of article 13, paragraph 3, of the Statute of the International Court of Justice, which read:

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

14. He did not see how it would be possible to reconcile, on the one hand, the proposal for the drawing up in advance of a list of conciliators by the Secretariat of the United Nations and, on the other hand, the freedom which paragraph 2 gave the parties to choose conciliators not included in that list. He shared the view of the members of the Commission who had stated that they were in favour of equality for States and international organizations in the nomination of the conciliators composing the list. That would ensure the equality of the parties.

15. In order to highlight the difference in the scope of the powers of the conciliators, who would have to choose their chairman from the list, and States, which might be able to choose conciliators not included in the list, it might be advisable to amend the words "The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman" in paragraph 2 of the annex by replacing the word "appoint" by the word "choose"; the amended sentence would then read: "The four conciliators shall, within sixty days following the date of the last of their own appointments, choose a fifth conciliator from the list, who shall be chairman."

16. Mr. LACLETA MUÑOZ said that he too was entirely convinced of the need to preserve the parallelism between the provisions of article 66 and the annex and the corresponding provisions of the Vienna Convention. He also agreed that international organizations must have the right to nominate persons whose names would be included in the list of conciliators. Actually, the provisions now under discussion were not completely parallel with those of the Vienna Convention. He drew

the Commission's attention, for example, to the words "in the absence of any other agreed procedure" in paragraph 3 of article 66, which made the application of conciliation subject to the absence of agreement between the parties on any other means of settling their dispute and thus detracted from the compulsory nature of conciliation, whereas the arbitration system established by the Convention on the Law of the Sea did embody the principle of compulsory conciliation. He was also of the opinion that it was the parties, and not the Secretary-General, which must submit a dispute to conciliation. The Secretary-General became involved only if the parties had failed to nominate conciliators.

17. Mr. USHAKOV said that he failed to see how the system provided for in the Vienna Convention would be seriously jeopardized if the parties to a dispute were allowed to constitute the conciliation commission as they wished or if words such as "unless the parties by common consent agree to establish the conciliation procedure in another manner" were added at the end of article 66, subparagraph 1 (b). The equality it was proposed to preserve between States and international organizations for the appointment of conciliators did not, in fact, exist. It was only apparent, because an international organization would appoint as conciliators not persons who would be chosen from among its officials—something that would be out of the question—but, rather, nationals of its member countries. It would thus be very difficult, in legal, political and practical terms, for an international organization of a universal character composed of 150 or 160 member States to appoint two conciliators only from among the persons nominated by all those States. It would actually be preferable for international organizations not to take part in the nomination of the conciliators included in the list. He would, however, not insist on the suggestions which he had made concerning the text of the annex and which were intended only to simplify it.

18. Mr. STAVROPOULOS drew Mr. Ushakov's attention to the fact that article 66, paragraph 1, of the draft referred to paragraph 3 of article 65, which itself referred to Article 33 of the Charter of the United Nations. Now, Article 33 of the Charter called upon "the parties to any dispute" to

seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies... or other peaceful means of their own choice.

It seemed to him that those words largely met the point raised by Mr. Ushakov.

19. Mr. USHAKOV said that, in article 66, paragraphs 2 and 3, the words "any other agreed procedure" in the phrase "in the absence of any other agreed procedure" did not refer to the conciliation procedure at all. There were means other than conciliation for the peaceful settlement of disputes from which the parties were free to choose. Compulsory conciliation came into play only if the parties to the dispute could not agree to set in motion another peaceful means of their own choice.

20. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, the proposed system of compulsory conciliation would go much further than the provisions of Article 33 of the Charter, which, in addition to conciliation, mentioned several other means of settlement. He did not think that, in the present instance, the Commission could go further than the Charter itself. The provisions of the Convention on the Law of the Sea did not constitute a valid precedent in the present case because that Convention had not yet entered into force. He also did not think that the Vienna Convention should be taken as a binding model. The Commission could not confine itself simply to reproducing and adapting the provisions of the Vienna Convention, which many States had not ratified precisely because of the system of compulsory conciliation for which it provided.

21. In theory, it would, of course, be ideal if States accepted a system of compulsory arbitration or even compulsory jurisdiction by the International Court of Justice. The fact of the matter was, however, that, in the present state of international relations, very few States were prepared to accept compulsory arbitration or jurisdiction. In conclusion, he said he agreed that it would be desirable to introduce greater flexibility in the provisions under discussion. The best course might, however, be to delete article 66 and the annex altogether.

22. Mr. JAGOTA said that the view expressed by the Chairman, speaking as a member of the Commission, reflected the position taken by India on the issue of compulsory conciliation. The provisions of article 66 and the annex of the Vienna Convention had constituted a compromise formula that had actually saved the United Nations Conference on the Law of Treaties in 1969. He himself had been responsible, together with Mr. Elias, for the drafting of that formula, and he well recalled the difficulties they had both had later with their own delegations. If the Commission were now to adopt the easy solution of deleting draft article 66 and the annex altogether, it would not thereby solve the problem under discussion. It would only be passing the problem on to the Sixth Committee of the General Assembly or to a conference of plenipotentiaries. Perhaps the Commission should retain article 66 and the annex and put them forward as a modest contribution to the stability of treaty relations.

23. As to flexibility, he pointed out that the draft now under discussion actually did contain some useful elements. In the first place, the question of methods of settlement under regional agreements (OAS, OAU, and others) was covered by the cross-reference in paragraph 3 of article 65 to Article 33 of the Charter, which called upon the parties to a dispute to seek a solution by "resort to regional agencies or arrangements". The draft thus clearly provided that a solution should be sought by regional means of settlement before the conciliation system came into play. Another important element of flexibility was introduced by the words "in the absence of any other agreed procedure" in article 66,

paragraph 3, which made it clear that the conciliation procedure specified in the annex was of a residual nature.

24. In conclusion, he said that he found the system embodied in articles 65 and 66 and in the annex to be entirely in keeping with the Vienna Convention as well as with the system embodied in the Convention on the Law of the Sea and the general practice of the international community. The proposed system had the advantage of moving towards some form of compulsory procedure for the settlement of disputes. It would be advisable for the Commission to retain that element in its draft instead of leaving the whole matter to a conference of plenipotentiaries.

25. Mr. REUTER (Special Rapporteur) suggested that the annex should be referred to the Drafting Committee. Although the system provided for in the Vienna Convention allowed for the greatest flexibility, the Commission could go even further and delete article 66 and the annex altogether.

26. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, the parties to a dispute could always agree on one of the means of settlement provided for in Article 33 of the United Nations Charter. The Secretary-General could also, by agreement with the parties, indicate an appropriate means. An example was to be found in an agreement between the United Kingdom and Venezuela,⁵ which provided that the Secretary-General could, in the absence of agreement, be requested to designate one of the means of settlement provided for in Article 33 of the Charter.

27. The CHAIRMAN said that, since there were no further comments, he suggested that the Commission refer the draft annex to the Drafting Committee.

*It was so decided.*⁶

Mr. Reuter took the Chair.

Co-operation with other bodies

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

28. The CHAIRMAN invited Mr. Ortiz Martín, the observer for the Inter-American Juridical Committee, to address the Commission.

29. Mr. ORTIZ MARTÍN (Observer for the Inter-American Juridical Committee) said that he wished to reiterate the Committee's request that, when members of the Commission visited the Committee, they should give lectures as part of the international law courses which the Committee had been organizing for the past several years.

⁵ Art. IV of the Agreement to resolve the controversy over the frontier between Venezuela and British Guiana, signed at Geneva on 17 February 1966 (United Nations, Treaty Series, vol. 561, p. 325).

⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 69-78.

30. Referring to the Committee's recent activities, he said that, on the initiative of the Legal Sub-Secretariat of the OAS, the Committee had undertaken to prepare a draft inter-American convention on international jurisdiction for the extraterritorial validity of foreign judgements, which would supplement existing conventions. That topic had been discussed at the first and second Inter-American Specialized Conferences on Private International Law held at Panama City (1975) and Montevideo (1979), respectively and, in April 1980, at Washington D.C., where the first meeting of private international law experts had included in its agenda an item on international jurisdiction with a view to supplementing, where necessary, the rules of international procedural law. It had then drafted bases of international jurisdiction for the extraterritorial validity of foreign judgements, and the rapporteur entrusted with the topic had described the efforts made to find terms that would apply both to the common-law system and to the Latin American system of law.

31. The Inter-American Juridical Committee had then considered the bases of international jurisdiction and the replies of jurists to a questionnaire sent to them by the OAS General Secretariat. During the article-by-article consideration of that text, questions on the use of terms had been raised and amendments had been proposed. Various other documents had been prepared and, in January 1982, the Committee had decided that the bases should take the form of a convention, which, although it could stand on its own, might serve to implement article 2 (d) of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, signed at Montevideo on 8 May 1979. In order to fill a gap in that article, the draft Convention contained a provision which would enable the States parties to the Montevideo Convention to apply the rules of that Convention in the event of a dispute but which would not prevent the draft Convention from remaining open for signature and accession by States that had not signed the Montevideo Convention. During the discussion of the title of the draft Convention, it had been agreed that the Spanish term "*competencia*" could be translated by the English term "jurisdiction". Restrictions on the subject-matter of judgements had been retained in the draft, but a provision had been added so that the States parties could declare that they would apply the rules of the Convention to one or more of the subject-matters not covered by that instrument; such a declaration could be made at any time. The draft Inter-American Convention would be useful to the American States, whether they belonged to the common-law system or to the Latin American system of law, and it would provide a universal standard for States other than those of the American continent which decided to accede to it.

32. Referring to the development of international law in the Americas, he said that private international law had originated in the Bologna School, but that public international law had been founded by Francisco de Vitoria, the author of two works which had served as a

basis for the theory of international law. In *De Indis*, Vitoria had condemned the excesses committed against the American Indians by some conquistadors. He had also expressed the view that international law should apply not only to Christians, but to non-believers as well. Vitoria's views had been expanded by Francisco Suarez in his work entitled *De Legibus ac Deo legislatore*. After the discovery of America, Spain had undertaken to draw up a special statute for its overseas territories, as well as special constitutional and administrative rules, which had departed radically from the ideas prevalent in Europe during the colonial period. Spain had encountered peoples who had had their own cultures and had given them a special status under what had been called *Leyes de Indias*. The conquest of America had been described in accounts that had been hostile to the Spanish colonists, some of whom had, however, founded the nations of the future. They had all been Spanish, but not all had been conquistadors. The conquistadors had been warriors who had relied on the laws of war; the Spaniards had been colonists who had proselytized and built convents where the Spanish language and religion had been taught; they had experimented with new crops, established schools and universities for instruction in the arts, letters and sciences. Handicrafts had flourished at the time. The races had met and mixed.

33. The main legacy left by the Spaniards and Portuguese had, however, certainly been international law, which Vitoria had created in order to protect the new Latin American nations. International law was thus part and parcel of Latin American culture, as the people of America had realized at the end of the wars of independence, when Simón Bolívar had convened the first inter-American congress, with the idea of uniting all the peoples of America as one. That had been the first positive step in the work, conferences, meetings and institutes that had led to the establishment of the Pan-American Union, in which the United States of America had taken part and of which it had been a fervent supporter. International law had thus developed, because the representatives of the peoples of Latin America had gone on meeting and trying to establish a legal framework for the settlement of their disputes. In Europe, it had been only later, with the establishment of the League of Nations, that such an international union had been born. In Latin America, however, theories had continued to be put forward, including the Bustamante Code,⁷ which had been adopted in 1928 and represented the first codification of uniform rules of private law.

34. It should also be borne in mind that the Treaty of Chapultepec⁸ had paved the way for the establishment of the United Nations, whose Charter recognized the regional value of the OAS and its right to conclude its own treaties and conventions of all kinds. As a result of

⁷ See 1709th meeting, footnote 9.

⁸ Final Act of the Inter-American Conference on Problems of War and Peace adopted at Mexico City on 8 March 1945 (*The International Conferences of American States, Second Supplement, 1942-1954* (Washington, D.C., Pan American Union, 1958)).

current unrest, the Latin American countries would have to re-examine their constitutions and the treaties that bound them to determine whether they were operating properly and effectively or whether they should be amended or supplemented. In the final analysis, what the world needed was an international law that would be respected out of a concern for justice.

35. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee for his masterly statement.

36. Mr. DÍAZ GONZÁLEZ said that it was an honour for him as a Latin American to welcome to the Commission a representative of the Inter-American Juridical Committee, which had been the first organization of its kind and was an example of the international co-operation established when Simón Bolívar had convened the 1826 Congress of Panama that had put an end to the colonial regime in the Americas. It had, of course, not done so completely, since there remained, even to the present day, colonialist enclaves to the elimination of which the major Powers were opposed.

37. Mr. Ortiz Martín had rightly spoken of the contribution of the Spanish-speaking peoples to the development of international law. Indeed, it had been in respect of Latin America that two international Powers, Spain and Portugal, had submitted their dispute to arbitration by a third Power, which had determined the extent of the two countries' conquests. Spain and Portugal had a love of the law, as also of equality and justice. In that connection, Mr. Ortiz Martín had suggested that the Inter-American Juridical Committee should recast the legal instruments that still bore the reflection of the old colonialist and imperialist Europe in an instrument of peace and justice designed to serve Latin America, rather than imperialism and colonialism. The Charter of the United Nations should also be revised. The common law and civil law traditions should be combined to form a law of justice and peace for the benefit of the Latin American States, not a law of force, as had thus far been the case.

38. As a Latin American member of the Commission, he would ask Mr. Ortiz Martín to convey to the Committee his concern for the future of international law in Latin America.

39. Mr. LACLETA MUÑOZ said that he had listened with pride to the account by the observer for the Inter-American Juridical Committee of the contributions made by Spain and the Spanish people to the development of international law. In the past, international law had often been criticized as the law of the European Powers and he was proud, too, that Spain had helped to break a vicious circle; it was nevertheless his opinion that only the first stone had been laid. With the emergence since the Second World War of so many newly independent States, it was essential to establish an international law which was of a universal character and would provide a firm basis for the peace and security of all nations. In his view, the work of the eminent jurists to whom Mr. Ortiz Martín had referred and the

developments that had taken place since the imperialist links between Spain and Latin America had disappeared augured well for the future of the international community.

40. Mr. JAGOTA said that he was much impressed by the contribution of Latin America and the Spanish-speaking peoples to the development of international law. There had, however, been certain initial points of difference, particularly with regard to the law of the sea. For instance, he had at the outset viewed with some hesitancy the Latin American proposals for a 200-mile exclusive economic zone. However, following an official visit to New Delhi by the representatives of Argentina, Brazil, Ecuador and Peru to a United Nations Committee that had met in Colombo in 1971, he had been persuaded that it would ultimately be in India's best interests to have its own exclusive fishing zone. India had therefore been applying such zones since 1979.

41. He also welcomed the close co-operation between the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee and the exchange of information that was taking place between the three regions.

42. Mr. CALERO RODRIGUES said that, as the observer for the Inter-American Juridical Committee had rightly observed, Latin America had made an important contribution to the development of international law. Specifically, it had undertaken some of the most important codifications of international law and had harmonized efforts to draw up legal instruments. There had been much discussion at the beginning of the century of whether or not there was a Latin American international law, and a Brazilian had even written a book on the subject.⁹ That was, however, past history. There had been changes in Latin America, as throughout the entire world. Now the aim was to make international law universal.

43. Originally, international law had been a deformation of European law, with some contributions by the United States. At present, Latin America was making its own contribution, as were Asia and Africa, and the work of the Asian-African Legal Consultative Committee was a case in point. The Commission seemed to be in clear agreement that the new international law should differ from the old in that it should consolidate universal ideas and reflect the contributions of the developing countries. The Inter-American Juridical Committee's work in that area was particularly important. Advantage should also be taken of the fact that, within Latin America itself, some countries had made their contribution by reference to their common-law tradition. That contribution should likewise be taken into account with a view to achieving universality. Against that background, co-operation between the Commission and the Committee was of the utmost importance.

⁹ M. A. de Sá Vianna, *De la non-existence d'un droit international américain* (Rio de Janeiro, Figueredo, 1912).

44. Mr. SUCHARITKUL, stressing the importance of co-operation in the development of international law, expressed appreciation for the contribution made by Latin America to the development of public and private international law.

45. Mr. FRANCIS said that the presence of the observer for the Inter-American Juridical Committee was indicative of the close links between the Commission and the Committee. The Committee's contribution to the development of international law was recognized throughout Latin America, and the challenge that Latin American jurists now faced was how to forge some means of ensuring compliance with international law. As a national of one of the small countries, he saw no other alternative for them and for Latin America than to devise a means for the peaceful settlement of disputes. He trusted that Latin American jurists would be ready and able to meet that challenge.

46. Mr. BALANDA, speaking on behalf of the African members of the Commission, stressed the importance of the contribution which Latin America had made and continued to make to the development of international law. That contribution had been particularly valuable during the work of the Third United Nations Conference on the Law of the Sea. It should also be noted that the European Convention on Human Rights¹⁰ had been based on the example provided by Latin America. He expressed the hope that Latin American jurists would continue to work to establish the rule of law through co-operation among peoples and to ensure that the earth really belonged to mankind and not to individuals fighting among themselves. That was also the Commission's goal. It was seeking a common denominator in the different legal and political systems so that its members could combine their efforts to ensure the rule of international law. He wished to add Carlos Calvo's name to those of the distinguished jurists to whom reference had been made.

47. Mr. USHAKOV, speaking also on behalf of Mr. FLITAN and Mr. YANKOV, congratulated the observer for the Inter-American Juridical Committee and expressed the hope that the Committee and the Commission would continue to maintain close and fruitful ties.

48. Mr. McCAFFREY said that he came from a part of the United States that was strongly influenced by the Latin American legal tradition and by the Mexican legal system in particular, above all in the private sector. He had done fairly extensive research into the Mexican legal system in so far as it related to transnational problems between Mexico and the United States. He had therefore been particularly interested in the statement by the observer for the Inter-American Juridical Committee, and he welcomed the close working relationships between the Committee and the Commission.

The meeting rose at 6.10 p.m.

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (United Nations, *Treaty Series*, vol. 213, p. 221).

1727th MEETING

Tuesday, 15 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ARTICLE 80 (Registration and publication of treaties)³
(concluded)

1. Mr. STAVROPOULOS said that he wished to correct a statement he had made at the 1725th meeting (para. 13). He had said that there was a difference in treatment, in regard to application of Article 102 of the Charter, between international organizations and Members of the United Nations, since treaties submitted by the former were not published, whereas those submitted by the latter were registered and published. Having examined the 1946 regulations to give effect to Article 102 of the Charter of the United Nations (General Assembly resolution 97 (I)), however, he had discovered that treaties submitted by international organizations were in fact published. Article 12, paragraph 1, of the regulations read: "The Secretariat shall publish as soon as possible in a single series every treaty or international agreement which is registered or filed and recorded ...". In that context, "filed and recorded" meant registered by the United Nations or a specialized agency.

2. Mr. NI said that the question raised by article 80 was which types of treaties should be registered with the United Nations. General Assembly resolutions 97 (I) and 33/141 provided certain indications in that connection. Under article 1, paragraph 1, of the regulations in resolution 97 (I), treaties entered into by one or more Members of the United Nations had to be registered with the United Nations Secretariat; under article 4, paragraph 1, subparagraphs (a) and (b), the United Nations was required to register *ex officio* treaties to which it was itself a party and under which it was authorized to effect registration; and, under paragraph 2 of the same article, a specialized agency might register with the Secretariat a treaty entered into

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1725th meeting, para. 32.

by one or more Members of the United Nations subject to the following three conditions: first, the constituent instrument of the specialized agency must so provide; secondly the treaty must have been registered with the specialized agency pursuant to the constituent instrument of the agency; and, thirdly, the specialized agency must have been authorized by the treaty to effect registration. In other words, only treaties entered into by one or more Members of the United Nations, or to which the United Nations was itself a party, or whose registration was effected by a specialized agency, subject to certain conditions, fell within the purview of Article 102 of the Charter.

3. That being so, treaties not covered by the regulations would include those entered into by States of which none was a Member of the United Nations, treaties entered into by international organizations *inter se* other than the United Nations, and treaties between such States and organizations. The regulations laid down only the conditions under which a specialized agency might register with the Secretariat a treaty entered into by one or more Members of the United Nations; it did not provide for the registration by a specialized agency of a treaty between a specialized agency and another international organization that was not a specialized agency or a State that was not a Member of the United Nations. In order to effect registration, a specialized agency had either to be involved in the treaty as a party to it or have participated in it in some other way.

4. Draft article 80, however, could not apply to all treaties, since there were certain treaties to which registration under the existing regulations did not apply. The Commission had considered inserting the words "where appropriate" in article 77, subparagraph 1 (g). Another suggestion had been to include in that paragraph a reference to Article 102 of the Charter, leaving the interpretation of the Charter to the United Nations itself. A third possibility was for the United Nations to amend the regulations to make them applicable to the new categories of treaty. The first two of those possibilities seemed unlikely to lead to a solution. As for the third, if the draft articles were adopted in the form of a convention before the regulations were amended, there would be a lacuna in the regulations, although it would not be very serious since it would mostly affect treaties between two or more international organizations *inter se*, and an amendment would probably be introduced to cover that case. For all those reasons, he was in favour of retaining draft article 80 in its current form.

5. Mr. STAVROPOULOS read out the following authoritative opinion, which he hoped might shed some light on the matter under discussion:

The obligation regarding filing, recording and publication by the Secretariat does not apply to treaties or international agreements concluded between international organizations other than the United Nations and the specialized agencies. However, a practice has developed whereby any such treaties or agreements transmitted by such organizations to the Secretariat for filing and recording are published by the Secretariat in part II of the volumes of the *Treaty Series*.

Treaties concluded by international organizations other than the United Nations and the specialized agencies were therefore also filed and recorded by the Secretariat of the United Nations.

6. Mr. USHAKOV recalled that he had proposed (1725th meeting) dividing article 80, paragraph 1, into two subparagraphs. The first subparagraph would begin:

"Treaties concluded between one or more States and one or more international organizations shall, after their entry into force, be transmitted to the Secretariat of the United Nations ...",

and the second would begin:

"Treaties concluded between two or more international organizations may, after their entry into force, be transmitted to the Secretariat of the United Nations ...".

7. Mr. FLITAN said that the Commission should adopt the text of article 80 as it stood, since the only obligation involved related to the transmission of treaties. It was certainly in the interest of the parties to treaties and of the international community as a whole to have some sort of record of all multilateral treaties concluded, whether treaties between States—which would be covered by the Vienna Convention—or treaties to which two or more international organizations were parties. Moreover, such a procedure would simply meet the wish expressed by the Commission, in the first reading of article 80,⁴ to see the role of the Secretariat of the United Nations expanded. As far as the registration, filing, recording and publication of such treaties was concerned, there were regulations to give effect to Article 102 of the Charter of the United Nations, which fell within the competence of the General Assembly alone. The future changes would depend on many factors, not least the financial and human resources of the Secretariat of the United Nations.

8. Mr. JAGOTA said he agreed that all treaties falling within the scope of the articles should be registered; the question was how to do it. The point had been raised whether Article 102 of the Charter of the United Nations would apply to treaties registered pursuant to draft article 80, so that an obligation would be imposed, not only on the parties to the treaty, but also on the United Nations to file and record that treaty; failure to perform obligation would give rise to the consequences provided for under Article 102, paragraph 2, of the Charter. In his view, Mr. Ni's interpretation regarding the treaties that could be registered by the United Nations was correct. However, the position with regard to treaties between international organizations, namely, treaties to which the draft articles would apply, was not entirely clear. For example, there were agreements between the Asian-African Legal Consultative Committee and the International Centre for Settlement of Investment Disputes (ICSID)—an organ of the World Bank—re-

⁴ *Yearbook ... 1980*, vol. I, pp. 54-55, 1593rd meeting, paras. 43-57.

garding general arrangements between the Regional Centres for Commercial Arbitration and ICSID, and the draft articles would apply to those agreements. Would the World Bank, as a United Nations specialized agency, be required to register the agreements, or could the Legal Consultative Committee register them under draft article 80? Again, would the agreement fall within the scope of General Assembly resolution 97 (I)? The same question arose in the case of agreements concluded between the Asian-African Legal Consultative Committee and other regional legal committees, to which the draft articles would likewise apply.

9. His own feeling was that if such agreements were currently registered, it was as part of established United Nations practice, rather than under Article 102 of the Charter or the relevant resolutions. However, he favoured the retention of draft article 80 and would therefore like some clarification as to whether the part of the draft articles that dealt with treaties between international organizations—none of which would necessarily be a United Nations specialized agency—could be registered under Article 102 of the Charter, under the relevant resolutions of the United Nations General Assembly or in accordance with established United Nations practice.

10. Mr. STAVROPOULOS pointed out that, under article 4 of the regulations to give effect to Article 102 of the Charter of the United Nations, the United Nations was itself required to register *ex officio* any treaties subject to article 1 of the regulations, whereas specialized agencies might register such treaties under certain conditions, but were under no obligation to do so. The purpose of his earlier comment had been to show how keenly interested the General Assembly was in having all treaties published, although certain treaties did not have to be published *in extenso* by the Secretariat.

11. Mr. FRANCIS said that, whereas article 80 of the Vienna Convention governed only treaties between States, the draft articles were wider in scope, since they extended to treaties between States and international organizations and between international organizations. In his view, draft article 80, as it stood, was perfectly correct. Article 80 of the 1969 Vienna Convention clearly referred to treaties between Member States of the United Nations, or between Members and non-Members, or exclusively between non-Members. To that extent, the Vienna Convention could rightly be said to go beyond Article 102 of the Charter. Moreover, it was the clear intent of Article 102 of the Charter that all treaties should be registered. Quite apart, therefore, from the final preambular paragraph of the Vienna Convention, which affirmed that the rules of customary international law would continue to govern questions not regulated by the provisions of the Convention, it must by now be firmly established customary practice for all treaties to be registered. Consequently, there was no need to develop draft article 80 any further; all that was required was for the General Assembly, at an appropriate time, to bring up to date the regulations set

forth in General Assembly resolutions 97 (I) and 33/141.

12. Mr. LACLETA MUÑOZ said he agreed that draft article 80 fulfilled its purpose perfectly. It was an exact parallel to the corresponding provision in the Vienna Convention and could likewise be applied to treaties where the parties were not bound by the Charter of the United Nations, simply because they were not Members of it.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 80 to the Drafting Committee.

*It was so decided.*⁵

PROVISIONS ALREADY CONSIDERED IN SECOND READING

ARTICLE 5 (Treaties constituting international organizations and treaties adopted within an international organization) *and*

ARTICLE 20 (Acceptance of and objection to reservations)⁶

14. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission must revert to a number of questions relating to the draft articles which had been left in abeyance. He recalled that, in second reading, the Commission had adopted an article 5 which it had not adopted in first reading, since it had felt it necessary to have a provision extending to the draft articles the rule set forth in article 5 of the Vienna Convention, which stipulated:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Naturally, that assumed that the Commission accepted the idea that treaties could include the constituent instruments of international organizations to which one or more other international organizations were parties—a concept based on the fact that the word “treaty” did not have the same significance in the Vienna Convention as in the draft articles under consideration. It also assumed that the Commission agreed that treaties adopted within an international organization could have one or more other international organizations among their parties. Such arguments were somewhat bold, since few cases in point currently existed; nevertheless, the Commission had been of the view that they should not be excluded, in so far as article 9 of the draft provided that international organizations could participate in conferences of States at which the texts of treaties were adopted.

15. He was not suggesting that the Commission should reopen consideration of article 5, although members of the Commission could, of course, revert to it. He

⁵ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 67-68.

⁶ For the texts of these articles, see footnote 2 above.

wished to point out, however, that, if article 5 was adopted, the Commission would then, logically, have to review the text of article 20,⁷ since the text of that article adopted by the Commission in second reading contained no provision parallel to that of article 20, paragraph 3, of the Vienna Convention. That paragraph had been inserted at the request of the Secretary-General of the United Nations and read:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Actually, that text would not be necessary if the draft articles did not include a provision such as that contained in article 5. However, once the Commission had accepted the idea of including such a provision in the draft, there would no longer be any reason not to include in article 20 a third paragraph modelled on article 20, paragraph 3, of the Vienna Convention. He proposed, therefore, that a third paragraph should be inserted in article 20 of the draft, purely and simply reiterating the provisions of article 20, paragraph 3, of the Vienna Convention, and that the other paragraphs of draft article 20 should be renumbered accordingly. Such a procedure should not give rise to any great difficulty.

16. Mr. USHAKOV recalled that he had proposed⁸ the following text for article 5: "The present articles apply to any treaty adopted within an international organization without prejudice to any relevant rules of the organization", in which the word "adopted" did not necessarily imply a formal act of acceptance. The Drafting Committee had decided also to include a reference to treaties which were the constituent instruments of international organizations. However, it was difficult to see how an international organization could be party to the constituent instrument of another international organization. In any event, such a situation would constitute a special case, and should be treated as such if it occurred in the future. The question could be considered by the Drafting Committee.

17. Mr. JAGOTA said that, if he had understood correctly, Mr. Ushakov's point was that, whereas a provision similar to that set forth in draft article 5 had relevance for the Vienna Convention, it had no relevance for the draft articles. Mr. Ushakov had said that he knew of no example of an international organization being established by a treaty between one or more States and one or more international organizations, but that if such an example existed, it should be treated as a special case and should not come within the scope of the draft articles. He, himself, was not certain that such a distinction was justifiable. It might be technically correct to say that a treaty establishing an international organization was a treaty between States, to which the Vienna Convention would therefore apply. However, since the international organization was

established pursuant to a constituent instrument and might therefore itself subsequently conclude treaties, he thought that nothing would be lost if the text were retained as drafted.

18. An example was provided by the Convention on the Law of the Sea,⁹ which had established the International Seabed Authority and might therefore be considered as the constituent instrument of that Authority. Since the parties to the Convention could be, not only States, but also international organizations, that Convention, as the constituent instrument of the Authority, would certainly fall within the scope of the draft articles. One possible approach, therefore, would be to leave it to the parties to the Convention to take care of their own interests. Lastly, he considered, in the light of those comments, that draft article 5 did have a place in the draft and should be retained. He also supported the Special Rapporteur's proposal that a new paragraph 3 be added to draft article 20.

19. Mr. McCAFFREY said he appreciated Mr. Ushakov's point that the situation contemplated by draft article 5 would be a special case within the context of the draft. He also believed that he understood that Mr. Ushakov's reason for suggesting the deletion of the reference to "any treaty which is the constituent instrument of an international organization" was that there was no need to provide for very infrequent cases if to do so would complicate the draft unnecessarily and possibly create other unforeseen problems. In his own view, such would not be the case. He considered that a provision such as that contained in the first part of draft article 5 would be useful, not only in the context of the law of the sea, but also increasingly so in the course of the coming years. For those reasons, he supported the Special Rapporteur's proposal to retain draft article 5 and to add a new paragraph 3 to draft article 20.

20. The CHAIRMAN, speaking as Special Rapporteur, said that it was quite easy to conceive of international organizations (as well as States, as the case might be) concluding agreements affecting the material interests of international civil servants—who were frequently transferred from one organization to another—in such areas as pensions and the establishment of a fund or of an autonomous institution to manage them. In the case referred to by Mr. Ushakov in which the organization would simply authenticate the text of a treaty, he pointed out that a text could be adopted without any signing formality being provided for other than signature by the chairman of an organ. The Drafting Committee could also consider that question.

*Article 5 and article 20, paragraph 3, were referred to the Drafting Committee.*¹⁰

⁷ See *Yearbook ... 1981*, vol. II (Part Two), p. 139, para. (3) of the commentary to article 20.

⁸ See *Yearbook ... 1981*, vol. I, p. 17, 1646th meeting, para. 41.

⁹ See 1699th meeting, footnote 7.

¹⁰ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 12.

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)¹¹

21. The CHAIRMAN, speaking as Special Rapporteur, recalled that the Commission had adopted in second reading (1702nd meeting) article 30, which contained the following provision:

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

and that Article 103 of the Charter of the United Nations read as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

A number of members of the Commission had wondered, in respect of articles 30 and 42, whether the Commission should not include in the draft a single final article containing the rule laid down in article 30, paragraph 6, while extending it to cover all the draft articles.

22. He was not very much in favour of that suggestion, for two basic reasons. Firstly, the Commission, if it adopted that suggestion, would be compelled to justify it by providing a fairly precise and exhaustive interpretation of Article 103 of the Charter, which it was not authorized to do. Secondly, the inclusion of such a provision in the draft would be tantamount to pointing out a deficiency in the Vienna Convention. Consequently, he did not consider it necessary to refer the matter to the Drafting Committee. Attention could simply be drawn in the commentary to the provisions of Article 103 of the Charter of the United Nations.

23. Mr. STAVROPOULOS suggested that paragraph 6 of article 30 should be deleted, since it stated the self-evident.

24. Mr. USHAKOV said that a reference to Article 103 of the Charter of the United Nations relating to the draft as a whole, which would ultimately codify the law of treaties concluded between States and international organizations or between two or more international organizations, was unwarranted. It was justified, however, in article 30, which dealt with the application of successive treaties relating to the same subject. Such treaties were quite specific and laid down obligations, over which the obligations assumed under the Charter of the United Nations would, of course, prevail. The Drafting Committee could, in any event, take up the question.

25. The CHAIRMAN, speaking as Special Rapporteur, said that he had simply followed the wording of article 30 of the Vienna Convention, with the sole exception that the provision appeared at the end rather than at the beginning of the article. It nevertheless covered the same paragraphs. While he understood the position of Mr. Stavropoulos, to act upon it would be tantamount to criticism of the Vienna Convention.

26. Mr. STAVROPOULOS asked whether it was the intention that every treaty should contain a reference to article 103 of the Charter. Such a provision would seem unnecessary.

27. The CHAIRMAN, speaking as Special Rapporteur, said that the convincing argument put forward by Mr. Ushakov answered the observations made by Mr. Stavropoulos.

28. Mr. USHAKOV said that article 30, paragraph 1, of the Vienna Convention merely recalled that the Charter prevailed in all cases over all other treaties, regardless of the relationships between the treaties themselves. However, it was unnecessary to recall that fact with reference to the draft as a whole.

29. Mr. LACLETA MUÑOZ said, while he agreed that the reference in draft article 30 to Article 103 of the Charter should be retained, he did not altogether understand why it appeared at the end rather than at the beginning of the article, as was the case in the corresponding provision of the Vienna Convention. Moreover, the whole provision could be cast in the more general terms of article 30 of the Vienna Convention, and the parallelism with that Convention should be strictly maintained.

30. Mr. McCAFFREY said he agreed that no new article should be added. He was also in favour of the inclusion, in draft article 30, of a reference to Article 103 of the Charter, in particular for the reasons stated by Mr. Ushakov. It would perhaps be preferable, for reasons of style and alignments with the Vienna Convention, if the reference were incorporated in paragraph 1 of article 30.

31. Mr. FLITAN supported the proposal to include a reference to Article 103 of the Charter of the United Nations only in article 30 of the draft. He suggested that the question of article 30 and the placing of the reference to Article 103 of the Charter of the United Nations, should be referred to the Drafting Committee for consideration in the light of the observations made by Mr. Stavropoulos.

*It was so decided.*¹²

RECOMMENDATION TO THE GENERAL ASSEMBLY

32. The CHAIRMAN invited members of the Commission to express their views on the scope of the recommendation to be submitted to the General Assembly regarding the draft articles.

33. Mr. FLITAN said that there were many arguments in favour of the convening of a conference of plenipotentiaries—the same procedure as had been followed in the case of the draft articles on the law of treaties.

34. Mr. USHAKOV said that, while it might be easy to agree on the principle of a recommendation calling

¹¹ For the text, see 1701st meeting, para. 22.

¹² For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 15.

for the conclusion of a convention, the drafting of such a recommendation was a more difficult matter. Should the Commission recommend, for example, the convening of a conference of representatives of States only, or of representatives of States and of international organizations? It was important for the Commission to consider beforehand the situation of international organizations in respect of the future convention, since those organizations could actually become parties to the instrument or could assume obligations in other ways than by signature. Perhaps the Chairman or the Drafting Committee could draft one or a number of recommendations concerning the convening of a conference of plenipotentiaries.

35. Mr. McCAFFREY reiterated his preference for the holding of an appropriately convened conference to adopt a convention. He agreed that the drafting of the recommendation might give rise to some complications, but those complications were not unsurmountable. He agreed in principle to refer the draft articles to a conference of States with the participation of intergovernmental organizations.

36. Mr. JAGOTA endorsed the views of the three previous speakers. The proposed course was a logical one. The draft articles would complete the codification of international law governing the treaties in general. Certain portions of that law had been left outside the scope of the 1969 Vienna Convention. Subsequently, the topic of succession of States in respect of treaties had been the subject of a separate convention. The question of treaties to which international organizations were parties (which had been similarly deferred) should receive the same treatment and be dealt with by a conference of plenipotentiaries.

37. The question of participation by international organizations raised the important practical issue of which organizations would be called upon to participate in the proposed conference, apart, of course, from States. It might be suggested that every intergovernmental organization with treaty-making capacity should be invited to participate. If that proposition were accepted, it must then be decided whether the treaty-making capacity should derive from the terms of the constituent instrument of the organization, or whether it was enough for it to be contained in the internal rules of the organization or merely result from established practice. Obviously, if it was stipulated that intergovernmental organizations should have statutory treaty-making capacity, the number of organizations to be invited would be few. Should the broader view prevail, on the other hand, numerous international organizations would qualify for participation.

38. Should the number of invited organizations be large, the result would be to create uncertainty as to the degree of acceptance of the draft articles. So far, very few organizations had submitted comments on the articles and, if a large number of organizations were to participate in the conference, the outcome would be quite unpredictable. In the circumstances, he felt that

the Commission was bound by the terms of draft article 6, which had already been adopted, and stated that the capacity of an international organization to conclude treaties was "governed by the relevant rules of that organization". Accordingly, any international organization having the capacity to conclude treaties in accordance with article 6 should be invited to participate in the conference.

39. Mr. LACLETA MUÑOZ supported the proposal calling for the convening of a conference of plenipotentiaries, which was the method traditionally adopted in carrying out the codification and progressive development of international law. The Commission should recommend that approach in the current instance; only when it was felt that a set of draft articles was not likely to become international law should a different course be recommended. On the subject of participation, he agreed entirely with Mr. Jagota that the criteria for treaty-making capacity should be the same as those stated in articles 2 and 6 of the draft.

40. Mr. DÍAZ GONZÁLEZ said that the question of participation was a matter to be decided exclusively by the General Assembly; the Commission was not empowered to make any recommendations in that regard. It should confine its action to recommending that the draft articles be referred to a conference of plenipotentiaries, in accordance with article 23 of its Statute.

41. Mr. NI said he supported the idea of submitting the draft articles to a conference of plenipotentiaries. The articles constituted the counterpart of those which had become the Vienna Convention, and there was no reason for giving them a different treatment. With regard to participation, he pointed out the difficulties that would result from the extremely large number of existing intergovernmental organizations, some of which, although of a highly technical character, nevertheless had treaty-making capacity. It might be advisable to take the preliminary step of requesting the Secretary-General to ask all intergovernmental organizations first, whether they were interested in participating in the conference and secondly, whether they had the capacity to conclude treaties. In that way, when the invitations to the conference were eventually issued, they would be addressed only to those organizations with treaty-making capacity which were interested in participating.

42. Mr. YANKOV urged caution in making recommendations; the Commission should not go beyond its terms of reference or attempt to do the work of political organs. As he saw it, the question of the procedure for the adoption of the future convention was more important than determining which organizations should be invited to the conference. He suggested, therefore, that the Commission's recommendation in the matter should be confined to the terms of article 23, subparagraph 1 (d), of its Statute. Of course, the report could include a commentary summarizing the views expressed on various other points. Such matters as participation, however, should be left to the General Assembly, in ac-

cordance with Article 13, paragraph 1, subparagraph *a*, of the Charter.

43. Two points were of course certain. First, a conference of plenipotentiaries would be held under United Nations auspices, and second, the conference would examine the draft articles. However, the Commission could not deal with the question of the rights of participants in the conference. In the past, as a general rule, international organizations had usually participated in plenipotentiary conferences only as observers; that had been true even in the case of the Third United Nations Conference on the Law of the Sea, when the position of those very organizations was being considered. It was essential to bear in mind that, in international law, law-making was essentially the task of States.

44. The United Nations specialized agencies and the IAEA would certainly be invited to participate in the conference. As for other intergovernmental organizations, it would be appropriate to examine their relationship with the Economic and Social Council. In that connection, he recalled the serious problems that had arisen in the special sessions of the General Assembly on disarmament regarding the participation of organizations concerned with disarmament problems. All those questions had significant political connotations, which the Commission should leave to the competent organs of the United Nations.

45. There was also the problem of the large number of intergovernmental organizations which might be eligible for participation. It was not at all improbable that as many as 350 intergovernmental organizations might wish to participate, thus outnumbering the 150 States that would be invited. With regard to Mr. Ni's interesting suggestion that a preliminary survey should be conducted before establishing the final list of invitations, he felt that the matter could not be left to the Secretary-General to decide. That was a matter which should be decided by a resolution of the General Assembly. Such a resolution would not be of a merely procedural character, as shown by the case of the Third United Nations Conference on the Law of the Sea. Clearly, it was not for the Commission to request the Secretary-General to conduct the survey proposed by Mr. Ni; the whole question should first be examined thoroughly by the Sixth Committee. The Commission, for its part, should draw the matter to the attention of the Sixth Committee by means of some appropriate reference in the report. That would give Governments a clear indication on the subject, with a view to the work of the thirty-seventh session of the General Assembly.

46. Mr. QUENTIN-BAXTER agreed with previous speakers on the need for the Commission to be very careful and restrained in its suggestions. It should remember that it was not a decision-making body and should confine its action to drawing the attention of the General Assembly to some relevant considerations. He therefore favoured the adoption of a recommendation to the effect that a conference of plenipotentiaries should be convened to consider the draft articles,

qualified by the comment that the case was a very special one. The General Assembly might then wish to consider the special interest of intergovernmental organizations in relation to the treaty which should be the outcome of the draft. The point should also be made that the United Nations must do its best to obtain the reactions of intergovernmental organizations to the draft.

47. The question of participation raised some very real problems. There must be adequate representation of States at the proposed conference. Clearly, States would not be represented at the conference in the same manner as they had been at the two sessions of the United Nations Conference on the Law of Treaties. As he saw it, there was a very real danger that States would be not only outnumbered, but even outshone, by the intergovernmental organizations. There was also the question of the participation of intergovernmental organizations in the future treaty. He earnestly hoped, in that connection, that organizations which did not signify their desire to be bound by the treaty would not thereby automatically be assumed not to be bound by it. It would be most unfortunate for the future if any such precedent were established. In conclusion, he supported the proposal to refer the draft articles to a conference of plenipotentiaries, since those articles were no less worthy of such treatment than earlier drafts relating to the law of treaties.

48. Mr. CALERO RODRIGUES supported the proposal to refer the draft articles to a conference of plenipotentiaries and agreed with previous speakers that caution should be exercised with regard to the question of participation in the conference. There was, of course, no certainty that the Commission's recommendation for the holding of the conference would be accepted. There was currently some reluctance on the part of States to convene conferences, because of the feeling that too many of them were being held. That being so, he believed that the Commission would not be exceeding its mandate if it were to add to its recommendation the comment that, in view of the nature of the draft, intergovernmental organizations with treaty-making capacity should be permitted to participate. There was of course no need for the Commission to go into details regarding such questions as invitations.

The meeting rose at 1 p.m.

1728th MEETING

Wednesday, 16 June 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) /A/CN.4/341 and

Add.1,¹ A/CN.4/350 and Add. 1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*concluded*)

RECOMMENDATION TO THE GENERAL ASSEMBLY (*concluded*)

1. The CHAIRMAN, speaking as Special Rapporteur, said that a number of conclusions could be drawn from the exchange of views that had taken place at the previous meeting. In its recommendation to the General Assembly on what was to be done with the draft articles on treaties concluded between States and international organizations or between two or more international organizations, the Commission should first indicate clearly and concisely its choice from among the four options set forth in article 23, paragraph 1, of its Statute and, secondly, justify that choice.

2. With respect to the operative part of the recommendation, members had been unanimous in the view that the General Assembly should convene a conference for the purpose of concluding a convention. One member of the Commission had suggested that all the relevant considerations should be indicated in the justification for that choice. However, as Special Rapporteur—indeed, as Chairman of the Commission—his own view was that the reasons should be stated simply and concisely, in keeping with the Commission's tradition and, in particular, with the position adopted in the past by the General Assembly itself, which had convened conferences to confirm the results of the Commission's work on the law of treaties, succession of States in respect of treaties and the representation of States in their relations with international organizations of a universal character. The Commission would therefore recommend the convening of a conference, on the understanding, of course, that it would not be required to consider the many problems that might arise in that regard and that were a matter for the General Assembly alone to determine, together with the understanding that the General Assembly, precisely on account of such problems, might be impelled to take a different decision.

3. In any event, the General Assembly would have to decide on the manner in which international organizations might be bound by the draft articles—and they would necessarily be bound by any convention—and also on the modalities for their participation in the work of the conference. With respect to the first question, international organizations might be bound by the set of draft articles by becoming full parties to the ensuing in-

strument, by a system similar to that provided for in the Convention on Privileges and Immunities of the Specialized Agencies,³ or by some other means. That again was a policy matter, which the General Assembly alone could decide. Similarly, the Commission should leave to the General Assembly the question of which international organizations would participate in the conference and on what basis—as of right, by special status, and so on—to which the Assembly would doubtless find an appropriate solution.

4. The exchange of views had also focused on the formulation of a preliminary draft recommendation, and it had been left to him to judge whether he should prepare it alone or submit it to a group, to a few members of the Commission or to the Drafting Committee. He intended to prepare a text without delay and submit it to some, if not all, members of the Commission for their consideration, but the matter need not be settled at the present meeting. When the text was ready, he would consult the Commission, as its Chairman, in order to determine whether it wished to examine the text before taking up the draft report on the work of the session, whether it wished simply to refer it to the Drafting Committee, or whether it preferred some other procedure.

5. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed to accept the proposals he had made as Special Rapporteur.

*It was so decided.*⁴

6. The CHAIRMAN announced that the set of draft articles on treaties concluded between States and international organizations or between international organizations, including the annex, had been considered in its entirety and referred to the Drafting Committee.

Jurisdictional immunities of States and their property (*continued*)* (A/CN.4/340 and Add.1,⁵ A/CN.4/343 and Add.1-4,⁶ A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁷ (*continued*)

³ United Nations, *Treaty Series*, vol. 33, p. 261.

⁴ For the discussion in the Commission and its decision concerning the recommendation to the General Assembly, see 1748th meeting, paras. 3-5.

* Resumed from the 1718th meeting.

⁵ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

⁶ Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

⁷ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154 footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

ARTICLE 11 (Scope of the present part) *and*

ARTICLE 12 (Trading or commercial activity)

7. The CHAIRMAN proposed that the Commission take up draft articles 11 and 12, submitted by the Special Rapporteur in his fourth report (A/CN.4/357, paras. 29 and 121), which read:

Article 11. Scope of the present part

Except as provided in the following articles of the present part, effect shall be given to the general principles of State immunity as contained in Part II of the present articles.

Article 12. Trading or commercial activity

1. In the absence of agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of that other State, being an activity in which private persons or entities may there engage.

2. Paragraph 1 does not apply to transactions concluded between States, nor to contracts concluded on a government-to-government basis.

8. Mr. MALEK said he shared the view of other members of the Commission that article 11 in its present form tended to duplicate article 6. He had pointed out on an earlier occasion (1709th meeting) that article 6 set forth the rule of State immunity but made the rule subject to the provisions of other draft articles. Moreover, under article 6 immunity could be viewed only within the limits laid down by the various provisions of the draft, including those forming part III, entitled "Exceptions to State immunities". However, article 11 enunciated the same rule in slightly different terms by stipulating that effect should be given to the General principles contained in part II, except as provided in part III. Consequently, he saw no great objection to maintaining article 11, but is present wording made it appear to be an introduction to part II rather than to part III. If it was to remain in part III, it should be amended accordingly.

9. As to article 12, paragraph 1, he wondered whether it would not be preferable for the phrase "being an activity in which private persons or entities may there engage" to appear instead in article 2, relating to the use of terms, for it was doubtful whether such clarification was appropriate in a substantive article. In any event, the word "*telle*", in the French version, was out of place in a legal text of that kind, and it should perhaps be replaced by the expression "*de nature à*". In paragraph 2, the use of the word "States" in the expression "transactions concluded between States" and the use of the word "government" in the expression "contracts concluded on a government-to-government basis" did not seem felicitous, even though the distinction between the concepts of "State" and "government" was justified in the context.

10. Mr. RAZAFINDRALAMBO observed that, in considering part III of the draft, concerning exceptions to State immunities, the Commission was once again confronted with problems relating to the scope of the

rule on immunity and the need to maintain a balance between the sovereignty of the territorial State and that of the foreign State. Those problems were assuming growing importance because of the accession to independence of new States whose political and economic interests had apparently been subject to conflicting demands—political interests that called for a clear confirmation of sovereignty and of its corollary, immunity, and economic interests that prompted an easing of the immunity rule, in view of the trend in industrialized capital-supply countries towards narrower immunity. The new States had been compelled to yield to efforts to encompass trade and development needs in the exceptions to immunity: first, by waiving immunity through clauses on jurisdiction that were regularly included in contracts concluded with foreign partners in the financial, commercial or industrial fields and were designed to prevent any recourse to domestic jurisdiction; and secondly, by increasingly conceding to the distinction—one which had become traditional in industrialized countries—drawn between *acta jure imperii* and *acta jure gestionis*, or a similar differentiation.

11. The fourth report (A/CN.4/357) and the draft articles submitted by the Special Rapporteur were based on that distinction, and it was difficult not to endorse, in principle, the approach followed by the Special Rapporteur, who had devoted part III of the draft to the exceptions to State immunities. Nevertheless, in common with other members of the Commission, and most recently, Mr. Malek, he wondered too whether article 11 did not duplicate article 6, particularly paragraph 2 thereof. An introductory provision to part III was undeniably useful, provided part III dealt with more than one exception, in which case the exceptions should be introduced directly by some such formula as "A State is not immune from the jurisdiction of another State in the cases set forth in the following articles", as was done in the Foreign Sovereign Immunities Acts in the United Kingdom and the United States.⁸ In any event, article 11 began with a reservation whose meaning was not altogether clear, since the phrase "Except as provided in the following articles of the present part" appeared to refer to article 12, which stipulated "In the absence of agreement to the contrary ...", thus obviating the need for the reservation at the beginning of article 11.

12. Article 12, which had to be considered in the light of articles 2 and 3, made the exception to immunity subject to two conditions: the State must be conducting a trading or commercial activity, and the activity must be one in which private persons or entities might engage. "Trading or commercial activity" was defined in article 2, subparagraph 1 (f), as a regular course of commercial conduct or a particular commercial transaction or act, and that definition was further explained by the interpretative provision in article 3, paragraph 2, to the effect that the commercial character of a trading or commercial activity was determined by the nature of the

⁸ See 1709th meeting, footnotes 12 and 13.

course of conduct or particular transaction or act, rather than by its purpose. Unfortunately, however, those explanations did not solve all the problems. What indeed was the meaning of the expression "nature of the course of conduct"? Malagasy law, following French law, enumerated a number of acts which, by their nature, were deemed commercial, together with some activities that were not covered by the Commercial Code. Case law had developed two criteria for establishing the commercial character of an act by laying down essential conditions: the part the act played in distributing wealth, and the concept of speculation and pecuniary gain. Since the French versions of article 2, subparagraph 1 (*f*), and article 3, paragraph 2, both spoke of the "nature" of the activity, it was essential to take account of those criteria, which were generally acknowledged under the civil law system. Since one of them was pecuniary gain, could activities be described as commercial when they were non-profit making and had no speculative intent?

13. In his opinion, it was the abandonment of the formalistic criterion, and thus the concept of public service that accounted for the somewhat curious decisions mentioned by the Special Rapporteur (*ibid.*, para. 48), decisions whereby, for example, a contract for the purchase of bullets had been deemed a private act, whereas the purchase of cigarettes for a foreign army had been judged to be an act of the public authority. Hence it was difficult, in the absence of objective criteria for determining the nature of the commercial activity, to avoid running into distinctions that bordered on the arbitrary. Some activities, such as those relating to contracts for the transfer of technology or technical assistance agreements, were of a somewhat intellectual nature and it was not easy to say *a priori*, whether they constituted a commercial activity. A trading or commercial activity should therefore be defined by a combination of various criteria.

14. The second condition laid down in article 12, namely, that the activity was one in which private persons or entities might engage, could not easily be applied on a universal basis because the legal systems in the world were varied, if not at variance with one another. In order to determine whether or not a private person might engage in a particular activity, would his position have to be regarded from the standpoint of the territorial State or that of the foreign State? In many countries, private persons or entities could carry out many acts that were considered elsewhere as commercial. Moreover, a Government would only have to decree that a particular activity fell outside the private sector for it to consider that the activity was covered by immunity. Accordingly, the use of the phrase "being an activity in which private persons or entities may there engage", at the end of article 12, paragraph 1, had more drawbacks than advantages. In principle, paragraph 2 of the article met with his support and could be referred to the Drafting Committee in its present form.

15. Mr. NI noted that, in his fourth report (A/CN.4/357, paras. 27-28), the Special Rapporteur had dwelt on the relations between rules and general exceptions, but the prevailing opinion, and one he himself shared, was that State immunity itself constituted a rule and not an exception to another rule. Indeed, the very terms of article 6 clearly showed that that was true, as he had had occasion to point out earlier in the discussion (1712th meeting).

16. He too agreed that article 11, was of doubtful value in its present form and that it partly repeated the contents of articles 6 and 7, and perhaps even article 8. It could well be redrafted by using a formulation such as: "A State is not immune from the jurisdiction of another State in the cases provided for in the articles of the present part", but even then the article would have little meaning, except as an introductory provision to part III. It would in fact restate what was already clear from the title of part III of the draft, which covered the exceptions to the general principle of State immunity.

17. Mr. EVENSEN agreed that article 11 seemed superfluous. The basic principle was already embodied in article 6, and it was obvious that the general principles set forth in part II applied to all of the articles in other parts of the draft. The very heading of part III was sufficient to indicate that the articles in it contained exceptions to State immunity, something which tended to militate against the alternative formulation for article 11 proposed by Mr. Ni.

18. In article 12, paragraph 1, the phrase "conducted by it, partly or wholly in the territory of that other state" was unduly restrictive. Under the general principles of conflict of laws, venue was possible in a State without need for the transaction to have been concluded in the territory of that State. He therefore proposed that the words "or where the authorities of that State have jurisdiction over such activity" should be inserted after the words "in the territory of that other State".

19. In his opinion, a broader interpretation should be placed on the formula "trading or commercial activity". In Norway at least, it covered fishing and hunting, which were of great practical significance, especially in the North Atlantic area. Again, under Norwegian law the placing of a Government loan in the international bond market was deemed a commercial activity and, accordingly, foreign bondholders could sue the Norwegian Government in the Norwegian courts in connection with suppression of the gold clause. Lastly, the end of paragraph 2 of article 12 might be reworded to read: "... transactions or contracts concluded between States or on a government-to-government basis".

20. Mr. CALERO RODRIGUES said he shared the views of previous speakers that article 11 was superfluous, something which the Special Rapporteur himself appeared to have recognized, judging from his remarks in the fourth report (A/CN.4/357, paras. 27-28).

21. Clearly, article 12 stated an exception to the rule, rather than the principle, of State immunity, for it should be remembered that the Commission was engaged in drafting legal rules for the application of a certain principle. Indeed, article 12 was of great importance and lay at the heart of the rule and the exceptions thereto. The terms of the article hinged largely on the rather difficult interpretation of the expression “trading and commercial activities”. Under the definition contained in article 2, subparagraph 1 (f), “trading or commercial activity” signified a regular course of commercial conduct or a particular commercial transaction or act, but that definition raised the question of the determination of the commercial character of an act, which could be decided on the basis of either the legislation of the forum State or that of the foreign State. A number of Governments had stated that consideration must be given strictly to the nature of the act, to the exclusion of its purpose. However, the use of such criteria was rendered difficult by the fact that the precedents were inconsistent not only between countries but even between courts in one and the same country.

22. In view of the uncertainties, a clearer definition of the expression “trading or commercial activity” was obviously required. Admittedly, the nature of the act must be the major factor in determining whether it had a commercial character, but account must also be taken of its purpose. At the same time, the element of profit could not be excluded altogether.

23. Mr. FRANCIS referring exclusively to article 11 for the time being, said that it was not necessary as it stood but might none the less be included in the draft in some other form. The provisions of the article should be couched in terms of a statement on the boundaries of the exceptions and on the general plan and scope of the subsequent articles, rather than affirm that effect should be given to the general principle of State immunity.

24. Mr. BALANDA said he too felt that article 11 was not indispensable. To begin with, the title did not seem consistent with the article’s place in the draft, and it should be amended to show that it related to exceptions either to the rule, or the principle, of jurisdictional immunities of States and their property, in which connection Mr. Al-Qaysi (1711th meeting) had rightly pointed out that the Commission should decide whether it intended to make such immunities a principle or a rule. Moreover, the provision itself appeared to duplicate article 6, paragraph 2, and articles 7 and 8.

25. Fortunately, the relativity of the jurisdictional immunity of States was implied in the formulation of paragraph 1 of article 12, but he fully endorsed the comments by Mr. Calero Rodrigues concerning the expression “commercial activity”, which differed in meaning from one country to another, so that in all likelihood it would be difficult to propose a comprehensive and universally applicable definition. Plainly, a trading or commercial activity in which a State might engage should not be covered by jurisdictional immunity,

but the adjective “commercial” alone was too restrictive. It might therefore be helpful to use additional adjectives such as “industrial” and “financial” before the word “activity”, as did the Special Rapporteur in his fourth report (A/CN.4/357). One alternative, if such a course proved to be too cumbersome, would be to explain in the commentary what the expression “commercial activity” signified within the meaning of the draft.

26. Again, although the reference to “private entities” in paragraph 1 was intended to preclude immunity from jurisdiction when States carried out activities in which private persons also normally engaged, it could easily be deleted without in any way making the text less understandable, firstly, because the nature of a State differed entirely from that of a private entity, and, secondly, because the reference appeared to conflict with article 12, paragraph 2, under which the exception provided for in paragraph 1 would not apply to transactions concluded between States or to contracts concluded on a government-to-government basis.

27. As to article 12, paragraph 2, he wondered why it had to be assumed *a priori* that all contracts, of whatever nature, concluded on a government-to-government basis were not to be considered as exceptions, when the Special Rapporteur had specifically proposed from the outset that the criterion for exceptions would be the nature of the act. Furthermore, why could not all transactions concluded between States also be covered by exceptions, when Mr. Razafindralambo had just observed that the notion of pecuniary gain should also be taken into account? Were all activities in which a State might engage, either with other States or with other entities, to be considered as activities of the public authority and thus entitled to immunity? He did not think so, for the Special Rapporteur had in fact drawn attention in his fourth report (*ibid.*, paras. 35-45) to a number of cases in which the State could behave in precisely the same way as a legal person, whether natural or juridical. That indeed was what had led the Special Rapporteur to propose, as a criterion for exceptions, activities in which private persons or entities might engage.

28. He agreed with the Special Rapporteur that account must be taken of the nature of the act, but it was not the sole yardstick, since the purpose of the act should also be employed as a criterion in determining whether it came within the category of *acta jure imperii* or *acta jure gestionis*, along with any other criteria for establishing in each case whether the activity involved was commercial or one conducted by the State as the public authority.

29. Mr. RIPHAGEN said that article 11 might well seem redundant in the light of article 6, but there was some difference between them. Article 6, which reflected the best approach, left open the possibility that not all matters might be regulated by the set of draft articles, something which did not hold true in the case of article 11.

30. Article 12 afforded a good illustration of the problems posed by the wording of article 11, for it was couched in terms that gave rise to difficulties of interpretation and an element of ambiguity was introduced by the concluding words in paragraph 1, "being an activity in which private persons or entities may there engage", which should be deleted. Again, with regard to the expression "trading or commercial activity", the nature of the act involved was of course relevant, but the problem of determining the character of an act did not arise only in respect of commercial contracts, and State immunity was equally pertinent in such matters as acquisition of property, contracts of employment and wrongful acts. Accordingly, some effort should be made to clarify the concept of the commercial nature of the act. However, the element of profit had no place in the law of State immunity and there was no need to draw any distinctions in that regard. Obviously, any person making a transaction entered into it for his own benefit and that would also be true of a Government.

31. With reference to the formulation in paragraph 1, "conducted by it, partly or wholly in the territory of that other State", it had to be remembered that many activities—especially those of a general character—could be connected with several States. In such instances, the national legislations and judicial precedents in the various countries offered very different criteria for solving the resultant problems.

32. As to the question "Immunity from what?", there were cases in which the very fact that the law of a State was applicable entailed the necessity of some form of "sitting in judgement" or even some form of execution. For example, intellectual property was not of a physical character and was simply a creation of the law, but the rights in question had also to be administered by the courts and authorities of the State by virtue of whose law the property had been created. If a State applied on its own behalf for a patent in another State, it had to accept the jurisdiction of the authorities of that State in all matters pertaining to the application or enforcement of the rights involved. Similarly, it was not uncommon for a State to enter into a company governed by the law of another State and, for the purposes of its relations with the other participants in the company, it had to accept the jurisdiction of the foreign courts concerned. Yet another example was provided by arbitration, which was always connected with the legal system of a particular State: the law of the forum applied to all the consequences of arbitration. Such points would have to be dealt with somewhere in the draft.

33. Lastly, another important matter was that, even when a State engaged in trade, some element of immunity always remained, quite apart from the question of immunity from execution. For instance, it was doubtful, to say the least, whether a judge could order an injunction against a foreign State, even in connection with its commercial activities. The same was true of penalties for non-completion of contracts, the remedy known in French law as "*astreinte*", which seemed to be ruled out

by the status of a foreign State. The award of punitive damages against a foreign State would also seem to be excluded in most cases.

34. He wished to emphasize that his remarks had not been made in a spirit of criticism. They related to extremely difficult problems, and he much admired the skill with which the Special Rapporteur had striven to solve them.

35. Mr. McCaffrey, noting that several members had queried the need for article 11 on the grounds that it had the same effect as article 6 and served basically to introduce part III of the draft, said that the article could be construed as performing two other functions, both of which were of a limiting nature. In the first place, the opening phrase "Except as provided in the following articles of the present part ..." could be interpreted as limiting the possible exceptions to the ones set forth in part III of the draft; consent and waiver would also be recognized, of course, by the article's subsequent reference to part II. Secondly, the words "... effect shall be given to the general principles of State immunity as contained in part II of the present articles" arguably performed the same limiting function, since it could be interpreted as meaning that the scope of the doctrine of State immunity was confined to the rules set forth in part II. Thus, in the absence of a specific provision in part II, there would be no rule of State immunity. The phrase "... as contained in part II..." was an explicit reference to article 6, the wording of which was of paramount importance. In its current form, that article could be interpreted as restricting the scope of State immunity to the rules set forth in the draft articles. However, if article 6 were to be reworded to establish that a State would be immune from the jurisdiction of another State except as provided in part III of the articles, it could then be read as purporting to codify State jurisdictional immunity as a rule of general international law.

36. If the Commission did not consider those two functions necessary, and did not wish to confine the exceptions to those specifically enumerated in part III of the draft, then the introductory element of article 11 could perhaps be deleted, each exception instead being prefaced by some introductory wording along the lines he had suggested earlier: "A State immune from the jurisdiction of another State except ...".

37. As to article 12, it would be possible to take the view that trading and commercial activities were not, and never had been, an "exception" to the doctrine of sovereign immunity; rather, one could take the view that the doctrine simply never extended so far as to immunize States in respect of such activities. By that he did not mean to object to the title of part III; it was simply a theoretical point which might bolster the argument that trading or commercial activities should not enjoy immunity under the draft or, indeed, in general international law.

38. In regard to the requirement under paragraph 1 of the article that the trading or commercial activity should

be conducted partly or wholly in the territory of the other State, a number of speakers had stressed that care should be taken not to depart from the realm of public international law. However, conduct of the activity wholly or partly in the forum State was not a requirement under public international law and was relevant only in so far as the competence of the court under the State's internal rules was concerned. Consequently, it would be appropriate either to modify the requirement by making the determination dependent upon the jurisdiction of the forum States, as suggested by Mr. Evensen, or simply to omit it and allow each State to decide for itself whether the nexus between the activity in question and the forum State was sufficient to enable that State's courts to assert jurisdiction over the defendant State. That, too, would be achieved with Mr. Evensen's proposed formulation. Either alternative would be preferable to the existing wording.

39. He was also inclined to agree that while, in general, the nature of the activity should be the decisive factor, consideration of such factors as the purpose of the activity should not be excluded, but it might well prove dangerous to establish an exhaustive list of all the factors involved, since some of them might be omitted. Rather than lay down any criterion, it might be better to leave it to the court of the forum to determine the meaning of trading and commercial activities in accordance with its own law. Lastly, he concurred in the view that the interpretation of the requirement that the activity should be one in which private persons or entities might engage could vary, according to the different systems and jurisdictions. It really depended upon the forum State, and the fact that private persons could not engage in a particular activity in the forum State should not necessarily mean that the defendant State was immune from jurisdiction. Possibly that particular requirement, even though it was established in certain national legislations, might not be appropriate in a set of internationally applicable articles.

40. Mr. USHAKOV said that the conclusions drawn by the Special Rapporteur in his fourth report (A/CN.4/357) were totally unsatisfactory. In the report, the Special Rapporteur dealt with the question of exceptions to the principle of the jurisdictional immunity of States, a principle which stemmed from the sovereign equality of States and was a fundamental principle of general international law. Any exceptions to that principle must also be embodied in accepted rules of general international law. If the Commission intended to engage in the task of codification, it must establish the existence of such rules. If, on the other hand, it intended to concentrate on the progressive development of international law, it did not have to establish the existence of those rules; it must propose new rules, when it was convinced that there was a general tendency to respect them and that they would be accepted by all States. In his view, there was nothing to justify either step in the case at hand.

41. As the Special Rapporteur had indicated (*ibid.*, para. 52), international case law on the subject was

practically non-existent and he had therefore limited himself to studying the internal case law of States. Yet internal case law alone was not sufficient to establish the existence of a legal rule that was valid as between States. A judicial decision taken by a court of one State could be applied to another State only if the second State accepted it voluntarily. The Special Rapporteur had never said that the internal judicial decisions he had cited, which held that jurisdictional immunity did not exist, had been accepted by the States in question. In that area, the Soviet Union followed a well-established practice in that it never agreed that a foreign court might take a decision affecting it without its consent, regardless of whether the decision was favourable or otherwise. That practice was followed, not only by the other socialist countries, but by many other States as well. Admittedly, in the absence of any international case law, it was possible to study the internal case law of States. However, no conclusions could be drawn unless a practice emerged and was generally accepted by the States directly involved. The conclusion reached by the Special Rapporteur from the judicial decisions he had reviewed was quite contrary to the practice of States.

42. State legislation could also be invoked. Nevertheless, it should be pointed out that, alongside laws affirming the existence of exceptions, there were, in the Soviet Union for example, laws whereby the courts of one State were not empowered to judge another State without the latter's consent. He wondered what conclusion could be drawn from the co-existence of such conflicting laws. A law providing for exceptions to the principle of the jurisdictional immunity of States could be taken as evidence of the existence of a rule of general international law only if it were accepted by other States. Such was not the case, for example, with regard to the legislation enacted on the subject by the United Kingdom and the United States of America, which had been the subject of protests by the Soviet Union. The reason for the protests had been that the legislation in question was not purely internal in nature, but concerned international relations and ran counter to a basic principle of international law.

43. In order for treaties or agreements between States to be invoked, it must be possible to establish that they were all based on a rule that State immunity did not exist in respect of commercial activities. The Special Rapporteur's analysis of agreements concluded by the Soviet Union and other socialist countries appeared to be erroneous, not to say tendentious. Those agreements were all based on the fundamental rule of jurisdictional immunity, a rule which all the co-contracting States, whether they were socialist States, market-economy countries or developing countries, had always accepted. While it was true that the Soviet Union had been known to waive the application of that rule voluntarily in specific treaties, that fact did not justify the Special Rapporteur's conclusion that those treaties established the existence of a general rule making an exception in the case of commercial activities, since they proved the

existence of the general rule of unlimited jurisdictional immunity. It had perhaps been the Special Rapporteur's anxiety to support his position that had caused him to misinterpret the meaning of the treaties and agreements he had analysed. For example, in his report (*ibid.*, para. 99), the Special Rapporteur quoted the Treaty of Trade and Navigation, signed at Peking on 23 April 1958 between the Soviet Union and the People's Republic of China,⁹ under which the trade delegations of both countries enjoyed all the immunities to which a sovereign State was entitled, and which related also to foreign trade, with certain exceptions. Only after having laid down the principle of jurisdictional immunity, including immunity in matters of foreign trade, had the parties consented to exceptions to that principle. On the basis of that example, however, the Special Rapporteur had concluded that a generally accepted rule of exception existed. Nor was it possible to infer that such a rule existed from the Agreement concluded in 1951 between France and the Soviet Union,¹⁰ which was also quoted in the report (*ibid.*, para. 100). In that agreement, as in others of the same type concluded with other developed countries, the Soviet Union had given its consent to exceptions to the general principle of the jurisdictional immunity of States.

44. The situation was no different with regard to international conventions. States parties to the 1972 European Convention on State Immunity¹¹ had allowed a number of exceptions to the principle of immunity, exceptions which did not exist as rules of general international law. It was therefore impossible to draw the opposite conclusion, namely that such rules did exist. In the final analysis, he believed that further study should be made of State practice in order to determine whether an identifiable rule exempting commercial activities existed. Personally, he was convinced that the accepted general rule was immunity from jurisdiction and that exceptions could be made to that rule only by express consent.

45. The Special Rapporteur had stated repeatedly in his report that foreign trade was not really of a political nature and that States could conduct commercial activities on the same basis as private persons or entities. His own view was that, on the contrary, foreign trade was currently of very great political importance. All States, and in particular market-economy States, regulated their foreign trade; the free-trade era was ended for ever. Because the very existence of States depended on their foreign trade, they regulated it by setting quantitative and qualitative limits for imports and exports, by issuing licences and by levying customs duties. The reason why one State took economic sanctions against another and prohibited individuals and legal entities under its jurisdiction from conducting com-

mercial activities with that State was that its political interests were at stake. Although States, and particularly market-economy States, did not normally conduct foreign trade activities themselves, those activities, in principle, were still of a highly political nature. It was not possible to overlook that political reality and assert that foreign trade activities could be conducted by private persons or entities. A distinction must be made between the State, which conducted foreign trade activities for the benefit of its population, and the private person or entity, which sought to make a profit. Since the aim was totally different in each case, they could in no sense be placed on the same footing.

The meeting rose at 1 p.m.

1729th MEETING

Thursday, 17 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3).

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

ARTICLE 11 (Scope of the present part) *and*

ARTICLE 12 (Trading or commercial activity)⁴ (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, since he had omitted to make an introductory statement in the present discussion on articles 11 and 12, some clarification was required in response to the comments by a number of members of the Commission.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981* vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the texts, see 1728th meeting, para. 7.

⁹ United Nations, *Treaty Series*, vol. 313, p. 152.

¹⁰ Agreement (with Protocol) concerning reciprocal trade relations and the status of the Trade Delegation of the Union of Soviet Socialist Republics in France, signed at Paris on 3 September 1951 (*ibid.*, vol. 221, p. 92).

¹¹ See 1708th meeting, footnote 12.

2. Article 11 served a number of purposes. First, it acted as an introduction to the subsequent articles in part III and, in that connection, he wished to thank Mr. Ni for his valuable drafting suggestions (1728th meeting, para. 16). Indeed, it had been suggested that such an introductory article was not necessary because of the very title of part III, but the matter was not so straightforward as it might seem. To take the English version alone, he had used the form “exceptions to immunity”, in keeping the United States legislative practice. However, the form “exceptions from immunity” was used in the practice of the United Kingdom, Pakistan and Canada. It would be for the Drafting Committee to make a choice and submit a proposal on that point. Secondly, article 11 provided a link to ensure the necessary transition between parts II and III of the draft, and it was in the nature of a signpost that warned of the difficulties that lay ahead in subsequent articles. Thirdly, the article could serve to dispel some doubts and highlight the relativity of the rule on State immunity, as well as the exceptions thereto. Articles 7 and 8 were couched in unduly absolute and unqualified terms, and article 11 therefore afforded a suitable place for qualifying those provisions. Again, it would be useful to keep article 11 in reserve as a substantive introduction to part III, bearing in mind the controversial character of the topic, which gave rise to great divergence of views and should therefore be approached with caution.

3. Article 12, however, dealt with the exception to the rule of State immunity that was least open to dispute, as could be seen from recent trends in State practice in connection with trading or commercial activity, practice which had no bearing on the distinction between acts performed *jure imperii* and acts performed *jure gestionis*. From some thirty years' experience he could vouch for the abundance of evidence in support of the provision contained in article 12.

4. Article 31, subparagraph 1 (c), of the 1961 Vienna Convention on Diplomatic Relations set forth an exception to the immunity of diplomatic agents for the case of an action relating to “professional or commercial activity”. No definition of “commercial activity” was provided in the Convention and there was no reference to that point in the Commission's commentary⁵ to the draft articles which had been used as a basis for the work of the 1961 United Nations Conference on Diplomatic Intercourse and Immunities. However, the concept of “commercial or trading activities” had been defined by learned bodies, such as the Harvard Law School,⁶ and some definitions of that kind had found their way into certain national legislations. The Havana

Charter⁷ had also attempted to lay down certain criteria, which drew a clear distinction between purchase and sale and, with regard to the former, between purchase for own use (which was not commercial) and purchase for commercial resale. Naturally, sale always constituted trading, regardless of the presence or absence of the profit motive. For example, Mr. Riphagen had pointed out that practically all airlines operated at a loss, but they were none the less highly commercial in character. Nevertheless, in the present instance the Commission had to go beyond such concepts and define the kinds of activities that were covered by article 12. Mr. Evensen (1728th meeting) had given the useful example of hunting and fishing, and there was also the problem of investments, the commercial character of which was sometimes doubtful.

5. The territorial connection established by the words “partly or wholly in the territory of that other State” was intended to serve not only the purposes of private international law but also those of public international law, which laid down the supremacy of the territorial State. Lastly, he wished to thank the members who had made valuable suggestions regarding the formulation of paragraph 2 of article 12, and noted that no objection had been raised to the exception set forth in that paragraph.

6. Mr. JAGOTA said that several different views had been expressed with regard to the approach to the problem of the relationship between a rule and an exception to the rule. For his part, he fully endorsed the Special Rapporteur's decision to use the inductive approach and to enunciate the rule on State immunity and then enumerate the exceptions.

7. The legal position in the matter had been clarified by Mr. Ushakov (*ibid*), whose remarks appropriately conveyed the position not only in the socialist countries but also in many developing countries. The practice of India, for example, followed the same general direction as that indicated by Mr. Ushakov. Section 86 of the Code of Civil Procedure⁸ laid down that a foreign State engaging in commercial acts could be sued in the Indian courts but added that the prior consent of the central government was essential before any suit could be brought. Accordingly, the consent of the Indian Foreign Office was required in all such cases, but had in fact rarely been given, even in respect of commercial and trading activities. An exception was made only when the foreign State concerned had previously given its consent to the jurisdiction of the Indian courts, either in general terms under an international agreement or, in respect of a particular transaction, in the form of a waiver in a specific contract. Such provisions were, of course, common in State trading activities and in contracts concluded with State enterprises of foreign States. The con-

⁵ See *Yearbook ... 1958*, vol. II, pp. 98-99, document A/3859, chap. III, sect. II, commentary to article 29 (Immunity from jurisdiction).

⁶ “Draft Convention and comment on competence of courts in regard to foreign States”, prepared by the Research in International Law of the Harvard Law School, art. 11, in *Supplement to the American Journal of International Law*, (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 597.

⁷ Havana Charter for an International Trade Organization (*United Nations Conference on Trade and Employment, Final Act and Related Documents* (Havana, Cuba, 1948), E/CONF. 2/78, sect. II.

⁸ See 1708th meeting, footnote 31.

tracts in those cases usually included arrangements for the law applicable and for submission to the jurisdiction of the courts of a given country. Another option was reciprocity action. If the Indian Government did not enjoy State immunity in respect of certain acts in a particular foreign State, the Indian Foreign Office would give its consent under section 86 of the Code of Civil Procedure for action to be taken in the Indian courts in respect of similar activities conducted in India by the foreign State in question.

8. To his mind, State practice along those lines corroborated the substance of article 12, which contained an exception that could be said to be in a fairly advanced stage of formation as a customary rule of international law. It was much more than *lex ferenda*, although not quite *lex lata*. The wording of article 12 took due account of the fact that the rule embodied in it was still in the emergent stage, and the opening phrase, "except as provided in the following articles of the present part", of article 11 also made it clear that the rule involved was residual in character. Mr. Evensen's welcome suggestion (*ibid.*, para. 19) would prove useful in redrafting the formulation of article 12, paragraph 2, and the rule set forth in article 12 would thus be made more flexible. Hence, although he could agree to article 12, in the main, two basic questions should be dealt with in the definitions, or at least in the commentary.

9. First, the meaning of the term "State" would have to be defined so as to encompass State-owned enterprises. Second, in international law, the term "territory" signified a State's land territory, together with its territorial sea and the superjacent airspace. Technically, however, it did not include the 200-mile exclusive economic zone. An additional problem lay in activities conducted outside a State's territory but having an effect in that territory. One example was that of a State's deep sea-bed mining activities which did not take place in its territory but had effects therein because the mining products were sold in that territory. In cases of that kind, it would be necessary to determine whether the courts of the territorial State had jurisdiction and whether the rule of State immunity applied.

10. The test embodied in the proviso "being an activity in which private persons or entities may there engage", quite apart from the technical problems involved, was unlikely to prove politically acceptable and its application would lead to unbalanced situations. In fact, the expression "an activity in which private persons ... may engage" would clearly have a totally different meaning in a socialist country, as compared with a market-economy country. Accordingly the proposed test would thus produce totally different results, depending on the economic systems of the two States involved. Since the proviso was simply intended to indicate that the activities in question were activities governed by private law, it could well be deleted from paragraph 1 and reflected in paragraph 2 or even relegated to the commentary.

11. The expression "trading or commercial activity", raised the delicate question of the relationship between the nature and the purpose of the activities concerned. Article 3, paragraph 2, placed emphasis on "the nature of the course of conduct or particular transaction or act, rather than ... its purpose". In that regard, State practice in the developing countries was still hesitant. Difficulties arose because, in those countries, it had been found necessary for the State to take the lead in certain matters simply to further the cause of development, a fact which made the test in article 3, paragraph 2, difficult to apply.

12. Again, article 11 would lead to difficulties of interpretation if retained in its present form. As a link between parts II and III of the draft, it merely specified that effect must be given to the general principles of State immunity, except in the situations covered by articles 12 *et seq.* In so doing, it emphasized the rule of State immunity and the conclusion was that the exceptions to that rule must be interpreted restrictively. However, the matter could be dealt with in article 6, which already enunciated the main rule. Accordingly, article 11 should be deleted and the exceptions in part III would commence with what was now article 12.

13. Mr. McCAFFREY said that his earlier remarks (1728th meeting) had been made on the assumption that the exception to the general rule of State jurisdictional immunity in the case of trading or commercial activity was accepted by the Commission. Meanwhile, certain comments had called into question the very existence of the exception and had prompted him to consider the status under general international law of State trading or commercial activity as it related to jurisdictional immunity.

14. Mr. JAGOTA had pointed out that in some countries no immunity would be granted in respect of claims involving a State's trading or commercial activity if the defendant State did not grant immunity to the forum State in similar circumstances. However, a somewhat broader interpretation could be placed on the exception in an endeavour to show that it could be treated not as an exception but as a rule of public international law, which stood on a par with the rule of State jurisdictional immunity itself. That proposition could be analysed more particularly in the light of the comments made by Mr. Ushakov (*ibid.*), who had examined three different matters—municipal and international case law, legislation, and treaties—and had concluded that none of them was the source of an exception under international law for trading or commercial activity.

15. The first question to be considered, therefore, was whether the exception in article 12 merely reflected the case law and legislation of various jurisdictions or whether it was a principle as fundamental as the rule of sovereign immunity itself. The starting point in that regard was Mr. Ushakov's affirmation that the basic reason why the principle of State jurisdictional immunity did not involve a conflict of sovereignties was that one State could enter the territory of another State and

act within it only with the consent of the other State. In other words, one State could refuse to allow entry by another State, for trading or even for diplomatic purposes, as was apparent from article 2 of the Vienna Convention on Diplomatic Relations. Accordingly, if jurisdictional immunity itself was a rule, it came into play only when a State had given its consent to another to conduct activities within its territory.

16. Yet it was clear that one State could permit another to enter its territory without making all the activities of the latter State immune from its jurisdiction, something that was evident from article 31, subparagraph 1 (c), of the Vienna Convention on Diplomatic Relations and article 43 of the Vienna Convention on Consular Relations, which illustrated the basic proposition that immunity might not be co-extensive with permission to enter. A State could consent to the presence of another within its borders but might not guarantee the other State jurisdictional immunity with regard to anything it might do within those borders.

17. To determine the type of activity covered by jurisdictional immunity, it was therefore necessary to look to the purpose for which immunity was granted in the first place. If, as Mr. Jagota had suggested, the aim of granting States immunity was to establish a basis for peaceful and friendly relations among States, at the very least immunity would have to be extended to the diplomatic and consular activities involved in inter-governmental relations, as well as to the persons of diplomatic and consular officials with respect to acts performed in the course of their official duties. Presumably, however, the mere fact that the person of the official was immune would not mean that the State would be immune in respect of a contract entered into by such an official with a private party.

18. What about cases in which the foreign Government entered into relations with private individuals? It could be argued, by analogy with article 43, subparagraph 2 (a), of the Vienna Convention on Consular Relations, that where the agency of the foreign State did not expressly or implicitly identify itself as such in its dealings with a private individual, no immunity would be granted. But this analogy may not be accepted and, in any event, does not cover all cases.

19. The *laissez-faire* era had spawned judicial pronouncements on the doctrine of sovereign immunity like that of Chief Justice Marshall in the *Schooner "Exchange"* case (1812),⁹ when there had been virtually no "grey areas", since the State had rarely entered the realm of private commercial activity. Hence, the absolute theory of sovereign immunity had made perfectly good sense at that time. The question now was whether it still did. Towards the latter part of the nineteenth century, the *laissez-faire* doctrine had given way to increasing State intervention in the private sphere as Governments had begun to regulate private activities and per-

form entrepreneurial functions such as the operation of railway, shipping and postal services, something which had obviously placed private interests in competitive activities at a distinct economic and legal disadvantage and had resulted in recognition that the jurisdictional immunity of the State was not absolute but was limited to acts of a sovereign or public nature—*acta jure imperii*.

20. Indeed, from the very outset, the doctrine of the jurisdictional immunity of foreign States had never been intended to apply to cases in which the State engaged in commercial or trading activities with private individuals. The practical need to distinguish between government acts of a public and private character had been recognized by States with major commercial and trading operations even though, at one time or another, such States had adhered to the so-called "absolute" theory of jurisdictional immunity. For example, the United States of America and the Soviet Union had frequently agreed by treaty to waive immunity with regard to shipping and other commercial activities. Again, the 1958 Geneva Conventions on the Territorial Sea and Contiguous Zone, and on the High Seas,¹⁰ in effect treated government ships operating for commercial purposes as private merchant ships. That was concrete evidence of State recognition of the functional importance of differentiating between types of government activity, and the distinctions drawn were buttressed by such multilateral agreements as the 1972 European Convention on Sovereign Immunity,¹¹ by a wealth of municipal judicial decisions and by recent legislation on the subject.

21. The need for an exception in the case of trading or commercial activity therefore seemed clear, since it not only reflected current State practice, but also enhanced the ability of States to provide for the vital needs of their people by making it safe for private parties to enter into commercial relationships with them and thus ensure the ability of States to acquire the requisite goods and services. Consequently, practical considerations also militated in favour of recognition of such an exception. In any event, it would not really restrict the immunity of the State to recognize that the State could be sued in connection with trading or commercial activities with private parties, if "restrict" was taken to mean "cut back" on a plenary immunity that had existed at one time. In fact, sovereign State immunity had never been designed to cover activities such as those mentioned in article 12. Conceptually, the view could be taken that trading and commercial activities were not, and never had been, an exception to the doctrine of sovereign immunity. The doctrine had simply never extended so far as immunity for States in respect of actions arising out of such activities.

22. Mr. FRANCIS said that article 12 caused some concern because State immunity should be qualified, in

⁹ See 1708th meeting, footnote 9.

¹⁰ United Nations, *Treaty Series*, vol. 516, p. 205, and *ibid.*, vol. 450, p. 11.

¹¹ See 1708th meeting, footnote 12.

some respects, but any qualification must take a count of certain basic considerations. Care should be taken in order to avoid jeopardizing the interests of the developing countries, which were in a special position. He had pointed out previously that, whereas the older concept of trade and commerce might have had real significance in the past, its application in the modern world could be counter-productive in the absence of proper safeguards.

23. Three items reported recently in the media could illustrate his argument. The first was an editorial in *The Times* of London on food as a foreign policy issue in Zimbabwe. The second was an item in the *International Herald Tribune* reporting that the present British Prime Minister had decided that the trading arm of the British National Oil Corporation should remain in public ownership, a decision that had been taken by a Prime Minister who held political views different from those of the Labour Party, which had originally set up the company in question. The third item was an interview on the Swiss radio with an American who had come to Geneva to try to develop the barter trade between developed and developing countries and had affirmed that, given the developing countries' lack of foreign exchange, the barter system would grow in popularity. In that regard, reference had been made to a recent agreement between the United States and a Caribbean country under which the United States undertook to supply powdered milk in exchange for bauxite from the country concerned. Such an arrangement might be hard to understand in the developed countries, where it was left to the commercial sector to supply such commodities. In poor countries, however, Governments could not afford, in terms of human resources, to rely on the private sector to meet basic needs in times of difficulty. Lastly, at a conference held in Geneva in 1978, the developing countries had formed a Council of associations of developing country producers and exporters of raw materials, with a view to rationalizing the resources of those countries in primary commodities.¹²

24. Such developments were a clear indication that the State, particularly in the developing world, was becoming increasingly involved in trading and commercial activities and would continue to be so in future, not out of any desire for profit but out of dire need. It was for those reasons that he had some doubts about the way article 12 codified the principle involved, and more specifically about the phrase "being an activity in which private persons or entities may there engage".

25. In the United States of America, there was a notion that a foreign Government could act in two capacities, commercial and political, and that notion seemed in some way to permeate the draft article, so that any activities of the State which fell outside the political sphere would be deemed commercial and, consequently, would attract the jurisdiction of the territorial State. The matter was being over-simplified,

since what might appear *prima facie* to be an exclusively commercial arrangement—a barter agreement, for instance—was in fact totally political, inasmuch as it was concerned with the well-being of the people. An examination of the article revealed that it was based on the legislation of the United States and the United Kingdom and on the State practice of countries whose thinking was cast in the same mould.

26. Of course, such State practice as existed must necessarily be taken into account, but something more was needed, both qualitatively and quantitatively. His concern, bearing in mind the decision in the *Krajina v. The Tass Agency and Another* case (1949),¹³ was that many State organs, particularly from the developing countries, might be exposed to the jurisdiction of the territorial State. The developing countries, unlike the developed, lacked the necessary infrastructure and therefore had to create State agencies to serve as arms of government and perform certain functions that would otherwise grind to a halt. Great care was therefore needed in drafting article 12 to ensure that all factors were taken into account, with a view to doing justice to the countries concerned.

27. It appeared that certain United States legislation, which had been the subject of some criticism in the Sixth Committee of the General Assembly, more particularly as it was applied in the Court of Claims, sought to draw a parallel between the treatment of private United States citizens and of foreign States. While the ease with which that court could entertain a suit from American nationals, or indeed from one of the constituent States, could not be questioned, he did not think that the same should apply in the case of foreign States.

28. Lastly, the activity which was deemed under article 12 to be of a trading or commercial nature could be something quite different from that under certain national laws, and it was therefore important not to draw too indiscriminately on the elements of the various national legislations in coming to a decision on the article. It would be wrong to use the analogy of a sovereign who, in a bygone age, lost his immunity if he engaged in some activity in a personal capacity, and go on to assert that in the modern world a State would also lose its immunity if it did likewise. In his opinion, no State could divest itself of its public character. Naturally, he was not opposed to exceptions to the rule of State immunity, but it was essential to weigh up the various factors that could affect all countries, including the developing countries.

29. Mr. NI, referring to article 12, said he would like to pose the question of whether there were in fact any exceptions to the principle of State immunity. In that connection, he had noted with interest Mr. Ushakov's repeated assertion that a State was a sovereign body which never lost its public personality and, regardless of the activities it engaged in, it always acted *jure imperii*.

¹² "Report of the Plenipotentiary Conference on the Establishment of a Council of Associations of Developing Countries Producers-Exporters of Raw Materials", Geneva, 5-7 April 1978 (NAC/PC/1).

¹³ *Annual Digest and Reports of Public International Law Cases, 1949* (London), vol. 16 (1955), case No. 37, p. 129.

His own view, however, was that efforts should be pursued to find a solution to a problem that had troubled the minds of lawyers for years, particularly in recent years, for developing States could not achieve their desired objective if they were constantly subjected to the jurisdiction of foreign developed States which were concerned to protect their investments abroad. Part III of the draft would not be required if no exceptions to State immunity were allowed. Nevertheless, he realized that that was not Mr. Ushakov's claim and, for his own part, he was ready to proceed to consider specific aspects of the problem. The actual structure of the draft articles and the advisability of including a list of areas of immunity and non-immunity, and indeed of "grey areas", could be decided at a later stage.

30. At the present stage, the question to be decided was what constituted trading or commercial activity, yet article 12 was silent on the matter. Article 2, subparagraph 1(f), defined such activity as: "(i) a regular course of commercial conduct, or (ii) a particular commercial transaction or act". But what was meant by "a regular course" and "a particular commercial transaction or act"? Different States, and even different courts within the same State, attached different meanings to the expression "trading or commercial activity", as was abundantly clear from legal writings and jurisprudence. In prescribing a rule of law to be observed by States, it was essential to have something to rely on, and if everything was to rest upon the decisions of the domestic courts, the value of the draft articles would be greatly diminished.

31. Yet another question related to the distinction between *acta jure imperii* and *acta jure gestionis*. In that connection, in Belgium, the Cour de Cassation had held that the operation of a Government railway was a private act,¹⁴ while many other countries regarded it as a public act. Romania considered that the tobacco monopoly involved a private act, whereas the United States of America thought the contrary. Italy deemed the purchase of military boots to be a private act, whereas France and the United States took the opposite view. Lauterpacht had given a long list of such contradictions in his writings, and legal literature on the topic reflected a similar divergence of views. In the course of the discussion, a number of questions had been raised—for example, whether "trading or commercial activity" signified trading for profit. Could every transaction for profit be termed a trading or commercial activity? Could a monopoly on certain commodities declared to be of strategic importance by Governments be considered commercial? Such points were difficult to answer, but leaving the matter to the decisions of domestic courts alone could only lead to more numerous conflicts in future. Hence, lawyers must see that justice was done.

¹⁴ *Société anonyme des chemins de fer liégeois—luxembourgeois v. Etat néerlandais (Ministère du Waterstaat) (1903) (Pasirisie belge, 1903 (Brussels), part. 1, pp. 294, 301-302).*

32. A third question of concern to a number of members of the Commission related to article 3, paragraph 2, for if the emphasis that it placed on the nature of the transaction were carried to extremes, every transaction could be deemed to be a private act; it would invariably involve buying, selling, profit-making, and possibly speculation. In the *Berizzi Bros. Co. v. "S.S. Pesaro"* case (1925),¹⁵ the Supreme Court of the United States had denied that there was any international usage that regarded the maintenance and advancement of the public welfare of the people in time of peace as any less a public purpose than the maintenance or training of a naval force. Mr. Balanda (1710th meeting) had also referred to the Belgian case of *Monnaie v. Caratheodory Effendi*,¹⁶ in which the court had held that the criterion of the nature of the act should not preclude other factors, in particular the purpose of the act performed by the State. In a socialist State with a planned economy, trade or commerce was always carried on for the benefit of the people as a whole and not for private gain.

33. He had raised those points because a rule of international law could not, in the words of Mr. Díaz González, be drafted on the basis of one trend alone. The Special Rapporteur (1713th meeting) had said that the interests of all countries, and especially those of the developing countries, must be taken into account. In fact, the interests of the developing countries lay in asserting not only their territorial sovereignty but also, in appropriate cases, their sovereign immunity from foreign jurisdiction. In that respect, there had been a trend in recent years towards a broader jurisdiction in civil procedural law. Formerly, it had been customary to sue the defendant at his domicile or place of business, but now defendants could often be brought into the jurisdiction at which the plaintiff had his domicile or place of business. Moreover, in State contract practice, developing countries were often required to sign contracts waiving their immunity in advance. For those reasons, developing States should be ever more vigilant in ensuring that they were not caught up in litigation without sufficient means to defend themselves properly.

34. The CHAIRMAN, speaking as a member of the Commission, said that he wished first of all to congratulate the Special Rapporteur both on his research into the very essence of the entire set of draft articles and on the compromise that he was proposing, one which, subject to inevitable drafting improvements, could alone command general acceptance. For his own part, he was only too aware of the radical differences in the views of the members of the Commission, differences which lay in the conflict between three different theories: first, that there was a rule of public international law establishing the immunity of the State in all cases, other than in clearly demonstrated exceptions; second, that such a rule did exist, but was accompanied

¹⁵ *United States Reports: Cases adjudged in the Supreme Court (Washington, D.C., U.S. Government Printing Office, 1927), vol. 271, p. 562.*

¹⁶ See 1710th meeting, footnote 4.

by demonstrated or demonstrable exceptions relating to trading or commercial activity; and third, that immunity did exist in a number of cases but not in others, as could be seen from the lack of a general practice.

35. In his opinion, the rule of immunity did not exist. The real rule was the territorial sovereignty of States, and the consequences of the activities of foreign States on another State's territory were open to numerous interpretations. In the political field, for example, did a State have the right to arrange for its nationals in the territory of another State to participate in elections? Many countries, more particularly the former colonial countries, challenged such a right, whereas others accepted it. Did a foreign State have the right to establish a court in its embassy for the purpose of judging its nationals? Some States answered in the affirmative, others in the negative. Switzerland, for example, did not even allow international arbitration on its territory without specific permission from its authorities. In the economic field, some States did not recognize the right of foreign States to engage in economic activities on their territory, whereas other States did, and yet others imposed particular conditions. Those conflicts were the root of the problem facing the Commission in connection with article 11 and its relationship to article 6. But in the final analysis, State immunity came down to the problem of a State's activities, including its economic activities, on foreign territory, in the context of the law of the other State concerned. For all that, the three theories did exist and the set of draft articles would have to be structured in such a way as to afford no exclusive advantage to any one of them.

36. Article 12 contained a referral to the internal law of the territorial State concerned, in other words, the State on whose territory the activity was being carried out. In view of the present wording of paragraph 1, the questions that arose was which legal system was to be used to determine the trading or commercial activity in which the private persons or entities "may" engage. The relevant legal writings contained no precise indication as to the exact right of foreign States to engage in social, financial and commercial activities on a territory other than their own. In his opinion, the Special Rapporteur had chosen the proper and indeed the only possible formulation, even though many members of the Commission were pressing for an accurate and valid description of the term "trading or commercial activity".

37. He agreed with Mr. Jagota that no problem arose in practice. It was perfectly legitimate for the socialist and semi-socialist countries to prohibit foreign States from engaging in certain activities on their territory and, if they wished, to grant them immunity in order to carry out the activities in question. If, in connection with a transaction, a developing country or a socialist country were to claim in vain the immunity that it normally granted to others, it might not agree to the transaction,

but it could obtain satisfaction by agreement or otherwise; the future of international trade did not lie in the rule to be enunciated in article 12 but in the furtherance of the international commercial arbitration practised by the socialist, the capitalist and the developing countries. Obviously, if the Commission formulated a rule such as that contained in article 12, a country which considered that it was injured would be perfectly entitled to avail itself of the principle of reciprocal action.

38. Article 12, paragraph 2, called for some clarification and for some changes. He was convinced that two States could subject their transactions to a particular system of internal law. Some developing countries had concluded contracts in a third State so that some of their relations would be brought under the local law, and they had not taken up the question of acceptance of jurisdiction. He therefore hoped that the text would be drafted carefully, so as to preserve the freedom of Governments. In fact, many countries were wise enough to accept recourse to the private law of a third country. Even a highly industrialized State, when it stood in need of money and floated a loan, was not oversensitive about its privileges and was content to turn to private law, without even taking the initiative of raising the problem of jurisdiction.

39. Mr. McCAFFREY, referring to the remarks made by Mr. Francis, said that there was a certain parallelism between the United States Court of Claims Act¹⁷ and the Foreign Sovereign Immunities Act,¹⁸ but only to the extent that the Court of Claims Act allowed suit to be brought by private citizens against the United States Federal Government. That, and other administrative procedures whereby private citizens could challenge Government action, indicated that there was something of a trend away from the notion of absolute sovereign immunity, but he did not think it went any further than that. The purpose of the Foreign Sovereign Immunities Act was to provide guidance regarding the circumstances in which foreign States could be sued in the United States courts, a function that had previously been performed by the Department of State, albeit in a far less formal manner than in certain other countries. Hence, it could not be said that foreign States were treated like the United States Federal Government so far as suits by private individuals were concerned. Both domestic practice and the practice vis-à-vis foreign Governments reflected the need to allow private individuals to bring an action against Governments, but it could also be argued that they reflected the notion that no immunity for Governments had ever existed in respect of certain types of action.

The meeting rose at 1 p.m.

¹⁷United States Code, 1976 Edition (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, chap. 7, p. 171.

¹⁸ See 1709th meeting footnote 13.

1730th MEETING

Friday, 18 June 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/339, ILC (XXXIV)/Conf. Room Doc.3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (concluded)

ARTICLE 11 (Scope of the present part) and

ARTICLE 12 (Trading or commercial activity)⁴ (concluded)

1. Mr. RIPHAGEN said that he was impressed by the quality of the discussion, which showed that international lawyers had a common interest in promoting peaceful and harmonious relations between States. He was concerned, however, at the situation that arose when international lawyers had to discuss the present topic with municipal lawyers, who had little regard for State immunity and virtually considered it a source of injustice. For example, if a company had sold goods to a foreign State, failed to receive payment and was then told that it could not sue the foreign State in the courts, it would consider itself the victim of an injustice and would ultimately demand payment from the Government of its own country. That type of case showed that there was little or no chance of getting municipal lawyers to adopt an understanding attitude towards State immunity.

2. Mr. BARBOZA said that he wished first to thank the Special Rapporteur for his laudable endeavours in submitting to the Commission material which would enable it to discuss and eventually take decisions on a topic of such importance.

3. Article 11, as a number of members had pointed out, had to be read in conjunction with article 6, yet it had in fact been deemed repetitive because it reiterated the provision contained in article 6. But that was not so.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the texts, see 1728th meeting, para. 7.

Article 11 unambiguously set forth the general principle, the general rule, of State immunity, by making non-immunity an exception thereto. Article 6, on the other hand, was not so clear and should therefore be changed so as better to reflect that general principle, that general rule or, to say the least, that general trend long discernible in international relations. Changes were required because the exception, in other words, the non-immunity, had to be interpreted restrictively, and also because if immunity was made the exception even in the legislation of the United Kingdom and the United States of America, which led the move towards a restrictive interpretation of State immunity, the Commission should not favour a formula which was even more restrictive of such immunity.

4. Article 12 lay at the heart of the set of draft articles and the differing opinions thereon merely reflected in some sense the divisions of present-day relevant doctrine. In his opinion, the Commission must seek to elaborate a draft which would, in practice, facilitate foreign trade and related international activities by protecting the interests of the developing countries and affording them the best safeguards possible. The first point was not so much how State trading or commercial activity should be defined as whether such activity should constitute an exception to the principle of State immunity. The matter was not an easy one to decide, but in view of the current overall trend, it was likely that the Commission would in the long term have to accept that State trading or commercial activity did form an exception to that principle. For all that, it would be easier to apply the exception to activities of State enterprises rather than to activities of the State itself.

5. Certainly, it was an exacting task to arrive at a universally valid definition of "trading or commercial activity" and the Commission would therefore do better to try and signpost the way. If article 12 did indeed contain an implicit referral to internal law, as Mr. Reuter had pointed out at the previous meeting, a conflict could arise with article 3, paragraph 2, which set pre-eminence on the nature of the course of conduct or particular transaction or act, because the internal law to which the interpreter was referred might not give such pre-eminence. This would interfere with the pure and simple *renvoi* by introducing a foreign element in it. Besides this aspect, emphasis on the nature of the act would also signify leaving aside some aspects of State activity which had to be taken into consideration, particularly if the Commission was to place a restrictive interpretation on trading or commercial activity as an exception to the rule.

6. Mr. CALERO RODRIGUES said that, in the interesting practical example given by Mr. Riphagen, the point to be borne in mind was that if the company in question was allowed to sue the foreign State and won its case, it would be unable to secure execution. It had of course been agreed that the question of execution measures would be dealt with separately in the draft, but it was none the less relevant to the present discussion.

7. In Brazil, the courts had often declined jurisdiction in cases against a foreign State purely on the grounds that it was better not to deal with a case at all than to hand down a decision which could not be executed. If he were to take the Brazilian view, he would have to uphold the doctrine of absolute State immunity, to which the Brazilian Supreme Court was firmly attached. His personal opinion, however, was that it was essential to seek some middle ground in order to devise a solution acceptable to all. Clearly, the Commission could not frame a set of draft articles embodying an extreme view of State immunity; equally clear was the fact that it could not reject the concept of State immunity altogether. To revert to Mr. Riphagen's example, the company had to realize that it would not obtain payment by suing in the local courts and that it had other means available to it, such as diplomatic channels.

8. Mr. USHAKOV said that, regretfully, he was compelled to reiterate that nothing made it possible to infer from State practice, as such practice was described in the Special Rapporteur's fourth report (A/CN.4/357), that there was a generally accepted exception to the principle of State immunity. The Special Rapporteur had simply sought to back up his view that jurisdictional immunity did not apply in the case of trading or commercial activity and, in so doing, had based himself on an analysis of State practice. However, with regard to the Soviet Union and other socialist countries, the Special Rapporteur's interpretation was completely incorrect. Accordingly, the fourth report should be objectively supplemented, for which purpose a brief description of the doctrine and practice in the USSR might prove helpful.

9. So far as doctrine was concerned, any State could make purchases in the Soviet Union through the foreign trade agencies, which were persons under private law, totally independent of the State, and consequently did not enjoy any immunity. If the foreign State concluded a contract containing no express clause specifying that it would subject itself to the jurisdiction of a Soviet or any other court, in the event of litigation, it would then enjoy jurisdictional immunity under both international law and Soviet law. The same was true when a foreign State sold products in the Soviet Union, and they too were sold through the same foreign trade agencies. That was so because foreign trade, even in the socialist countries and not only in market-economy countries, was always in the hands of persons under private law. It was extremely rare for foreign trade to be carried out by the State. Accordingly, what was the purpose of the set of draft articles? In his opinion, it was to undermine international law, which was based on the sovereignty and the sovereign equality of States, and hence the immunity of the State.

10. In matters relating to practice, the USSR, through its trade delegations, which formed an integral part of its embassies, frequently entered into agreements to guarantee contracts concluded by its foreign trade agencies and, of its own accord, waived jurisdictional immunity for such guarantees. If, in some instances, the

USSR was compelled to invoke jurisdictional immunity, it was because the courts in some countries adopted a tendentious attitude towards it. For example, if a Soviet foreign trade agency concluded a contract for the sale of aircraft abroad and litigation arose in that connection, the purchaser instituted legal proceedings not against that particular agency but against the Soviet State as such. The Soviet State then invoked jurisdictional immunity on the basis of both international law and its own law.

11. No State wished to conclude with Soviet foreign trade agencies a contract containing a clause on jurisdiction, for in the Soviet Union, State immunity existed in principle and no litigation arose in practice. Again, it should be remembered that foreign trade, although conducted by persons under private law, necessarily formed part of the economic and trade policy of States, a policy that must be governed by the new international economic order so as to take account of the needs of the developing countries, which suffered from discrimination, exploitation and unfavourable terms of trade.

12. Article 11 merely reproduced the provision contained in article 6. As to article 12, the phrase "In the absence of agreement to the contrary" in paragraph 1 suggested that the agreement should provide for immunity, yet the principle of immunity was already enunciated in article 6. Some members of the Commission had also proposed that the exception should include financial and industrial activity—in other words, the entire range of the economic activity of States—and any action under civil law would thus be permissible. If that proposal was adopted, what purpose would be served by the articles dealing with consent? Furthermore, like other members, he considered that it was virtually impossible to provide a definition of the expression "trading or commercial activity". He was firmly opposed to any attempt to exclude the whole field of economic activity from the scope of jurisdictional immunity.

13. Mr. FRANCIS said that, with reference to Mr. Barboza's interesting view that the provisions of article 12, paragraph 1, were more suitable for State enterprises than for the State itself, a number of practical examples could be cited to illustrate the need for caution in order to ensure that a State did not claim immunity when it engaged in commercial transactions. It was true that, as pointed out by Mr. Ushakov, commercial transactions on behalf of the State were usually conducted through enterprises organized under private law—sometimes State-owned but sometimes purely private. In countries with mixed economies, however, certain difficult problems arose from time to time. In 1973, a State had purchased wheat on the world market in order to remedy a local shortage of flour and had concluded the contracts itself because it had not had the machinery of State-owned enterprises at its disposal. Again, the same State had made international purchases of food products for its school feeding programme, the aim being to supplement the donations in kind received from friendly Governments. In that instance too, the

question arose of whether the State concerned could be said to have been conducting a commercial activity within the meaning of article 12.

14. Mr. McCAFFREY said that he welcomed Mr. Barboza's constructive observations and his view that the Commission's task was to formulate a practical draft which would reflect present trends and safeguard the interest of developing and developed countries alike. The articles had to deal with the very real problem that arose when foreign States claimed immunity from jurisdiction in suits brought by private persons. Indeed, the volume of cases involved was large, as illustrated by a published list of over 100 sovereign immunity decisions of the United States Department of State between 1952 and 1977.⁵ Clearly, the Commission should endeavour to provide some guidance for the courts that were called upon to deal with the matter, but it was not easy to achieve unanimity in that regard. Therefore, the provisions to be adopted should not be unduly specific. For example, the test of the "nature" of an act for the purpose of determining its commercial character, which was also found in the United States Foreign Sovereign Immunities Act of 1976,⁶ might, if retained, come into conflict with certain systems of internal law. The same was true of the territorial connection embodied in article 12, if it was interpreted restrictively. The best course would be to remove those elements and deal with them in the commentary; otherwise, they could well militate against acceptance of the draft by Governments.

15. Mr. BARBOZA, commenting on the remarks made by Mr. Francis, said he would like to point out that, should the Commission agree to an exception in the case of State trading or commercial activity, for obvious reasons such activity could be brought under a foreign jurisdiction or the jurisdiction of the territorial State much more easily when it was conducted by State enterprises than was the case when it was carried out by the State itself. He fully realized that the system in the Soviet Union described by Mr. Ushakov was very practical, but he had not really discarded the possibility of subjecting a trading or commercial activity undertaken by the State to a foreign jurisdiction or the jurisdiction of the territorial State.

16. Mr. JAGOTA said that he wished, in the light of Mr. Ushakov's comments, to clarify his own position. He fully agreed that the political and policy aspects of trade and commerce were important, but they were not directly germane to article 12. The article dealt with specific kinds of trading activity, rather than with the policies on such matters as the flow of goods and commodities and the earnings therefrom, which were regulated by agreements or under special arrangements made within the framework of institutions like the EEC. While his attitude was basically similar to

Mr. Ushakov's, he none the less considered that the concern of developing countries in regard to economic development matters and the related trading and commercial activities would be met by the terms of paragraph 2, since any joint venture involving an activity in a foreign State would, in most cases, be regulated by agreements at government level that provided for settlement of disputes. Accordingly, paragraph 1 was residual in character and would apply only to the case of State corporations or agencies engaged in trading and commerce and vested with that function under internal law, and in the absence of an agreement to the contrary. That should not undermine the foundations of international law, save perhaps at the level of principle.

17. Lastly, as Mr. Ushakov had explained, in the Soviet Union it was never the State but the State agencies, vested with legal personality under Soviet law, that engaged directly in a trading activity. To cover the point, the term "State" could perhaps be elaborated in the commentary so as to indicate whether it referred to the State as such, to a State undertaking, or to a statutory corporation controlled by the State.

18. Mr. KOROMA said that article 12 was central to the draft as a whole and the Special Rapporteur should not be surprised if it had aroused controversy. Mr. Jagota had suggested that paragraph 1 dealt with specific activities of States in their commercial or trade relations, whereas paragraph 2 dealt with policy matters. Article 2, however, defined "trading or commercial activity" as either a regular course of commercial conduct or a particular commercial transaction or act, and he had himself observed earlier (1712th meeting) that there was no rationale for the distinction between *jus imperii* and *jus gestionis*. What was perhaps more crucial was the fact that the article did not, to his mind, differentiate between the commercial activities of States as such.

19. Developing countries might well engage in activities which, though seemingly commercial, were in fact, part of their development effort. For example, if a Government purchased a staple food for sale to the population at a subsidized price, it might make a certain profit, but the alternative—lack of the staple food—could prove very serious. Although the definition contained in article 2 seemed to encompass activities of that kind, article 12 labelled them as trading or commercial activities of States and they were therefore subject to the jurisdiction of another State.

20. He was not sure, despite the wealth of legislation, case law and practice, whether a rule of customary law had in fact been established. Article 12 in its present form appeared to provide that if a State engaged in a trading or commercial activity it did not enjoy immunity; however, what was needed was to reflect the dual position that existed in international trade and economic relations. Hence, the aim should be to strike a balance between States that engaged in purely commercial activities for profit and States that engaged in activities which might seem commercial but were in fact

⁵ See J. A. Boyd, ed., *Digest of United States Practice in International Law, 1977* (Washington, D.C., U.S. Government Printing Office, 1979), pp. 1017 *et seq.*

⁶ See 1709th meeting, footnote 13.

important for the integrity or stability of the State. The article did not fully mirror existing trading relationships, particularly as between the developed and the developing countries. It required further consideration if the article, and indeed the draft as a whole, were to gain general acceptance.

21. Mr. BALANDA, referring to the comments by Mr. Ushakov, said that it would be useful to consider article 12 from the standpoint of the developing countries, where the State, in contrast perhaps with the situation in the developed countries, was playing an increasingly greater role in commercial transactions conducted with private persons. That tendency could be illustrated by examples from his own country. Zairian companies might need to seek on the external market products which were not available on the domestic market, in which case their trade partners regularly required a Government guarantee. Again, foreign groups interested in the Zairian market might conclude contracts with private persons in Zaire, and they too required a State guarantee. In either instance the intervention by the State was necessary in order to guarantee the transaction, and it also afforded proof of the *bona fide* nature of the contract and its value to the country. In addition, the guarantee provided the foreign partners with the assurance that they would be dealing directly with the State in the event of insolvency or any difficulties concerning the performance of the obligations of the parties. It was at that level that the problem of jurisdictional immunity arose. Most contracts of that type, which were initially concluded between private persons but could only be performed by means of a State guarantee, contained a clause to the effect that either the courts of the foreign State had jurisdiction or the State could not plead jurisdictional immunity. Faced with the needs of development and unable to do without the device of furnishing guarantees for their own enterprises, the developing countries were in fact compelled to waive their jurisdictional immunity.

22. The growing intervention of the State in the developing countries was to be seen also in the field of marketing. For example, three major Zairian companies, the General Quarry and Mining Company (*Société générale des carrières et des mines*), the Ore Marketing Company (*Société de commercialisation de minerais*) and the National Insurance Company (*Société nationale d'assurance*) did not enjoy complete freedom in their commercial transactions. At all times the State exercised a kind of supervision over almost all of their activities. For example, the General Quarry and Mining Company could not set prices without consulting the Government, and in the case of the National Insurance Company the appropriate Ministry established insurance rates in an effort to maintain an equitable balance between the constraints on the Company and its value to society. Similarly, trading in ores was not left entirely to the discretion of the Ore Marketing Company. The State always stood behind those companies and was in reality a partner in all their commercial transactions with foreigners. That was where the new inter-

national economic order should come into play. Copper prices, for instance, were not determined by the producer countries, which were compelled to agree to prices established by a whole range of international mechanisms. The new international economic order was intended to deal precisely with injustice of that kind.

23. As to the topic at hand, it was gratifying to note that, in paragraph 2 of article 12, the Special Rapporteur had reserved transactions concluded between States and contracts concluded on a government-to-government basis, a wise course that could strengthen the position of the developing countries. If the Commission's work was to prove useful, it was essential to take account of the interests of all States.

24. Mr. SUCHARITKUL (Special Rapporteur) said that he was most grateful for members' comments, which would assist him in arriving at a solution that would be acceptable to all States. He had long been aware that, so far as the Soviet Union and other socialist countries were concerned, the problem of trading activities had virtually been solved, as could be seen from the fact that not a single judicial decision on the subject had been handed down in those countries. Had all traders been familiar with the doctrine explained by Mr. Ushakov, much tendentious litigation would have been avoided. Problems had none the less arisen elsewhere and his aim therefore had been to reach some degree of compromise that would not offend the basic principles of any legal system. In that connection, he had been pleased to hear Mr. Jagota's view that policy matters relating to commerce and trade, being political in nature, lay outside the scope of the draft.

25. There was, however, a lurking danger, and Mr. Ushakov had cited an example of the way in which the national legislation of certain countries could give rise to a protest on the part of other countries. In Thailand, as in the Soviet Union, State organs and agencies were separate legal entities, and liability could not be attributed to the State, something which was borne out by a decision in which the Supreme Court of Thailand had held that it had no jurisdiction to entertain a suit brought by Thai subjects against the Government and the Council of Ministers. The decision had been based not on immunity but on the fact that, under Thai law, the Government of Thailand did not have legal personality. Protests of another kind had also occurred. For instance, Thailand had initially protested against any claim to a 200-mile limit for the economic zone, but had ultimately been compelled to make a proclamation to that effect because of its fishing interests. For all that, the main danger was that, if the Commission failed to put forward specific proposals, States would be left to enact their own legislation, as many had indeed already done. Such legislation would not be uniform, with the result that a plaintiff would look to the court that was most likely to protect his interests.

26. There were, of course, many theories of State immunity, one being that it was not a principle of international law, owing to the lack of any universal State prac-

tice. Another was that a doctrine of State immunity did exist and that it was well established in State practice. Naturally, a State could consent to the exercise of jurisdiction by another State, thus providing a basis for the recent tendency to confine immunity to certain categories of activities. Yet another theory was that, from the very outset, immunity had been founded in customary international law and in State practice, but solely in so far as sovereign acts were concerned. It was supported not only by the decisions of the courts of the United Kingdom and the United States of America, but also by the practice and case law of other countries.

27. Nevertheless, the majority in the General Assembly seemed to endorse the view that there was a general rule of immunity, involving certain exceptions. Some countries, in his opinion, placed undue restrictions on immunity. For example, in one case concerning an embassy bank account it had been held that, because the account was a mixed account, the embassy was responsible for separating it and, because it had failed to do so, the account could be attached. He was not criticizing such decisions but considered that they should be taken into account in arriving at a final solution.

28. He agreed that it might be necessary to elaborate on the definition of "trade or commercial activity" contained in article 2, subparagraph 1 (f), and the interpretative provision in article 3, paragraph 2. Furthermore, having examined in more detail practice and decisions that had caused hardship, particularly to the developing countries, he believed that the test of the nature of the act, advocated by the Austrian and German courts, should not be an absolute one. For the purpose of a more acceptable compromise, an effort could perhaps be made in the Drafting Committee to spell out the idea that the main purpose of the activity should be to provide relief for the country or to assure its stability, particularly in terms of the developmental effort. He had noted Mr. Balanda's reference to contracts of guarantee and recalled in that regard that, in a sale of Airbus to Thailand by France, he had himself been instructed to sign such a guarantee and, at the same time, a clause waiving immunity. Such an occurrence was not the first of its kind and was an indication of the way in which matters were developing.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 11 and 12, together with the definitions contained in article 2, subparagraph 1 (f), and article 3, paragraph 2 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

1731st MEETING

Monday, 21 June 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

State responsibility (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur

ARTICLES 1 TO 6

1. The CHAIRMAN invited the Special Rapporteur to introduce the topic of State responsibility.

2. Mr. RIPHAGEN (Special Rapporteur) said he would attempt to do three things: to situate the topic of State responsibility within the entire field of international law; to introduce the topic as a whole; and to make some general comments on the draft articles proposed in his third report (A/CN.4/354 and Add.1 and 2, paras. 145-150), which read as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

- (a) not to recognize as legal the situation created by such act; and
- (b) not to render aid or assistance to the author State in maintaining the situation created by such act; and

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

(c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b).

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

3. There were two basic and opposite approaches to international law. One, which could be called the classical approach, started from the sovereign State and tried to draw consequences from the plurality of sovereign States and their obvious equality. That approach presupposed roughly equal State powers. The other, which could be called the modern approach, started from humanity and the human person; from an ideal picture of the world situation, it tried to draw conclusions as to the contributions everyone had to make to the establishment of that situation and the distribution of its benefits. That approach was to be found in various fields, such as the new international economic order, the environmental movement and the quest for arms control and disarmament.

4. The two approaches tended to meet, but not at the same place in all fields, at the present stage of international law. That was why, from the legal point of view, there were different subsystems of international law, co-existing and therefore necessarily interrelated, but separate. Mr. Quentin-Baxter's topic represented the modern approach and his own the classical approach, but they also tended to meet and overlap. Represented graphically, Mr. Quentin-Baxter's topic would be near the centre, and State responsibility more towards the periphery. The Commission used the terms "primary" and "secondary"—and even "tertiary"—rules, but those rules could not define watertight compartments. In essence, the perennial question was how far the law prevailed over the facts or the facts over the law.

5. State responsibility was a highly abstract topic. Starting from the sovereignty of States, it was recognized that those States could and should be subject to obligations under international law. Taking the obligation as a starting-point, three elements were left aside, or abstracted from. First, the source of the obligation, whether general rules of customary international law, treaties, decisions of international organizations, or judgements of international courts; second, the content of the obligation, for example, non-aggression, respect for human rights, delivery of a certain amount of grain, respect of a foreign State's immunity, rules relating to international watercourses, the law of the sea or of outer space; and third, the object and purpose of the obligation, namely, the situation it was intended to create. The usual "linear" view was then adopted: there were obligations, the breach of which entailed legal consequences. Before determining those legal consequences, however, it must first be determined what con-

stituted a breach. Part 1 of the draft articles was devoted to that question.

6. An analogy could be drawn between part 1 of the draft articles³ and the Vienna Convention on the Law of Treaties. That Convention stated the principle of *pacta sunt servanda* in article 26, and then proceeded to devote many articles to the circumstances under which *pacta non sunt servanda*, thereby returning to the unilateralism of national sovereignty. Similarly, part 1 of the draft articles on State responsibility was largely devoted to non-responsibility. It covered that matter in three stages. First, in chapter II, it determined and thereby limited the cases in which conduct (action or omission) was attributable to the State. A State, of course, did not have a human personality, but it did have persons purportedly acting on its behalf, regarding whom Shakespeare had spoken of "the insolence of office" as being one of the ills "that flesh is heir to", and more modern writers had coined the phrase "the arrogance of power". In any event, when discussing State responsibility, human conduct had to be related to a State. The articles in part 1 made a distinction between organs of the State and persons not acting on behalf of the State, but because that distinction could not be maintained completely, there were many references to related conduct of a State, and even some articles, such as article 15, in which the dichotomy between organs of the State and persons not acting on behalf of the State was dropped entirely. Secondly, chapters III and IV of part 1 determined the circumstances in which conduct was a breach of an international obligation, including the *tempus delicti* and the implication of a State in the internationally wrongful act of another State. Thirdly, chapter V enumerated a number of circumstances precluding wrongfulness.

7. Thus, in articles 1 to 35, adopted by the Commission on first reading,⁴ the stage was set for determining, in parts 2 and 3, the legal consequences of an internationally wrongful act. In musical terms, parts 2 and 3 contained three "movements": the first, the new obligations of the State which had committed an internationally wrongful act (the "author State") or the self-enforcement by the State of its obligations; the second, the new rights of other States or the national enforcement of such obligations; the third, the implementation of State responsibility or the international enforcement of such obligations.

8. It was impossible, however, to remain as abstract as the Commission had in drafting part 1. Source/obligation/breach/consequence/implementation constituted a system, and it had to be admitted that there were several interrelated subsystems of international law in different fields of international relations. He had drawn attention to that fact in his third report (A/CN.4/354 and Add.1 and 2, para. 27) by quoting the following passage from the commentary to article 19 of part 1 of the draft:

³ For the texts, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ See footnote 3 above.

The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies—indeed it is very unlikely—that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (*mettre en œuvre*) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions.⁵

Clearly, at that time the Commission had been aware that in the transition from part 1 to parts 2 and 3 of the draft articles the difference between international obligations, or subsystems of international law, would come to the fore. Perhaps even more illuminating was another remark in the same commentary, mentioned in his third report (*ibid.*): “The idea that there is some kind of least common denominator in the regime of international responsibility must be discarded”.⁶

9. The task in drafting parts 2 and 3 of the draft articles was the identification of those subsystems and the determination of their interrelationships. There were three points to keep in mind. First, State responsibility could not realistically be separated from its implementation; second, in creating obligations, it had to be accepted that the legal consequences of a breach could also be determined; and third, the Commission could not hope to produce an exhaustive set of rules—a point which was elaborated by the Special Rapporteur in his third report (*ibid.*, para. 103).

10. Turning to general comments on the draft articles discussed in his third report (*ibid.*, chap. VI), he said he would attempt to link the commentaries to articles 1 to 6 with his oral introduction and some paragraphs of the report. As indicated by the remarks of the Commission to which he had referred, the Commission had always known that it could not hope to draw up an exhaustive set of rules. Both article 1 and, particularly, article 2 reflected that non-exhaustiveness. Article 1 was purely introductory and informed the reader that “legal consequences”, that was to say, rights and obligations, entailed by an internationally wrongful act would be mentioned. It promised no more; in fact it promised less than it gave, for article 6 already talked about the obligations of States other than the author State. But why confuse the reader by saying that an internationally wrongful act of one State entailed obligations for another State? Actually, the obligations mentioned in article 6 were rather obligations to exercise the rights created for other States by the internationally wrongful act. They were part of what was called in the report the

international enforcement, or third parameter (*ibid.*, para. 87), which the Commission had called “the determination of the subject or subjects of international law permitted to implement (*mettre en œuvre*) the various forms concerned ...” (see para. 8 above).

11. The non-exhaustiveness of the rules in parts 2 and 3 of the draft articles was particularly reflected—or hidden—in draft article 2, which states the principle of proportionality. Proportionality was typically a central idea of justice. It was, in a way, a denial of the maxim *fiat justitia atdum pereat mundus* and an affirmation of the caveat *summum jus, summa injuria*, on which the Commission had leaned heavily in its commentary to article 33 in part 1, dealing with state of necessity as a circumstance precluding wrongfulness.⁷ However, proportionality also expressed the idea of *jus in causa positum*, the uniqueness of every set of facts with regard to the dictates of justice. The idea of justice was universal and permanent, but above all concrete; the relationship of abstract rules of law to justice was more or less comparable to the relationship of mathematics to physical reality.

12. Proportionality was a typically quantitative concept. As such, it created some uneasy feeling in lawyers, who would not agree with the statement of one British physicist that “quality is a poor substitute for quantity”, but who, on the contrary, attempted to reduce quantity to quality. In that connection, paragraph 83 of the arbitral award of 9 December 1978 in the *Case between the United States of America and France concerning the Air Services Agreement of 27 March 1946*,⁸ cited in the preliminary report,⁹ was illustrative; though the award dealt with countermeasures, its statements were equally applicable to the first and third parameters.

13. In stating a rule of proportionality in article 2, the Commission seemed to be giving an answer, but was not really giving a direct answer. There was nothing wrong with that. Legal texts often used such hidden quantitative terms as “serious”, “important”, and “gravity” as was indicated in the third report (A/CN.4/354 and Add.1 and 2, para. 64), and in relation to wrongful acts, lawyers were familiar with the notions of “aggravating” and “extenuating” circumstances. Those two notions came close, respectively, to a special form of imputability of an act to a State and to circumstances precluding wrongfulness. In short, a link between a particular internationally wrongful act and a particular legal consequence could never be automatic (*ibid.*).¹⁰

⁷ *Yearbook ... 1980*, vol. II (Part Two), p. 49, para. (31) of the commentary.

⁸ United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 483.

⁹ *Yearbook ... 1980*, vol. II (Part One), pp. 127-128, document A/CN.4/330, para. 94.

¹⁰ See also para. (22) of the commentary to article 34 in part 1 of the draft (*Yearbook ... 1980*, vol. II (Part Two), p. 60).

⁵ *Yearbook ... 1976*, vol. II (Part Two), p. 117, para. (53) of the commentary.

⁶ *Ibid.*, para. (54).

14. Because of the nature of proportionality, care must be taken in stating a rule (*ibid.*, para. 65). He had accordingly suggested that article 2 should use the word "should" instead of "shall" and substitute for "proportionality" the absence of "manifest" disproportionality. That was to avoid stating a rule which seemed to be rigid. Perhaps the result seemed meagre and hardly a rule at all; but even the Vienna Convention on the Law of Treaties did not hesitate, if necessary, to state a legal truth in a rather primitive form. Thus article 44, subparagraph 3 (c) of that Convention stated, as the final criterion for the possibility of invalidating, terminating, withdrawing from or suspending particular clauses of a treaty, that "continued performance of the remainder of the treaty would not be unjust".

15. A quite different legal phenomenon from quantitative proportionality was the co-existence of an interrelationship between different subsystems of international law. That phenomenon was dealt with in his third report (*ibid.*, paras. 67, 69-77 and 125-129). In a way, that problem came close to the determination of a breach, in part 1: it involved both the inseparability of legal consequences and implementation, to which he had referred earlier, and the residual character of the rules in parts 2 and 3 of the draft.

16. What was meant by the term "subsystem of international law"? A theoretical answer might be that a system was an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed, inasmuch as it had an interrelationship with other subsystems. A concrete example of a subsystem was provided by the Judgment of the International Court of Justice in the case *United States Diplomatic and Consular Staff in Teheran*.¹¹ The Court had held that the corpus of rules of diplomatic law constituted a "self-contained regime", and thus that the breach of an obligation in that field by the sending State could be countered only by a partial or total breaking off of diplomatic relations.¹² That was clearly relevant to the question of the legal consequences of an internationally wrongful act. Another example was provided by the Court's decisions relating to the mandate system. In its Judgment of 18 July 1966 in the *South West Africa Second Phase* cases,¹³ the Court had decided that Ethiopia and Liberia did not have a "separate self-contained" right to demand performance of the obligations of South Africa in respect of its "sacred trust".¹⁴ Therefore, a regime, or subsystem, in which at least some of the legal consequences of a breach of an obligation could not individually be invoked by each of the States parties to the regime, could very well be imagined. For that matter, it was not difficult to imagine a regime under which a State which was not a party to it

could invoke the legal consequences of a breach of an obligation within that regime. The latter phenomenon was typical of "objective regimes", which in themselves were a typical example of a subsystem of international law and were referred to in his third report (*ibid.*, paras. 120 *et seq.*). The draft articles proposed in the report did not yet deal with those regimes.

17. Referring to the draft articles, in particular draft article 3, he pointed out that most subsystems of international law were created by treaty, though other sources of such subsystems could not be excluded. From the point of view of efficiency, it would seem normal for States, in the process of creating obligations in a field of relationships between them, also to give thought to the legal consequences of a breach of such obligations, and to determine those legal consequences and their implementation. In fact that was very often not done fully or not done at all. But to the extent that it was done, the relevant provisions must prevail over the rules to be laid down in parts 2 and 3 of the draft. Those rules were residual rules; they were intended to fill the gap left by the States consenting to create obligations between them. Article 3 was designed to convey that residual character.

18. Obviously, if the State concerned purported to fill the gap themselves, they could not escape from other existing subsystems of a peremptory nature. Articles 4, 5 and 6 referred to such peremptory subsystems. On the other hand, it should not be presumed that States entering into a treaty stipulating obligations between them also intended to deviate from the residual rules to be laid down in parts 2 and 3 of the draft articles. Accordingly, article 3, as proposed, did not contain the words "explicitly or implicitly" found in the somewhat analogous provision of article 33, subparagraph 2 (b), in part 1 of the draft articles.

19. Nevertheless, it had to be recognized that the concept of an "international obligation" covered a wide variety of legal phenomena having different sources, contents and objectives, all of which inevitably influenced the legal consequences of a breach of such an obligation. An obligation, therefore, was but one element in a subsystem, and the subsystem to which it belonged still had to be identified. Moreover, an obligation was one thing and the actual conduct of a State was another: the latter could be relevant to different subsystems, in which case the interrelationship between them had to be determined.

20. The Commission had earlier stated, in paragraph (7) of its commentary to article 17, that:

For it to be actually decided that an act of State which conflicts with a supposed international obligation of that State is not wrongful, it would be necessary to conclude... that the obligation did not exist, or at least that it was not a legal obligation.¹⁵

The matter did not rest there, however, since even true legal obligations could have different legal consequences. Modern legal literature often used the expression "soft law" to denote obligations that, though legal

¹¹ *I.C.J. Reports 1980*, p. 3.

¹² *Ibid.*, para. 86.

¹³ *I.C.J. Reports 1966*, p. 6.

¹⁴ *Ibid.*, pp. 28-29, para. 33.

¹⁵ *Yearbook ... 1976*, vol. II (Part Two), p. 81.

obligations, did not entail all the legal consequences of obligations under “hard law”. Borrowing from that terminology, it could be said that there existed “super hard law” in the form of *jus cogens* and, by the same token, “semi-hard” and “semi-soft” law. At all events, it seemed clear that not all obligations need have the same force or resistance—a point illustrated, in another context, by article 33 in part 1.

21. In the case of treaties—the typical source of obligations—and specifically, the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in respect of Treaties, it would be seen that different types of treaty had different force and resistance against such exogenous circumstances as succession of States. They all created different kinds of obligation with regard to the legal consequences of their breach. The same applied to the decisions of international institutions, which might or might not themselves constitute a source of obligation separate from the treaties that established them.

22. Those remarks went to show that the rules on State responsibility could not be exhaustive, and for that reason alone, draft article 3 was indispensable. That did not, of course, preclude an endeavour to identify some subsystems and to say something about the interrelationship between them. Draft articles 4, 5 and 6, as proposed in his third report, sought to do precisely that (see para. 2 above). The same applied to draft article 5 in conjunction with draft article 4, proposed in the second report (A/CN.4/344, para. 164), which had been withdrawn for the time being. Those articles had been designed to deal with the subsystem concerned with the treatment to be accorded by the State to aliens within its jurisdiction. He still considered that it was an identifiable subsystem, but thought it could be better dealt with at a later stage.

23. Draft article 4, as proposed in his third report, related to the subsystem of *jus cogens*. In that connection, he had to admit to a slip of the pen in stating, in paragraph 105 of his third report, that “one could hardly call it a system or subsystem”. Draft articles 5 and 6, as now proposed, referred respectively to the subsystems of the Charter of the United Nations and to international crimes. Lastly, he suggested that the Commission might wish to reconsider some of the articles in part 1 of the draft during the second reading.

24. Mr. MALEK said that the purpose of draft article 1 was not difficult to grasp. It was an introductory article which served as a link between parts 1 and 2 of the draft. But in view of the nature of the constituent elements of the provision and their mutual relationships, it was not easy to find a satisfactory form of words. First, it followed from the present wording of article 1 that an internationally wrongful act of a State had specific legal consequences. That first conclusion was perfectly correct and technically satisfactory; but it was then stated that the legal consequences occurred in conformity with the provisions of part 2 of the draft,

which seemed to impose limitations on the general rule which were certainly not intended.

25. As at present drafted, article 1 appeared to recognize only the consequences provided for in part 2. If the legal consequences of an internationally wrongful act of a State were not mentioned in part 2, it must therefore be deduced that the act would not have legal consequences, which was manifestly absurd. But the Special Rapporteur had emphasized that article 1 did not necessarily mean that the other articles in part 2 would give an exhaustive list of the legal consequences of every internationally wrongful act of a State. Consequently, it might be possible to add, at the end of article 1, the saving clause “and the other rules of international law”. It was true that the legal consequences of a wrongful act not provided for in the draft would still be governed by the other rules of international law, whether that was stated or not; but it seemed technically advisable to say so in the introductory article to part 2 of the draft. The provisions of article 3 did not appear able to fill the gap left by article 1 as at present drafted.

26. According to article 3, “The provisions of this Part apply to every breach by a State of an international obligation ...”. He found it difficult to see how part 2 of the draft, which dealt with the legal consequences of an internationally wrongful act by a State, could apply to every breach by a State of an international obligation when that part could certainly not contain an exhaustive list of all the legal consequences of every internationally wrongful act by a State. In any case, the purpose of article 3 was different from that of article 1, and the two articles could not complement one another. Article 3 was intended to permit, and perhaps even to encourage, the establishment of special regimes; thus it recognized the precedence of such regimes over the rules laid down in part 2 of the draft articles.

27. The fact that article 1 identified the two kinds of consequences produced by an internationally wrongful act of a State, namely, rights and obligations, might raise other difficulties. But that approach seemed inevitable, and there was nothing wrong with it so long as it did not include an exclusive attribution of one kind of consequences to the State committing the internationally wrongful act or to the other States concerned. In fact, however, article 1 exclusively reserved obligations to the State committing the act and rights to the other States, for it provided that an internationally wrongful act of a State entailed obligations for that State and rights for other States. However, it had been established that the author of a wrongful act did not *ipso facto* lose its rights under international law. That was stated in the former article 3 (A/CN.4/344, para. 164), according to which “A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law”. Moreover, one of the purposes of the new article 2 was to protect a right of the State committing the wrongful act, namely, the right that the reaction or response of other States to the internationally wrongful act must not be disproportionate to the seriousness of the act. Besides, an internationally

wrongful act of a State did not necessarily produce only rights for other States. It also imposed obligations on them in the most important sectors of international relations. Draft article 6 provided a significant example, since it imposed all kinds of obligations on States other than the State committing an internationally wrongful act which constituted an international crime.

28. Article 1 also gave the impression that every internationally wrongful act of a State, whatever its nature or gravity, gave rise to legal consequences for all other States. But in most cases such an act, apart from the State committing it, concerned only the State or States injured and possibly one or more third States. In the light of the comments he had made, he proposed that article 1 should be drafted to read:

“Every internationally wrongful act of a State entails obligations and rights for that State and for every other State concerned, in conformity with the provisions of the present part 2 and with the other rules of international law.”

29. Finally, he reminded the Commission that chapter V of part 1 of the draft articles on State responsibility contained a number of articles dealing with circumstances precluding wrongfulness. The act of a State of which the wrongfulness was precluded by reason of a particular circumstance was not, however, always without legal consequences. Moreover, article 35, at the end of chapter V, contained a saving clause according to which preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29 (Consent), 31 (*Force majeure* and fortuitous event), 32 (Distress) or 33 (State of necessity) does not prejudice any question that may arise in regard to compensation for damage caused by that act. Thus it did not appear that part 2 of the draft articles would be confined to the legal consequences of internationally wrongful acts of a State alone; they should perhaps take account of certain obligations, such as the obligation to compensate for damage caused by an act whose wrongfulness was precluded.

30. Mr. CALERO RODRIGUES noted, from paragraph 50 of the second report (A/CN.4/344), that the Special Rapporteur had proposed that, instead of dealing straight away with the definition of the forms, degrees and content of international responsibility, part 2 would start with a number of general principles. The Special Rapporteur had, however, also pointed out that the new draft article 1 was no more than a link between parts 1 and 2 of the draft and therefore could not really be said to state a general principle; the principles were set out in draft articles 2 to 6.

31. He agreed with Mr. Malek that draft article 1 should refer not only to the rights, but also to the obligations which an internationally wrongful act of a State entailed for other States. He also agreed that the addition of the words “and the other rules of international law” might make the article clearer, although he thought that Mr. Malek’s point—that draft article 1 seemed to limit the legal consequences of international

responsibility to cases falling within the terms of part 2—was covered by the phrase in draft article 3: “... except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law”.

32. With regard to the structure of the draft, he thought the principle relating to the residual nature of part 2 should follow after draft article 1, which it completed and qualified. He wondered, however, whether it was really necessary to state the general principle laid down in draft article 6, which related to the position of third States in cases where an internationally wrongful act constituted an international crime. If so, it should, in his view, be framed in more concise terms since, as worded, draft article 6 gave the impression that it touched upon questions relating to the third parameter, and thus created an imbalance in the general principles.

33. Another point raised by Mr. Malek concerned the breach of an obligation and the rights of the author State under general international law, matters which had been dealt with in the previous draft articles 1 and 3 (A/CN.4/344). There had been a suggestion that those two articles should perhaps be combined, but the Special Rapporteur had had some difficulty in doing so. His own view was that it might be useful to retain the two propositions set out in the earlier draft articles.

34. Mr. FRANCIS proposed that draft article 1 be reworded to read:

“Subject to the provisions of this Part, an internationally wrongful act of a State entails *inter alia* obligations for that State and consequential rights for other States concerned.”

35. Sir Ian SINCLAIR said that what was expressed in draft article 1 was, in effect, that an internationally wrongful act of a State gave rise to consequential obligations. Although those obligations were sometimes referred to in the commentary (A/CN.4/354 and Add.1 and 2, para. 145), as “new obligations”, it might be better to use the word “consequential”, since they arose out of an internationally wrongful act. He was inclined to agree that it was necessary to refer both to consequential rights and to consequential obligations for other States because, again, they arose out of an internationally wrongful act. If draft article 1 was to be retained—and there might be an argument for omitting it, since it only served to link parts 1 and 2—he agreed that the words “other rules of international law” should perhaps be added, especially as part 2 was not intended to list exhaustively the consequences of a breach of an international obligation.

36. The CHAIRMAN, speaking as a member of the Commission, said that, before making any general comments on article 1, he wished to remind the Commission that, contrary to the frequently expressed opinion that damage was an element of responsibility, the Commission, convinced by the arguments of the former Special Rapporteur, Mr. Ago, had decided that damage was not an element of responsibility, so that it had not been

taken into account. The Commission was probably right, but it now had before it part of a draft of articles, part 2, which the problem of damage constantly underlay. The Special Rapporteur himself mentioned it as little as possible, because of the very general form of his work. He (Mr. Reuter) had some difficulties, and if the Commission was going to adopt an amended article 1, he suggested that a certain number of concrete cases should be mentioned in the commentary.

37. In that connection, he fully agreed with the opinion expressed by Mr. Malek (and endorsed by Mr. Calero Rodrigues), that in article 1 the expression “*pour les autres Etats*” (“for other States”) was too general, especially in the French text. There were, indeed, cases in which rights arose for all the other States, but there were also cases in which rights arose only for certain other States. The first category could include the case, never fully clarified, of the breach of a rule sufficiently general for all other States to have an interest in reacting. It was true that there were States which, even acting outside the framework of the United Nations, adopted countermeasures against another State which they accused of an international offence that had not been committed directly against them. It might really be doubted, and it was doubted, whether such a reaction was legitimate. It could thus be accepted that there were rules which gave other States a right, that of having a direct interest and of considering that they had suffered moral damage on the basis of which they claimed certain legal consequences relating to their rights and obligations.

38. But it was possible to imagine other cases in the second category: for instance, the case of a State suffering material damage as the result of an offence, even though that offence was not committed against it. One example would be hostilities breaking out without any declaration of a state of war. It might be supposed that the territory of a State A was bombarded by a State B. In the territory of State A, there were nationals, property and interests of a third State C, which were injured by the bombardments of State B. Supposing that a breach of international law had been committed, was it State A alone which had the right to claim compensation from State B, even though it might have to pass on some of the compensation to State C? Or had State C a direct right to claim against State B? That question had been the subject of numerous analyses in classical works on international law and had even arisen recently. If he understood it correctly, article 1 stated the answer to a question of that kind.

39. Another example, also in the second category, was that in which a State became involved in an offence by reason of the action of another State. For example, if a State had conceded a military base to another State, which committed a wrongful act from that base against yet another State, was not the conceding State in danger—even though it had committed no offence by conceding the base—of being a co-author or accomplice in the wrongful act, or at least jointly responsible? Could not the State which had been the victim of the

wrongful act claim directly against it as having some degree of responsibility? There were States which had protested against the use of conceded bases for carrying out actions whose lawfulness might be in doubt.

40. It therefore seemed to him that if the Commission was going to draft an article like article 1 and if it introduced the “explosive” cases he had described, it should reply in the following articles to questions such as those which had just been raised.

41. Mr. RIPHAGEN (Special Rapporteur) said that some misunderstanding might have arisen over draft article 1 because the rendering of the words “for other States” in the French version was not strictly correct. Moreover, in as much as draft article 1 was no more than an elaborate title, it could never be perfect and, if viewed as a rule that gave rise to consequences, would inevitably cause difficulty. Nevertheless, the text, which had been suggested by a former member of the Commission,¹⁶ had found much support in the Commission, and he had therefore adopted it. At the same time, he had tried, in the commentary (A/CN.4/354 and Add.1 and 2, para. 145), to avoid creating the impression that draft article 1 stated a rule from which legal consequences flowed. In some ways he would be inclined to follow the advice that the article should be dispensed with. Possibly that problem could be solved by the Drafting Committee.

The meeting rose at 5.55 p.m.

¹⁶ *Yearbook ... 1981*, vol. I, p. 136, 1669th meeting, para. 5 (Mr. Aldrich).

1732nd MEETING

Tuesday, 22 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (continued) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)³ (continued)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), arts. 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

ARTICLES 1 to 6⁴ (continued)

1. Mr. McCaffrey said he agreed that the Commission should not be bound by part 1 of the draft articles, which at that stage merely served as a scaffolding for part 2. Indeed, as the Special Rapporteur had noted in his third report, there was "no escape from a 'categorization' of primary rules for the purpose of determining the legal consequences of their breach, and from formulating different sets of legal consequences for each category of primary rules" (A/CN.4/354 and Add.1 and 2, para. 38). It therefore seemed inevitable, as the Special Rapporteur had predicted, that the Commission would "get ever further away from the unitary concept of 'international obligation' which is the cornerstone of part 1 of the draft articles" (*ibid.*).

2. It had already been noted that chapters III, IV and V of part 1 of the draft articles went beyond the articles proposed in the Special Rapporteur's third report in laying the basis for the whole of part 2 of the draft. But for that, he would have had difficulty in proceeding through such a maze without knowing where he was supposed to be going and what obstacles lay in the Commission's path.

3. He fully subscribed to the views expressed by the Special Rapporteur in the first, second and last sentences of paragraph 144 of his third report. As he saw it, draft article 1, as proposed in that report, was a Pandora's box which it was not necessary to open. He had nothing against "linkage" articles, but thought they were better omitted if they appeared likely to state a separate rule and take on a life of their own; and the potential of article 1 for doing so had already been amply demonstrated by several members. If draft article 1 were to be retained, however, he agreed that it should be amended to include the expressions "consequential obligations" and "consequential rights and obligations of other States". He would also favour the addition, at the end of the article, of the words "and other rules of international law", without which it would create the impression that part 2 was intended to contain an exhaustive list of consequences. Even with those changes, however, the article appeared to be doing its best to take on a life of its own, rather than to serve as the umbilical cord between parts 1 and 2, and for that reason he would prefer it to be deleted.

4. Instead, he would suggest that serious consideration be given to the two unnumbered articles set out in the third report (*ibid.*, para. 31). In that connection, he endorsed the suggestion that it would be more logical to place draft article 3 after draft article 1. If that were done, the first unnumbered article would become article 1; the second unnumbered article would become article 2; and the present article 2, on proportionality, would become article 3. The first unnumbered article, which combined draft articles 1 and 3, as proposed in the second report (A/CN.4/344, para. 164), performed certain useful functions. But the question arose whether it promised more than part 2 could achieve; in other

words, whether it implied that part 2 would provide exhaustively for the regulation of the consequences of internationally wrongful conduct. Read in isolation, it did perhaps do so, given the phrase "only as provided in this part", but read in conjunction with the second unnumbered draft article, it did not. The latter article seemed to make it clear that the provisions of part 2 were residual, since they would apply "except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law ...". Only if it could be argued that the "rights and obligations" referred to in the first unnumbered article were somehow broader than the "legal consequences" referred to in the second, could the saving clause in the second be said not to remove the implication of exhaustive treatment. "Consequences", however, seemed to be the broader term, since it embraced all of the rights and obligations to which the first article referred; consequently, the second article did effectively present the first from making a promise, which could not be fulfilled, of exhaustive coverage. It might perhaps be useful to consider the extent to which the word "only" in the first article was necessary; in other words, whether the advantage of the emphasis supplied was outweighed by the disadvantage of seeming to promise exhaustive treatment. If so, that word could perhaps be deleted.

5. The first unnumbered article also achieved economy by combining articles 1 and 3 as proposed in the second report, without sacrificing clarity or coverage. In that connection, he noted that the Special Rapporteur indicated, in his third report, that the Commission might wish the Drafting Committee to consider the two unnumbered articles (A/CN.4/354 and Add.1 and 2, para. 31).

6. Mr. Malek said he wished to make some general comments on article 2, and on article 6 and certain matters closely related to it which were dealt with in part 1 of the draft.

7. Article 2 was certainly better drafted than the former article 3 (A/CN.4/344, para. 164), which had the same purpose. Article 2 did, to some extent, take account of the view expressed by some members of the Commission at the preceding session, that the rule of proportionality should be clearly and explicitly stated in the draft articles. He himself shared that view and, in particular, the opinion expressed by Mr. Jagota at the Commission's preceding session,⁵ that article 3 as it stood applied only to the breach of an original obligation, and not to the breach of an obligation by means of a countermeasure. Any such article should therefore be worded in such a way as to make it quite clear that any response or reaction must be in proportion to the wrongful act if it was not itself to constitute another wrongful act. If the rule of proportionality was, as the Special Rapporteur thought, an existing rule of international law, there was no reason not to state it em-

⁴ For the texts, see 1731st meeting, para. 2.

⁵ Yearbook ... 1981, vol. I, p. 130, 1667th meeting, para. 8.

phatically in the draft articles. Article 2 should therefore be further improved.

8. Article 6 was the first article to deal with the specific legal consequences of an internationally wrongful act of a State. It came after five articles, of which the first was a kind of introduction establishing the link between the first two parts of the draft and the other four stated general principles that were to apply to the whole of part 2. While the former articles 4 and 5, proposed by the Special Rapporteur in his second report (*ibid.*) had dealt with the new obligations of the "author" State of an internationally wrongful act, article 6 dealt with the obligations of other States. Although it was impossible, at that stage, to express an opinion on the order in which the consequences of a wrongful act were to be presented, it should be noted at the outset that it might be advisable to begin with the obligations of the author State, rather than with those of the injured or victim State. That was a mere detail, however, and the order of the articles and the consequences they referred to could be decided later, when all the articles in part 2 had been submitted. The Commission might then decide to keep article 6 where it was, since it also dealt with the consequences of a particularly serious wrongful act.

9. Article 6 was extremely important and warranted careful consideration, particularly in regard to paragraph 1, whose content was, in principle, satisfactory. According to that paragraph, an internationally wrongful act of a State such as an act of aggression which constituted an international crime immediately and naturally entailed an obligation for all other States to join in affording mutual assistance in carrying out other obligations, namely, the obligation not to recognize as legal the situation created by the wrongful act and the obligation not to render aid or assistance to the author State in maintaining the situation created by that act. He noted that, in paragraph (13) of the commentary to article 6 (A/CN.4/354 and Add.1 and 2, para. 150), the Special Rapporteur had rightly pointed out that mutual assistance between States, other than the author State of course, was required and justified by solidarity in the face of an infringement of fundamental interests of the community of States as a whole. He himself nevertheless failed to see why mutual assistance between States in the face of an act constituting an international crime should be limited to the performance of the obligations listed in subparagraphs 1 (a) and (b); he thought it should be possible, and was desirable, to word subparagraph (c) in such a way as to cover other obligations without mentioning them specifically. Nor did he understand why article 6 was limited to the consequences it referred to. Were there other consequences of such a wrongful act which the Special Rapporteur planned to take into account in another article or other articles of the draft?

10. He also wondered why article 6 made no mention of the first—and most basic, important and natural—consequence of an international crime such as an act of aggression, namely, the universally recognized natural right of self-defence, which had been dealt with

specifically in article 34 in part 1 of the draft. Did the Special Rapporteur intend to deal with that particular consequence later? Paragraph (5) of the commentary to article 6 (*ibid.*) indicated that he did not intend to do so, and that was regrettable. Part 1 of the draft gave little place to the concept of self-defence, which was mentioned only with reference to Article 51 of the Charter of the United Nations, to be included, as it were, in the list of circumstances which had the same specific effect on a wrongful act of a State. He did not see how all the parts of the draft under consideration, which was a draft code of State responsibility, could be complete without appropriate provisions on self-defence.

11. Without having any particular *de facto* situation in mind, he had for many years been pleading in favour of a definition of the right of self-defence, which was of the greatest importance in the system of collective security established by the Charter of the United Nations. Such a definition should not simply be a reference to the Charter or a reminder of its relevant provisions. In paragraph (21) of the commentary to article 34 (Self-defence), as adopted on first reading, it was stated that:

The Commission's task in regard to the point dealt with in article 34, as in the case of all the other draft articles, is to codify the international law which relates to the international responsibility of States. The Commission would certainly be doing more than it has been asked to do if it tried, over and above that, to settle questions which ultimately only the competent organs of the United Nations are qualified to settle.⁶

But were there not questions which the Commission did settle although, ultimately, only the competent organs of the United Nations were qualified to settle them? The Security Council, which had unlimited power with respect to any question submitted to it, would take any decision it deemed appropriate without reference to any rule of law, including the rules the Commission was drafting.

12. In paragraph (22) of the same commentary, the Commission had also said:

Nor does the Commission feel that it should examine in detail issues, discussed in some cases at length in the literature, such as the "necessary" character which the action taken in self-defence should display in relation to the aim of halting and repelling the aggression, or the "proportionality" which should exist between that action and that aim, or the "immediacy" which the reaction to the aggressive action should exhibit. These are questions which in practice logic itself will answer and which should be resolved in the context of each particular case.⁷

But were there not issues, discussed at length in the literature, which the Commission had considered that it should examine in detail? Had it not defined an international crime in the draft articles, or at least provided some useful explanations of what an international crime was? When the clarity of the terms in which a principle or a rule was to be stated required it to do so, the Commission did not hesitate to draft a fairly detailed text. Article 33 (State of necessity), for example, was worded in such a way that it determined precisely the circumstances in which a state of necessity could or could not be invoked.

⁶ *Yearbook ... 1980*, vol. II (Part Two), p. 60.

⁷ *Ibid.*

13. A definition of the notion of self-defence would be very useful to public opinion, which could be an important factor in checking aggression, since no State, however powerful, liked to be left alone, isolated by the anger of the world community. What was required in part 2 of the draft, however, was not so much a definition of the right of self-defence as an indication of the scope, extent and limits of that right, which was a direct consequence of a particular wrongful act defined as an international crime in article 19, part 1 of the draft. It was, in fact, essentially on article 19 that the rules stated in draft article 6 of part 2 were based. The definition of an international crime given in article 19 thus served to determine, in draft article 6, the legal consequences of such a crime.

14. Because of the close link between those two articles, the question arose whether draft article 6 applied to every wrongful act characterized as an international crime under the terms of article 19. There was nothing in draft article 6 to suggest that the answer should be negative; article 19 was thus of fundamental importance, because it determined the actual scope of article 6. But article 19 took no account of an entire category of international crimes, thus excluding them from the scope of article 6: it merely referred to a few specific cases without mentioning that category. Article 19 established a special regime of responsibility for international crimes, which it attempted to explain by means of a general definition followed by a set of specific examples. In paragraph 2, it enunciated the basic general criterion for defining the wrongful acts falling within the category of crimes to be covered; according to that criterion, a wrongful act constituted an international crime if it resulted from a breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole. Paragraph 3 contained examples designed to explain that basic criterion: it mentioned four spheres in which a serious breach of an international obligation of essential importance was an international crime, namely, the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. With regard to the protection of the human being, only slavery, genocide and *apartheid* were mentioned as examples of international crimes. According to article 19, paragraph 3 (c), those international crimes could result from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being".

15. In the commentary to that provision, the Commission had attempted to explain the meaning of the words "on a widespread scale". In its view, a breach on a widespread scale "must take the form of a large-scale or systematic practice adopted in contempt of the rights and dignity of the human being".⁸ He was convinced

⁸ *Yearbook ... 1976*, vol. II (Part Two), p. 121, para. (70) of the commentary to art. 19.

that the Commission did not intend that explanation to mean that a breach which did not quite take the form described would not be serious enough to be classed as an international crime. Fortunately, however, the Commission had recognized in the same paragraph of the commentary that, in addition to the breaches mentioned as examples, namely, slavery, genocide and *apartheid*, other breaches might be considered as international crimes in that sphere. Those explanations, which had not thrown much light on the text of article 19, would not have been considered necessary if the definition of an international crime in the sphere of obligations to safeguard the human being had been worded to take account of the notion of an international crime in international criminal law, which had emerged, in particular, from the international agreements concluded since the Second World War and from the progress made at the international level in the punishment of international crimes and, in particular, of war crimes and crimes against humanity, not to mention crimes against peace.

16. There was no doubt that slavery, genocide and *apartheid* were odious international crimes, but genocide and *apartheid* were only specific examples of the general category of crimes against humanity which were, by their very nature, particularly serious. In contemporary international law, the concept of the crime against humanity might furnish other examples that were as serious as genocide and *apartheid*, but did not have the same dimensions. He had in mind the purely hypothetical case of a plan devised by a State, or within that State and with its consent, to use various means of moral pressure to compel part of the civilian population of another State to emigrate *en masse* for political reasons. He seriously doubted whether such a plan would be covered by article 19, even though it was a typical crime against humanity and he was convinced that the drafters of article 19 had intended such cases to be covered.

17. Crimes against humanity generally took the form of persecution of a group or members of a group, or of extermination, servitude, deportation or other similar forms, and were directed against some particular section of the civilian population because of its nationality, religion, race, etc. The notion of a crime against humanity thus encompassed both genocide and *apartheid* and, in many resolutions, including resolutions 2184 (XXI) of 12 December 1966 and 2202 (XXI) of 16 December 1966, the General Assembly had expressly condemned the policy of *apartheid* as a crime against humanity. It should be noted that crimes against humanity were international crimes which entailed both national and international responsibility, both for States as such and for individuals. They were "State crimes", since it would be very difficult to see how, in view of their nature, scope and dimensions, they could be committed by individuals without orders from, and the acquiescence of, State authorities.

18. Crimes against humanity had been recognized as such even when committed in time of peace. That concept, which had become part of international law as a

result of the adoption, in 1948, and entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide,⁹ had been recognized by the Commission in the draft Code of Offences against the Peace and Security of Mankind, which it had adopted at its sixth session, in 1954.¹⁰

19. According to article 19, such crimes against humanity were, in all their manifestations, serious breaches of international obligations essential for the protection of fundamental interests of the international community. In that connection, it would be remembered that in 1965 the whole world had risen up in protest at the idea that the war crimes and crimes against humanity committed during the Second World War could go unpunished as a result of prescription under internal law. The revolt by world public opinion had certainly not been directed against genocide only; it had been directed against all serious crimes against humanity and war crimes. The object, at both the national and the international level, had been to prevent the application of national statutes of limitation to serious crimes under international law. At the international level, that movement had led to the adoption by the General Assembly, in 1968, of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹¹

20. At the national level, several States directly interested in the punishment of those crimes had amended their laws on prescription to permit such punishment; and since they had not been deterred by the principle of non-retroactivity, it could be presumed that that principle was not applicable to that particular category of international crimes. The French law of 26 December 1964,¹² for example, went so far as to declare crimes against humanity imprescriptible by their very nature. The French legislators had thus refused to give that law the character of an emergency measure; they had, rather, considered it as simply an application of ordinary law. The imprescriptibility of crimes against humanity was undeniably a rule of *jus cogens*.

21. It was to be hoped that, during the second reading of article 19, the Commission would examine more thoroughly the criteria for defining the international crimes for which it reserved a special regime of responsibility. It should, in particular, give careful consideration to the idea that the non-exhaustive list of international crimes in article 19 should contain an explicit reference to the category of crimes against humanity.

22. Mr. SUCHARITKUL noted that the Special Rapporteur, in his lucid and interesting introduction (1731st meeting), had reminded the Commission of the classical concept of State responsibility, which dated back to the

time when a State had been held responsible for improper treatment of aliens; for example, when it failed to pay compensation after expropriating property belonging to an alien. Thirty years earlier, State responsibility had been a central topic of public international law. Since then, the concept had undergone drastic change as the number of developing countries had grown and as the modern developed State had taken measures to protect the interests of its citizens abroad by claiming on their behalf, not only under the international law of State responsibility, but also, by way of subrogation, under investment guarantee agreements. Whereas, formerly, a private person or company suffering injury as a consequence of a breach of international law would, under the classical rule, have had to exhaust all local remedies, the injured State could now proceed direct, by virtue of the relevant treaty or bilateral agreement, against the State responsible and claim damages without first having to exhaust such remedies.

23. The transition from the earlier classical concept of State responsibility to the more modern concept had not been easy, and the task that confronted the Special Rapporteur was formidable. Considerable progress had, however, been made in identifying the content and scope of the legal consequences of the breach of an international obligation. It had, for instance, been established that there were three consequential obligations: the obligation to desist from the wrongdoing; the obligation to abstain from committing any further wrongdoing in the future; and the obligation to compensate for any damage caused. It had been suggested that the sources of international law were not relevant to the responsibility of the State. When it came to the legal consequences of the breach of an obligation, however, the source of that obligation might not be entirely irrelevant.

24. Part 2 of the draft was concerned with the rights of other States but, as he saw it, a right carried with it an inherent duty to mitigate the damage and not cause further injury. There also had to be remedies, without which rights would have no meaning. He saw draft article 1 as the necessary link between the establishment of a breach of an international obligation and the legal consequences flowing from it.

25. The Commission had rightly concluded that damage was not an essential element of responsibility and that the responsibility of the State could be incurred regardless of injury or damage. However, as the Special Rapporteur had also pointed out, the question of injury or damage was highly relevant to the assessment of compensation and of the proportionality of the countermeasures which the other State might take.

26. One crucial question the Commission would have to decide concerned self-help and the extent to which it was permitted under international law, once a breach of an international obligation had been established. The Special Rapporteur had, in his view, adopted the right approach to that question by seeking to make it clear from the outset whether the matter fell to be considered

⁹ United Nations, *Treaty Series*, vol. 78, p. 277.

¹⁰ *Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, chap. III, para. 54.

¹¹ United Nations, *Treaty Series*, vol. 754, p. 73.

¹² Law No. 64-1326 of 26 December 1964 (*Journal officiel de la République française, Lois et décrets* (Paris), vol. 96, No. 303 (28-29 December 1964)).

within the context of the United Nations, or as an international crime, or as part of *jus cogens*. He endorsed the Special Rapporteur's general approach, which had set the Commission on the right course.

27. Mr. USHAKOV thanked the Special Rapporteur for having recast, in the light of the Commission's discussions, the articles which he had proposed at the previous session. It was, however, a matter for regret that, like the two previous reports, the third report (A/CN.4/354 and Add.1-2) did not deal with the substance of the subject. He himself had found much of the Special Rapporteur's long theoretical and abstract expositions difficult to grasp. The main point was not, however, to understand all the aspects of the general theory of responsibility as described by the Special Rapporteur, because that theory did not have to be expounded at the current stage in the Commission's work. When it had begun consideration of the topic of State responsibility, the Commission could have discussed the theory, but it had not wished to do so, and there was therefore no reason to do so now.

28. Chapter IV of the Special Rapporteur's third report, entitled "The catalogue of legal consequences", contained no such catalogue. Since the topic under discussion was the content, forms and degrees of international responsibility, a list of the forms which responsibility could take might well have been expected. But the report was in no way concerned with the forms of international responsibility, whether coercive sanctions, reparations, restitution or other forms.

29. Whenever the Special Rapporteur had referred to part 1 of the draft instead of dealing only with part 2, and had attempted to revise it, he had taken enormous steps backward. Instead of dealing with international responsibility, he had referred to obligations. Contrary to what was provided in part 1 of the draft, he had affirmed that obligations, as such, could derive from various sources of international law and that customary obligations had different legal consequences from conventional obligations. Such a statement was quite unacceptable. In part 1 of the draft articles, the Commission had adopted article 17, entitled "Irrelevance of the origin of the international obligation breached", which provided that an act of a State which constituted a breach of an international obligation was an internationally wrongful act "regardless of the origin, whether customary, conventional or other, of that obligation". Under general international law, an obligation could be of conventional origin for some States and of customary origin for others. For example, a rule codified in one of the 1958 Conventions on the Law of the Sea was of conventional origin for the States parties to that instrument and of customary origin for all other States. The Special Rapporteur could not now maintain that obligations of different origins had different legal consequences. Article 17, paragraph 2, provided that the origin of the international obligation breached by a State did not affect the international responsibility arising from the internationally wrongful act of that State. In the commentary

to that provision,¹³ the Commission had duly explained why the origin of the obligation did not affect international responsibility. The position adopted by the Special Rapporteur could be defended only if part I of the draft and, in particular, article 17, was revised, and that would be a step backward. Moreover, the topic which the Special Rapporteur had been requested to study related not to international obligations and the arising of international responsibility, but to international responsibility as it derived from part 1 of the draft articles.

30. In regard to obligations of conventional origin, the Special Rapporteur had referred to bilateral and multilateral treaties and even to treaties which entailed no obligations, such as treaties establishing boundaries. In his own view, even boundary treaties entailed obligations: in particular, the obligation to draw boundaries in accordance with those treaties. But all questions relating to treaties had been dealt with in the Vienna Convention on the law of treaties, and there was no need to interpret or comment on that Convention now.

31. The Special Rapporteur had also stated that there were obligations whose breach did not entail legal consequences. Yet the general principles enunciated in articles 1 to 4 of part 1 of the draft applied to the entire topic of State responsibility. Articles 1 and 3 of part 1 provided, respectively, that every internationally wrongful act of a State entailed the international responsibility of that State and that there was an internationally wrongful act when conduct consisting of an action or omission was attributable to the State under international law and that conduct constituted a breach of an international obligation of the State. In paragraph 117 of his third report, the Special Rapporteur had contradicted those principles by stating that, unless otherwise provided, the non-fulfilment of an obligation to co-operate, which was embodied in certain treaties, entailed no legal consequence. That statement was entirely contrary to the provisions of part 1 of the draft, which laid down that any internationally wrongful act of a State resulting from the breach of an international obligation, regardless of its origin, entailed the international responsibility of that State. If that were not true, there would be no basis for international responsibility. In short, article 1 as proposed by the Special Rapporteur totally contradicted the first few articles of part 1 of the draft.

32. Article 1 of part 1 of the draft indicated what the link between that part and part 2 should be. It provided that "Every internationally wrongful act of a State entails the international responsibility of that State", which showed that the legal consequence of such an act was international responsibility. Hence it was with international responsibility and, in particular, its content, forms and degrees, that part 2 should be concerned. It must define what was covered by the notion of international responsibility, which corresponded to the parallel

¹³ Yearbook ... 1976, vol. II (Part Two), pp. 80 *et seq.*

notions of criminal, civil and administrative liability in internal law.

33. The Commission had decided not to deal with primary rules because it would have had to indicate what those rules were, which would mean codifying the whole of international law. It had, however, pointed out that it could not entirely ignore the content of the primary rules and it had therefore distinguished between rules of fundamental importance for the international community, whose breach constituted crimes, and other rules of lesser importance, whose breach constituted international delicts. There was obviously nothing to prevent the Special Rapporteur from identifying other categories of obligations and rules and attributing different legal consequences to their breach, but he would have to do that according to the content of the obligations or rules, not according to their origin.

34. At the previous session, he (Mr. Ushakov) had already pointed out¹⁴ that, when preparing part 1 of the draft articles, the Commission had preferred, for practical reasons, to deal with the topic from the point of view of obligations rather than from that of rights, but the Commission had explained that it could just as easily have studied rights rather than obligations, since for every right there was a corresponding obligation and vice versa. For practical reasons also, he considered that part 2 of the draft should be approached from the point of view of the rights of injured States, rather than from that of the new obligations of a State committing an internationally wrongful act. In that case, too, the Commission's reasoning was valid. But there was no need to study rights and obligations simultaneously, as the Special Rapporteur had done.

35. Draft article 1 was not only unnecessary, it was also dangerous, since it implied a complete revision of article 1 of part 1. For the latter article provided that "Every internationally wrongful act of a State entails the international responsibility of that State", whereas draft article 1 in part 2 of the draft provided that "An internationally wrongful act of a State entails obligations for that State and rights for other States ...", so that it was no longer every internationally wrongful act that was taken into account, and the act no longer entailed international responsibility, but created unspecified rights and obligations.

36. Draft article 1 also contained the saving clause "in conformity with the provisions of the present part 2". That reference to the provisions of part 2 implied that under some of those provisions an internationally wrongful act of a State might not give rise to obligations for that State and rights for other States, which would be a flagrant contradiction of the principle enunciated in article 1 of part 1. It was inconceivable that the existence or non-existence of international responsibility should depend on the provisions to be contained in part 2, especially as the Special Rapporteur had said

that that part would not cover all possible legal consequences. Thus, although it looked quite innocent, draft article 1 seriously derogated from the general principles on which part 1 of the draft was based.

The meeting rose at 1 p.m.

1733rd MEETING

Wednesday, 23 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (continued) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)* (continued)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

ARTICLES 1 to 6⁴ (continued)

1. Sir Ian SINCLAIR said that the topic of State responsibility was related to every facet of contemporary international law, whether the source was treaty, custom or general principles of law. International lawyers were accustomed to speaking in terms of the rights and obligations of States. Yet every right and obligation derived its origin from one of the acknowledged sources of international law, unless the source of the principle *pacta sunt servanda* itself was to be traced. The *fons et origo* of that principle was of necessity somewhat metaphysical in nature, since it led to the search for the elusive *Grundnorm* which had taxed the intellects of many generations of international lawyers.

2. In dealing with the topic of State responsibility, then, the Commission was concerned with some of the fundamentals of the international legal order part 1 of the draft was a monument to the intellectual achievement of the previous Special Rapporteur, Mr. Ago, now Judge of the International Court of Justice. He himself had been rather critical, in the Sixth Committee of the General Assembly, of the general principles it reflected and the particular provisions it contained. In particular, doctrinaire rigour had been carried too far in

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part I of the draft articles (Origin of international responsibility), arts. 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ For the texts, see 1731st meeting, para. 2.

¹⁴ *Yearbook ... 1981*, vol. I, p. 208, 1683rd meeting, para. 12.

the construction of part 1. The distinction between primary and secondary rules was a useful analytical tool; but application of that distinction, together with the general approach of the Special Rapporteur and the Commission as a whole, had had the effect of locking the Commission into a construct which presented rules at a level of abstraction and generality that could rob them of much of their value to Governments in the long run. He did not intend to offer a critique of part 1 of the draft, but it was important to be conscious of its formulation when seeking to offer general comments on what should form the content of part 2.

3. Mr. Sucharitkul had referred to part 1 as a cathedral; it would be more accurate to say that it represented the foundations of the cathedral which the Commission was seeking to build. He, for one, would not be discontent if the new architect sought to add elements of the high gothic or the rococo to the edifice originally planned.

4. Mr. Ushakov, in his intervention at the previous meeting, had appeared to find a violent and irreconcilable contradiction between the Special Rapporteur's proposals for part 2 of the draft and the Commission's draft of part 1. With regard to article 17, he himself did not believe any international lawyer would disagree with the idea that the international responsibility of a State arising from an internationally wrongful act committed by that State could be engaged, no matter what the source or origin of the obligation breached. That was not at issue. What was at issue in the context of part 2 was the quite separate question of the content, form and degree of that responsibility; the source of the obligation breached could be highly relevant to the determination of any or all of those matters.

5. To take a single example, suppose that State A accused State B of having committed a breach of a treaty whereby State B had undertaken an obligation to pay State A, on a certain date, a defined sum of money in return for services performed by State A for the benefit of State B. Suppose, further, that both State A and State B had accepted, in the treaty, an obligation to refer any dispute concerning the interpretation or application of the treaty to arbitration at the instance of either party. State A took the dispute to arbitration. State B pleaded one of the circumstances precluding wrongfulness, such as *force majeure*, despite which the arbitral tribunal found in favour of State A. It could be held, on the basis of article 17, that the international responsibility of State B had been engaged from the very beginning, irrespective of the source of the obligation breached—but surely the degree of international responsibility of State B would be enhanced if it failed to comply with the arbitral award in the particular circumstances postulated. In other words, it could be argued that non-compliance with a binding arbitral award establishing the original breach was a quite separate and distinct act of the State, engaging a higher degree of responsibility than the original and contested breach. Furthermore, the source of the obligation breached would, in the example given, have changed

sensibly between the original breach of the treaty and the subsequent, and arguably much graver, failure to comply with the arbitral award. Therefore, while it could be accepted that article 17 was a correct statement of the law with regard to the determination of the origin of international responsibility, the source of the obligation breached could be of material, even crucial, significance in the determination of the content, forms and degrees of international responsibility.

6. If the source of the obligation could, in certain circumstances, be relevant to an assessment of the content, forms and degrees of international responsibility, so could the nature of the obligation. There was an infinite variety of gradations in expressing the precise extent of the obligations undertaken in international agreements. There were "weak" obligations, qualified obligations, obligations of limited scope and obligations of wider scope; all those types had to be considered. By a weak obligation, he meant an obligation embodying the minimum in the way of legal commitment. For example, a State could undertake, in a treaty with another State, to "use its best endeavours" to persuade a non-State entity subject to its jurisdiction to follow a certain line of conduct, or to refrain from carrying out certain actions. That obligation could be breached if the State in question failed to use any endeavours at all. But the content and degree of international responsibility entailed for the author State in failing to make any endeavours must be sensibly less than the content and degree of international responsibility entailed in consequence of a breach of a stronger obligation. After all, the treaty partner could hardly have entertained much expectation that conscientious fulfilment by the State of the weak obligation would result in the non-State entity's pursuing the desired line of conduct.

7. There was a certain lack of clarity in the Special Rapporteur's use of the term "subsystems". In the context of State responsibility, did subsystems mean distinct areas of substantive international law, such as the law of the sea, the protection of human rights, the regulation of international civil aviation, or the treatment of aliens? Or were they those areas of substantive international law in combination with whatever procedural mechanisms sustained them, whether in the form of international organizations or dispute settlement machinery? He was not unmindful of what the Special Rapporteur said in paragraphs 40 to 54 of his third report (A/CN.4/354 and Add.1-2). But he did think there was a need for clarification, and, in the elaboration of part 2, care would certainly have to be taken to preserve the effectiveness of already operating subsystems such as the General Agreement on Tariffs and Trade, which had a highly specific dispute settlement machinery.⁵

8. The Special Rapporteur deserved the Commission's support in his unenviable task of providing the proper

⁵ Arts. XXII and XXIII of the General Agreement (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), pp. 39-40).

framework for part 2. The three parameters were cornerpieces of the jigsaw puzzle; he hoped the Special Rapporteur would adopt an inductive approach, analysing some of the various subsystems to which reference had been made and distilling principles capable of application at least within each subsystem, and possibly more generally.

9. With regard to the six draft articles proposed in the third report, he had already spoken on article 1 (1731st meeting), and retained some doubt as to whether such a "linkage" was necessary. If it was necessary, the article should be reformulated along the lines suggested in the debate; but he thought it could easily be dropped, especially as he did not regard it as having any substantive content.

10. He supported Mr. Calero Rodrigues's proposal (*ibid.*) to invert the order of articles 2 and 3. It was important to signal at the outset that part 2 incorporated residual rules to be applied only where no other rules would be applicable within the framework of a particular subsystem. Article 3, the drafting of which might have to be looked at again, should certainly be retained, and should appear as article 1. He also supported article 2, since the principle of proportionality was a key element in the construction of part 2 and should be stated at the outset.

11. He had more difficulty with articles 4, 5 and 6, which appeared to be of a different order and perhaps should not be placed at the beginning as general principles. Article 5, for example, was in effect simply a saving clause, which should perhaps eventually be incorporated in one of the later articles of part 2. Articles 4 and 6 presented different problems. Article 6, was, of course, a substantive article, relating to the obligations of every other State arising out of an internationally wrongful act of a State constituting an international crime. He could not support that article in its present form. Careful thought must be given to the legal consequences of an international crime as defined in article 19. Article 6 only spelled out certain obligations of every other State—the Special Rapporteur's third parameter; nothing was said about the separate consequences of an international crime in regard to the victim State. The content of article 6, therefore, required very considerable further discussion before the concept of what flowed from an international crime in the way of State responsibility could be fully elaborated. As to article 4, an article of that type would have to be incorporated in the draft, but it did seem to be substantive rather than a simple elaboration of general principles governing the draft, and its place in the draft would have to be considered carefully.

12. Mr. EVENSEN said that the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2) was at a high intellectual level, but perhaps not easily accessible. It introduced six new articles, presumably belonging to a first chapter on "General Principles". One question which came to mind was whether article 6, on the obligations of every other State in regard to interna-

tional crimes, belonged in that chapter or somewhere else in part 2; he shared the views of Sir Ian Sinclair on that point. Articles 4 and 5, on the other hand, belonged more naturally in an introductory chapter. He also shared the view that article 1 might be superfluous, and that article 3 would fulfil the same object and should become article 1. Another question that arose was whether the Special Rapporteur planned to deal with additional provisions in the opening chapter on general principles.

13. In paragraph 151 of his third report, the Special Rapporteur stated that the draft articles presented in chapter VI replaced articles 1, 2 and 3 as proposed in his second report (A/CN.4/344, para. 164), and that articles 4 and 5 were also withdrawn. He himself did not see how the six new articles, which dealt with entirely different topics, could replace previous articles 1 and 3. Although he had had reservations about the drafting of those articles, they dealt with substantive issues, and should perhaps be retained somewhere else in part 2, if not in the chapter on general principles.

14. Article 1 as proposed in the second report provided that "A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation." The statement that, in principle, the original obligation survived the wrongful act was valid. Similarly, the former article 2 dealt with a valid issue: the legal consequences of an internationally wrongful act. That issue had, in principle, been covered by the new article 3, which he had no difficulty accepting. He did, however, have some doubts about the new drafting, in particular the words "except to the extent" and "are prescribed", which could perhaps be replaced by other formulations that would make the article more flexible. He did not see that the former article 3, as proposed in the second report, which provided that "A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law", had been covered by the new articles 1 to 6. The principle stated in that article was relevant and should be retained somewhere in part 2.

15. The legal issues in the former articles 4 and 5 were highly relevant. He had some drafting criticisms, but did not think those articles should be withdrawn. Perhaps they did not belong in an opening chapter on general principles, as the Special Rapporteur had indicated in his second report by placing them in chapter II of the draft, under the heading "Obligations of the State which has committed an internationally wrongful act". In any event, it was clear that the six new articles proposed in the third report did not cover any of the issues dealt with in the former articles 4 and 5.

16. He agreed that the three parameters stated by the Special Rapporteur were important, but they should not be over-emphasized. Other aspects were also important for the general structure of parts 2 and 3, such as the various remedies and their effect on provisions to be drafted, the *ex tunc*, *ex nunc* and *ex ante* aspects, the question of *restitutio in integrum*, the questions relating

to pecuniary compensation touched upon in the former articles 4 and 5 and, lastly, the questions of implementation and peaceful settlement procedures.

17. Mr. Malek (1732nd meeting) had emphasized the importance of self-defence as a remedy against internationally wrongful acts; a different aspect of that issue was dealt with in article 34 of part 1. He shared Mr. Malek's concern about the political situation and was deeply shocked at the flagrant violations of international law and basic human rights occurring throughout the world. But if the Special Rapporteur had not yet touched upon the question of self-defence, it was perhaps because he had not yet reached that stage in his work. The six articles proposed dealt with entirely different matters, not with remedies against internationally wrongful acts or implementation of the applicable principles of international law to prevent or remedy such acts. And since the purpose of the Commission was not only the codification, but also the progressive development of international law, the Commission's aim should be to tone down the importance of self-defence and emphasize the obligation of all States to settle their disputes by peaceful means consonant with the purposes and principles of the United Nations Charter. In the nuclear age, with its doctrine of pre-emptive acts of self-defence, the race for first-strike capability and first use of nuclear weapons in cases of self-defence, it was essential for the Commission to emphasize peaceful remedies for international disputes.

18. The topic of State responsibility was vast, complicated and challenging. Perhaps the Special Rapporteur could prepare a rather detailed outline of the structure of parts 2 and 3 and the headings of subsequent articles, so that the six present and five former articles could be placed in their logical context. Such an outline, completed either for the present session or the next, would enable members to hold a more general and detailed discussion on the scope and structure of the work.

19. Mr. NI observed that, though the Special Rapporteur had characterized the topic of State responsibility as highly abstract, it could be made more realistic and specific if it were linked with events of international life. Since the Commission was attempting to formulate draft articles which might become rules of international law, it should be in possession of sufficient data, for otherwise it would have to rely on academic suppositions and imaginative hypotheses.

20. As Mr. Malek and Mr. Evensen had pointed out, breaches of international obligations were by no means rare, and were dealt with through various channels, mostly political. Some legal cases had been cited in the Special Rapporteur's reports, but the approach adopted was predominantly academic and philosophical. In any event, only a few cases had been regarded as justiciable or capable of judicial settlement, or as otherwise providing precedent. Of course, a topic such as State responsibility was inevitably abstract when compared with such a topic as the jurisdictional immunities of

States and their property, with its abundant materials consisting of national laws, judicial decisions and State practice. But considering the extreme importance of State responsibility in the contemporary world, the Commission must be content with some abstractness at the start, bearing in mind that too much might submerge it in deep water.

21. The concept of State responsibility had undergone profound changes. As a background to the present situation in the development of the theory of State responsibility, the Special Rapporteur, in paragraphs 135-137 of his third report (A/CN.4/354 and Add.1 and 2) had invited the Commission to note three general points: first, a state of interdependence, in which an internationally wrongful act might entail an attitude of other States; second, a "bilateral" internationally wrongful act, whereby some State or States might be "specially affected" by the breach; third, a strong tendency towards "regionalization". He agreed with the Special Rapporteur to the extent that in modern international life, which was characterized by the frequency and inevitability of contact between the peoples of the world, the interdependence of the conflicting demands and responses of nations made constant adjustment necessary. The peoples of the world were not living in a vacuum, and an internationally wrongful act would naturally give rise to new relationships entailing consequential obligations and rights between the wrongdoer or author State and the injured or victim State, as well as between the author State and all the other States constituting the international community, whose interests in maintaining international peace and security had suffered. On the basis of that reasoning, the three parameters were well-founded.

22. He noted that the Special Rapporteur had withdrawn the five articles submitted in his second report (A/CN.4/344, para. 164). Some of the comments made on those articles in the Commission and in the Sixth Committee of the General Assembly had suggested that they tended to protect the interests of the author State. In his third report, the Special Rapporteur introduced six new articles, none of which exactly reproduced any of the articles withdrawn; that was indeed a radical change. Some concepts not previously dealt with had been introduced: the principle of proportionality, the peremptory norm and international crimes, and there was added emphasis on the application of the provisions of the United Nations Charter. Yet the third report contained little information on the line of thought behind the changes, although some occasional explanation might have been made in the commentaries.

23. With regard to article 1, whose purpose was to serve as a link between the articles in part 1 and those in part 2, he agreed with the suggestions made by Mr. Malek (1732nd meeting) and supplemented by Mr. Francis and Mr. Calero Rodrigues (1731st meeting) and Sir Ian Sinclair. To make that article clearer, perhaps it might be better to have two paragraphs, one relating to the consequential obligations of the author State and

the other to the consequential obligations and rights of the other States resulting from the internationally wrongful act. Something should be said about the obligations of the other States, because it might sound unusual to say, at the beginning of part 2, that other States, besides the victim State, would have to assume obligations by reason of a wrongful act. Further thought might also be given to whether the addition of the word “consequential” was sufficient. Among other drafting changes, the word “right” should be changed to “rights”, and the words “the present part two” to “the present part”. He did not agree with the Special Rapporteur’s statement (A/CN.4/354 and Add.1 and 2, para. 145) that article 1 merely served as a link and was not a statement of principle; it seemed to introduce the idea of the three parameters in part 2, and did not merely repeat article 1 of part 1.

24. The new article 2 introduced the principle of proportionality, which was a useful one; but the article should not be so worded as to suggest that it might be considered inappropriate to take effective counter-measures. The use of the two negatives—“... should not ... disproportional”—seemed to provide a balance. The principle of proportionality meant that the party wronged should not employ means grossly incommensurate with the actual necessity of counteracting the existing threat or consequent injury. For example, history recorded many cases in which the feigned disappearance of a foreign missionary or foreign officer had led to a full-fledged invasion. The words “in their effects” appeared unnecessary, however, and might give rise to confusion and differing interpretations.

25. In the new article 3, the use of the word “every” did not seem meaningful, and would give the false impression that in other draft articles the absence of the word “every” implied non-application in some cases. He endorsed the suggestions made by Mr. McCaffrey (1732nd meeting), Mr. Calero Rodrigues (1731st meeting) and Sir Ian Sinclair that the new article 3 would be better placed after article 1 because of its nearness in thought to that article, while article 2, introducing the concept of proportionality, might be placed after it.

26. The new article 6 reflected the third parameter—the position of third States with respect to the situation created by the internationally wrongful act. Since aid or assistance might sometimes be rendered to the author State indirectly or clandestinely, the words “directly or indirectly” might be added after the word “assistance” in paragraph 1 (b).

27. Mr. JAGOTA said that, despite the somewhat abstract nature of the material before the Commission, the topic of State responsibility was of great practical and, indeed, topical importance, as was all too apparent from the daily newspapers. The draft articles previously submitted by the Special Rapporteur in his second report (A/CN.4/344) had been criticized on the ground that they would protect the author State, because its rights subsisted even after the wrongful act had been

committed. The broad approach adopted in both the Commission and the Sixth Committee of the General Assembly seemed to have been that, since an internationally wrongful act had been defined in part 1 of the draft, part 2 should deal with the situation created by a wrongful act, that is, with the obligations of the author State, the rights and obligations of the injured State, and the rights and obligations of third States. That did not, however, imply any diminution in the value of the earlier articles, which could still be used in a different framework.

28. In his new approach the Special Rapporteur had concentrated more on the scope of the draft articles, while developing the concept of subsystems, or separate regimes of law, whereby a complete code was established with regard both to substantive and to procedural matters. The Special Rapporteur had explained (1731st meeting) that the rules of the draft would be residual rules, to the extent that they were not covered by individual subsystems. While he (Mr. Jagota) supported that new approach, he feared that if the exclusion of other rules and regimes was too complete, not only subsystems, but also the other generally applicable rules of international law might be excluded, with the result that the value of the residual rules in part 2 could be weakened.

29. Further, although draft article 3 dealt with scope and draft article 1 was designed as a linkage article, he considered that there was a difference of substance between them, since article 3 dealt with what was covered by the draft and article 1 with what would happen in the event of a breach of an international obligation. In his view, therefore, no useful purpose would be served by combining those two articles. If, however, draft article 1 were retained, as he thought it should be, he would suggest that it be slightly amended to provide that an internationally wrongful act of a State entailed “obligations for that State and rights *and obligations* for other States ...”. He would also like to see some reference to the injured State included. If article 1 was amended in that way, draft article 3 could follow it immediately.

30. While he agreed entirely with the statement of the fundamental principle of proportionality, which would establish a rule of law and prevent irresponsible action, he was not certain that draft article 2 should be retained in its existing form. In his view, that article should be so drafted as to provide for proportionality between the response and the breach and should place less emphasis on the State which had committed the wrongful act. It was a change of emphasis rather than a change in substance that was required. He also considered that the basic elements of the former draft articles 1 and 3, which had a direct bearing on proportionality, should be incorporated in the draft, either as separate paragraphs of draft article 2 or as a new article.

31. With regard to draft article 3, he would like the Drafting Committee to consider the possibility of amending the opening clause to provide that the provisions of

part 2 would apply "to the legal consequences of every breach", rather than simply "to every breach", by a State of an international obligation. That amended wording would be more in keeping with the purpose of the draft.

32. Draft articles 4 and 5 could be called subsystem articles, though he wondered whether it would not be more accurate to describe rules of *jus cogens*, which were referred to in article 4, as a supersystem rather than a subsystem. In the case of article 5, the Charter of the United Nations could be regarded as a parallel rather than a subsidiary system. He considered it particularly important, in the more serious cases of the use of force and aggression, to uphold the primacy of the Charter, despite its limitations.

33. Draft article 6, which was the first substantive article in part 2, called for closer examination in connection with article 19 in part 1. In his view, article 6 was inadequate, because it dealt solely with the obligations of "every other State", which could be interpreted to mean "other than the injured State". In view of the examples of an international crime given in paragraph 3 of article 19, article 6 could perhaps be expanded by the inclusion of references to the legal obligations of the State that committed the crime, the legal rights of the injured State, and the rights and duties of third States. That would provide the necessary framework for a provision that could be applied to specific situations. Some kind of legal framework should also be provided for the response to an internationally wrongful act, rather than leaving the matter to be dealt with in part 3 of the draft, which related to implementation of the provisions and settlement of disputes.

34. Mr. CALERO RODRIGUES said that the statement of general principles—draft articles 2 to 6—at the beginning of part 2 would be very useful, inasmuch as it would constitute a guarantee against any omissions in the provisions of part 2, which could not be exhaustive.

35. The Special Rapporteur had rightly stressed the principle of proportionality, but had had some difficulty in determining whether there could be a link between a secondary rule and a primary rule as to the content of the primary rule. He understood that the principle of proportionality was to underlie the whole set of provisions in part 2, even at the risk of making, between the primary and secondary rules, some connections which were absent from part 1, and which could, in fact, be interpreted as being contrary to the spirit of that part. It seemed, however, that some such connections would be unavoidable in part 2.

36. He noted that the commentary to draft article 2, stating the principle of proportionality (A/CN.4/354 and Add.1 and 2, para. 146), was limited to a reference to the commentary to article 1. While he agreed that, from a general point of view, a specific commentary to article 2 would be superfluous, he thought it would be useful in clarifying the drafting of that article. The negative form of words, "should not ... be manifestly disproportional", served a useful purpose in emphasizing

the relativity of the concept. As worded, however, the article provided that the performance of the obligations and the exercise of the rights should not, in their effects, be disproportionate to the internationally wrongful act. It might be advisable to go somewhat further and provide that it was the obligations and rights themselves which should not be disproportionate to the seriousness of the act, for in such cases proportionality could be regarded as a fundamental requirement rather than simply as a rule of application.

37. Draft article 3 established the residual nature of the provisions in part 2 by providing, in effect, that the rules in that part would determine the legal consequences of an internationally wrongful act only if they were not determined by other rules of international law. The Special Rapporteur had explained that the rules in part 2 were to be considered only as presumptions of the intention of States that established or accepted rights and obligations as between themselves. A more typical case would be that in which a primary rule that stated an obligation also prescribed the legal consequences of a breach of that obligation. In the previous version of draft article 2 (A/CN.4/344, para. 164), the Special Rapporteur had referred to a rule of customary, conventional or other origin and had provided that such a rule could determine, explicitly or implicitly, the legal consequences of the breach of an obligation created by it. Although he himself had previously had doubts about that rule, he found it quite acceptable as now drafted.

38. There was, however, another difference between the old and the new versions of the article. Whereas the former article 2 referred only to the possibility of determination of the legal consequences under the rule that established the obligation, the new article 3 recognized that the legal consequences might be prescribed by "other applicable rules of international law". The Special Rapporteur had cited the case in which States, having set out their obligations in a treaty, determined the legal consequences of a breach of those obligations in another and subsequent treaty. That was clearly a case in which the rules in the draft would not apply. But the rule should not be interpreted too broadly, since otherwise the provisions of part 2 would have a very small role to play. It would also be better to replace the words "apply to every breach by a State of an international obligation" by the words "apply to any internationally wrongful act of a State", because if the circumstances precluding wrongfulness, as provided for in part 1, obtained, a breach of an obligation would not constitute an internationally wrongful act and would not give rise to responsibility.

39. Draft articles 4 and 5, on which he had no detailed comments to make, were both very useful, because they provided that the rules of *jus cogens* and the provisions of the United Nations Charter would apply to the question of responsibility. As to draft article 6, he would have agreed with Mr. Jagota had he not understood the article in a different way. He did not think it had been the intention of the Special Rapporteur to deal once and

for all with the legal consequences of international crimes. He believed that the Special Rapporteur had meant to state the general principle that the main difference between international crimes and international delicts was that in the case of delicts the relationship established was between the author State and the injured State, whereas in the case of crimes the injury would be done to all members of the international community. He considered that the enunciation of that principle in part 2, though not essential, might be useful. He did agree, however, that draft article 6, as worded, might give the impression that it dealt in depth with the question of international crimes and sought to define their legal consequences. That impression could be corrected by making the article shorter and by providing that, in the case of international crimes, every State was concerned and every State had obligations, without going into details relating to the third parameter.

40. He assumed that the provisions of part 2 would have to specify in some detail the different legal consequences of the various kinds of breach. Lastly, he too thought that, since draft article 6 spoke of obligations which would clearly arise for States from internationally wrongful acts, draft article 1 should refer not only to the rights, but also to the obligations of other States.

41. Mr. USHAKOV said that the Commission should deal with the subject under study in concrete, not abstract, terms. It should draw up general rules, on the basis of State practice, since it could not draw up "primary" rules and then rules on responsibility for each specific case.

42. With regard to the so-called rule of "proportionality", he considered, unlike the Special Rapporteur and other members of the Commission, that it could not be a general rule—a general principle of general international law. In his view, there were two kinds of "proportionality". The first kind was "logical proportionality" according to which, in internal law, the legislator prescribed the maximum sentence for the most serious crimes and light sentences for minor offences. Once the sentence had been thus prescribed, it was for the courts to apply it. However, depending on the circumstances, the legislator could depart from that strictly logical approach. If article 2 was meant to provide, logically, the highest degree of responsibility for the most serious internationally wrongful act, he could accept such a rule of logical proportionality. But in international law the legislators—in other words States—had already laid down the content, forms and degrees of State responsibility: Chapter VII of the Charter of the United Nations set out the measures to be taken with respect to the most serious offences, such as acts of aggression, threats to the peace and breaches of the peace.

43. The second kind of "proportionality" related to the lower and upper limits of the sentence prescribed by the legislator in internal law for each offence. It was for the court to decide on the circumstances of the offence—such as the seriousness of the act, premedita-

tion, etc.—and to impose the corresponding sentence within the prescribed limits. The same applied in international law: in each individual case, the injured State itself determined the content, forms and degrees of the responsibility of the State which committed the internationally wrongful act. The Commission, as the counter-part of the legislators—that was to say, States—should confine itself to specifying, for each concrete situation or group of situations, the responsibility incurred under international law. But the fact remained that States, which were masters of their rights, were free to decide, except perhaps in the case of breach of a rule of *jus cogens*, not to invoke the responsibility of the State which had committed the internationally wrongful act. He would therefore prefer the draft articles to place more emphasis on the right of the injured State to invoke or not to invoke the responsibility of the offending State. It would then be for the injured State alone to define the content, forms and degrees of that responsibility.

44. He saw only two possible solutions: either the principle of proportionality would replace all other rules, in which case there would be a single rule of proportionality which the Commission would have to draw up, and by which the injured State would be governed in its response to an internationally wrongful act and the problem would thus be solved; or the Commission would determine the content, forms and degrees of State responsibility on the basis of international law, according to the content of the international obligations breached, and would leave the injured State free to claim or not to claim its rights. In the latter case, the Commission would merely have to codify rules already established in international law.

The meeting rose at 1.00 p.m.

1734th MEETING

Thursday, 24 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (continued) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)³ (continued)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 6⁴ (*continued*)

1. Mr. BARBOZA said he noted that the Special Rapporteur had withdrawn the five articles submitted in his second report (A/CN.4/344, para. 164) and had submitted six new articles, proposed in his third report (A/CN.4/354 and Add.1 and 2, paras. 136-150). The former article 1 would be dropped; the former articles 2 and 3 would be covered, in some way, by new provisions, but with more complex wording; the former article 4, which referred to the obligation to make reparation and was therefore very important, would appear after article 6, in the list of legal consequences flowing from the breach of an international obligation; and the former article 5, which had dealt with injury to aliens, had been omitted, though some provision on the treatment of aliens would eventually be included.

2. He agreed that the former article 1 should be dropped, for two reasons. First, while he understood the reasons why some members of the Commission considered that the initial obligation was not extinguished in the case of non-performance, he believed that it was really extinguished. There was no denying that the breach of one obligation created another, which necessarily brought about the termination of the first. For example, a State which had to pay a certain sum of money on 1 January 1982 had an obligation not only to pay that sum, but also to pay it on the stipulated date: the time-limit was an essential element of the obligation. If the State did not pay on the stipulated date, it did not discharge its obligation and a new obligation was created, which contained, besides certain elements of the initial obligation—the amount to be paid—other separate elements, such as payment of interest and the setting of a new time-limit. Logically and legally, therefore, the initial obligation was terminated. Secondly, a State could not have two obligations relating to the same subject at the same time; therefore, if the original obligation continued to exist, the new obligation could not come to life and international responsibility could not arise. The new obligation was thus a substitute obligation.

3. The former article 2 was covered in the third report by the new article 3 (*ibid.*, para. 147). As to the former article 3, it was not very clear to him whether the rights it referred to were all the rights of the State under international law or only the rights linked with the obligation breached. Whatever the meaning of that article, its object seemed to appear in articles 1 and 3, as proposed in the third report: the State which had committed the internationally wrongful act would be deprived of its rights only within the limits laid down by the draft articles and the applicable rules of international law.

4. The new article 1 submitted by the Special Rapporteur in his third report deserved very careful con-

sideration. Some members of the Commission had expressed the opinion that it was nothing more than a link between part 1 and part 2 of the draft. He himself believed that article 1 set out the basic principle underlying all the draft articles: it established the creation of new obligations and rights in the event of breach of an international obligation. It did so in general terms, and the scope of the new rights and obligations created was detailed in the articles that followed, in particular in article 4; he was therefore in favour of maintaining it. Some members of the Commission had suggested that a reference to other rules of international law should be added to article 1, because the Special Rapporteur had indicated (*ibid.*, para. 26) that part 2 of the draft articles was not going to contain an exhaustive list of the legal consequences of a breach of an international obligation. He himself respected that opinion and was quite prepared to follow it, but he wondered whether the saving clause in the new article 3, which read: "except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law", was not sufficient.

5. Article 1 referred to obligations and rights which, in the words of Mr. Ushakov, were two sides of the same coin. Nevertheless, he believed that part 2 of the draft laid down two broad categories of norms. The first category corresponded to the first parameter, namely, and speaking in broad terms, the obligation to make reparation (including in that concept *restitutio in integrum*) or the substitute obligation. That obligation was essentially of the same nature as the initial obligation: it was a "primary" obligation. The State which had committed the internationally wrongful act did not incur responsibility if it carried out the substitute obligation. Nevertheless, there was a very great difference in content between the substitute obligation and the primary obligations under international law which established the initial obligation. Those primary obligations were extremely varied in content, whereas the substitute obligation was basically of the type referred to in the former article 4, and variants of it were very rare. The Commission would have no trouble in defining the concept of a substitute obligation in part 2 of the draft articles, since it would not be coming up against the enormous problems raised by the classification of primary obligations.

6. The second broad category of norms corresponded to the concept of sanctions. By discharging the substitute obligation, the State was cleared of all responsibility; but if it did not discharge the substitute obligation, it could be liable to a sanction. The sanction would thus result from the non-fulfilment of the obligation; but there could also be shorter ways to sanctions, i.e. not passing by the breach of the substitute obligation: for example, *exceptio non adimpleti contractus*. In that connection, he had difficulty in situating the rights and obligations which formed the essence of the new article 1 in regard to sanctions. It was not quite clear who were the subjects of those rights and obligations and

⁴ For the texts, see 1731st meeting, para. 2.

with respect to whom they were exercised. For example, what were the obligations of the author State in regard to a countermeasure? Possibly, it had the passive obligation not to oppose the countermeasure; the subject of the right would be the injured State which initiated the countermeasure. But countermeasures, which constituted the majority of, if not the only, sanctions, went beyond the framework of the bilateral relations between the author State and the victim State. The State applying a countermeasure was acting as an organ exceptionally empowered by international law to apply sanctions. Article 5 would thus have to be drafted so as to avoid an overlapping of competence between the central competent organ of the United Nations and "decentralized organs", which were individual authorized States.

7. Perhaps the distinction between reparation and sanctions should be reflected in article 1, in a final clause reading: "and may entail countermeasures by the injured State as provided in the present articles". Particular attention would then have to be paid to the arrangement of the articles, and it would be necessary to regulate carefully the responsibility of States in one or more articles, which could appear either in part 2, or in part 3 on the "implementation" of State responsibility. A mere reference to international law, or to self-defence, would not be enough. Countermeasures would have to be defined precisely, or there would be a return to the system which had obtained before the establishment of the United Nations.

8. Article 2 stated the rule of proportionality, a concept which was interesting, but difficult to define. He believed that equivalence played a greater part than proportionality in the obligation to make reparation; but proportionality played an important part in the case of sanctions. The article should be drafted in a positive rather than negative form. As to the substance, he had difficulty in understanding the wording used in reference to the effects of the performance of the obligations and of the exercise of the rights.

9. Article 4, which should be retained as it stood or in some similar form, should not present any difficulties, since the Commission had already had occasion to introduce similar exceptions in favour of rules of *jus cogens* in other draft articles it had prepared. Article 5 should also be retained, subject to the comments he had made concerning it in connection with article 1. Finally, with regard to article 6, he subscribed, on a preliminary basis, to the general ideas expressed by Mr. Jagota at the previous meeting.

10. Mr. FRANCIS said that the six draft articles submitted in the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2, paras. 145-150) should be incorporated, in essence if not in form, in part 2 of the draft. He endorsed, in general, the statement made by Mr. Evensen at the 1733rd meeting and agreed that the Special Rapporteur's withdrawal of the former draft articles 1 to 4, submitted in his second report (A/CN.4/344, para. 164), was premature. He did not,

however, have any objection to the withdrawal of former draft article 5. He too would like to know whether the Special Rapporteur intended to examine further principles in subsequent reports, and to have some indication, by the Commission's next session at the latest, of the main articles to be included.

11. The Special Rapporteur's withdrawal of former draft articles 1 to 5 seemed to suggest that he had abandoned his original approach to the first parameter, relating to the new legal relationship created by the breach; perhaps the Special Rapporteur could reassure the Commission on that point, since it was difficult to determine whether all of the six new draft articles dealt with principles, or whether some of them contained substantive provisions.

12. Referring to the withdrawal of the former draft article 1, the Special Rapporteur had said (A/CN.4/354 and Add.1 and 2, para. 15) that there were occasions when an obligation that had been breached could not, in view of its nature, be sustained. But that kind of obligation was the exception; breaches were most frequently in respect of obligations of a continuing, if not of a permanent, character. And it was abundantly clear, in his view, that the former article 1 covered precisely those cases in which the obligation could be regarded as a continuing one.

13. He entirely agreed with Mr. Barboza's views on the new draft article 1, which showed the scope of part 2. It would have no place there as a linkage article, which should normally lead directly to the principles adopted. He would suggest, on an entirely informal basis, a linkage article worded on the following lines: "An internationally wrongful act of a State gives rise to consequences in accordance with the following general principles". A statement of those principles would then follow.

14. As he saw it, there could be a first general principle based on the new draft article 1 as amended in the light of the suggestions made by members. A second general principle could be that laid down in the former draft article 1, which provided, in effect, that an internationally wrongful act of a State did not of itself affect the legal force of the obligation breached. And there could be a third general principle based on the new draft article 3. In that connection, too, he agreed with Mr. Barboza that there was no need to include a reference to other rules of international law in article 1, since the point was already covered in article 3.

15. As to the principle of proportionality laid down in article 2, he considered that the reference to the performance of the obligations of a State should be omitted and that the article should be confined to the responses of the injured State and of third States. He took that view because, bearing in mind the terms of the former draft article 1, he believed that the author State had rights, whether under the instrument in respect of which the breach arose or under international customary law, and that those rights should be preserved within the framework of the principle of proportionality. He

would suggest, however, that the statement of the principle itself be shortened and worded in very general terms. Lastly, he would like a brief statement of the principle of non-recognition to be included in the general principles.

16. Mr. BALANDA said that the method of parameters adopted by the Special Rapporteur was appropriate for the subject, but it was unfortunate that the emphasis had been placed exclusively on the obligations of the State which had committed an internationally wrongful act, whereas the victim State and third States would generally only have rights. Would an injured State be forced to assert its right? That question had to be raised, and he intended to revert to it when examining the draft articles.

17. In paragraph 12 of this third report (A/CN.4/354 and Add.1 and 2) the Special Rapporteur had rightly pointed out that the mechanism of the international responsibility of States should not be confused with its counterpart institution in internal law. The Commission would therefore have to avoid using, in the draft articles, any word which was not in keeping with the nature of the international responsibility of States. For example, any idea of an offence suggested by the concept of negligence, which belonged to internal law, should have no place in draft articles on the international responsibility of States. For international law carefully defined every act or group of acts which constituted a particular offence, whereas in international law any internationally wrongful act engaged the responsibility of its author, even if no damage had been done. He therefore believed that the word "breach", as used in paragraph 88 of the third report, was not appropriate. The concept of "constructive injury" referred to in paragraphs 92 and 94 of that document was not very clear. How could the existence of "constructive injury" be easily proved? Was a "constructive injury" contingent or adventitious? Was a State justified in claiming reparation from another State for a contingent or constructive injury? It should be noted that chapter IV of the same document, entitled "The catalogue of legal consequences", did not give an exhaustive list of such consequences.

18. As a last general comment, he endorsed the view expressed by the Special Rapporteur (*ibid.*, para. 30) that there could be no question of the Commission's proposing a group of rules on the international responsibility of States without providing for an appropriate mechanism for the peaceful settlement of disputes.

19. Turning to the former draft articles 1 to 5 (A/CN.4/344, para. 164), he noted that they dealt with the situation of a State which had committed an internationally wrongful act only from the viewpoint of the obligations which would arise for it under the draft articles, whereas it was no less certain that the author State also had, and retained, rights. That principle should be stated, and it was therefore unfortunate that the Special Rapporteur had withdrawn the former article 3.

20. He wondered whether there might not be an inclination to believe that if an international obligation was frequently breached by States it lapsed, or at least that it lost its binding force; that was, indeed, a characteristic element of any legal rule. And since it was the act which created the law, was there not reason to believe that the repetition of a large group of acts ignoring a rule of law, by a large proportion of the members of the international community, could create a sort of custom affirming the non-existence of the rule being broken? That was where the former article 1, withdrawn by the Special Rapporteur, would be useful: it was important to state, among other principles, that a breach of an international obligation by a State did not affect that obligation.

21. It was also important for the draft articles to contain a provision affirming the principles of *restitutio in integrum* and of equivalent reparation, yet without going into detail as the Special Rapporteur had done in the former article 4. The principle of the obligation of the author State to re-establish the *status quo ante* or, failing *restitutio in integrum*, to make equivalent reparation, was an important principle which should be emphasized. It was quite obvious that certain injuries, because of their nature, could be remedied only by moral reparation. In the five former articles, that double principle was not stated in general and explicit terms.

22. He agreed with the Special Rapporteur that the former article 5 was not necessary. He did not see why the draft should assign a special place to the breach of rules on the status of aliens. To do so might give the impression that the obligation assumed by States in regard to the protection of non-nationals was a special obligation deriving from a superior norm of international law. The reference to "intent", in paragraph 2 (a) of the article, was not appropriate in the context: the intent or motive of a State's acts was assessed differently, and in any case in a context completely different from that of internal law, for internal law was equipped with mechanisms which made it quite easy to delimit the *animus delicti commissi* taking account of its structure. Article 5 could therefore be dropped.

23. Turning to the new draft articles proposed by the Special Rapporteur (A/CN.4/354 and Add.1 and 2, paras. 145-150), he observed that article 1 did not state a specific rule, but had some usefulness, as it provided the link between parts 1 and 2 of the draft. Article 2 laid down a principle which deserved to be retained: that of "proportionality". Nevertheless, it had to be acknowledged that application of that principle would come up against many difficulties, because it involved an element of evaluation which was open to different interpretations, especially as the Special Rapporteur used the adverb "manifestly", which was controversial. Furthermore, the evaluation of the proportion would be carried out *post factum*, when the reaction had already taken place, and would certainly not be easy in conflicts between States. According to the Special Rapporteur, the proportion must be between the performance of the

obligations created for a State by its internationally wrongful act and the exercise of the rights created for other States by that act; in other words, between the obligation to make reparation and the right to take countermeasures. But was the proportion limited to that level alone? He believed that it must also be considered at the level of the nature of the illicit act, and of its seriousness. For all those reasons, therefore, it would be preferable to adopt the idea suggested by Mr. Calero Rodrigues (1733rd meeting), that a countermeasure must not be disproportionate. Article 2 mentioned only the rights of the victim State and of third States. But did those States not have any obligations? It would be useful to go more thoroughly into that question.

24. Article 3 established the residual nature of the rules stated: in other words, it would be left to States to avoid other legal consequences they wished to attach to internationally wrongful acts. Article 4 was important because it dealt with *jus cogens*.

25. Article 6 contained several elements, the most important of which was that of an "international crime"; but its application was bound to raise several difficulties. The idea behind those provisions was certainly that of international solidarity between States, at least in the case of self-defence—which, as Mr. Malek had emphasized (1732nd meeting), should be defined as an independent concept, not simply by reference to Article 51 of the United Nations Charter. But the concept of self-defence was not easy to define. The obligations regarding assistance might, in some cases, remain a dead letter, judging from the state of current international relations, which were based on interests and affinities. Was it really believed that all States would rush to the aid of the State unjustly attacked? It was to be feared that on the day of reckoning the results would be scanty and bitter. And who would determine whether an "international crime" had been committed? According to the Special Rapporteur (A/CN.4/354 and Add.1 and 2, para. 150), it would be the organized international community, in other words the United Nations system, and more particularly the Security Council, under Chapter VI of the Charter. Was there not good reason to be sceptical about how quickly the Security Council, seized of an internationally wrongful act, would be able to characterize it properly? The Commission should be realistic; it should try to propose rules that could be applied and would not remain purely theoretical and academic. Article 6 raised another question: could abstention from the international solidarity required under paragraph 1 (c), be "punished"? In other words, could such abstention be regarded as a breach of international law? That idea, too, should be examined more thoroughly.

26. His preliminary conclusion was that the draft articles merited the attention of the Commission, and that the Commission should encourage the Special Rapporteur to proceed with their elaboration. He suggested that the Special Rapporteur should apply himself to proposing rules capable of application, for in as controversial and difficult a sphere as that of State respon-

sibility, the Commission would not achieve anything useful if its work could not be respected and applied. Furthermore, the rules to be established should, if possible, reflect the conduct of States, failing which States would refuse to apply them.

27. Mr. LACLETA MUÑOZ said he admired the way the Special Rapporteur had tackled the difficulties inherent in the topic. Generally speaking, he endorsed the comments made by Mr. Evensen (1733rd meeting). He, too, would prefer the five draft articles (A/CN.4/344, para. 64) submitted by the Special Rapporteur at the previous session not to be put aside permanently; those articles did correspond to concepts which had become traditional, and they should be inserted somewhere in the draft. The six new articles were also important and should all be included. Many of the difficulties they raised seemed to be due to the fact that the members of the Commission did not yet know enough about the content of the provisions to follow. Useless discussion could be avoided if the Special Rapporteur would indicate the probable structure of the draft. With regard to the order in which the articles were presented, he agreed to a large extent with Mr. Jagota (1733rd meeting).

28. The new article 1 had been criticized as being a mere repetition of article 1 of part 1 of the draft, and because the words "in conformity with the provisions of the present part two" seemed to exclude applicable customary international law. Those making the first of those criticisms had probably been surprised that a provision which was intended to serve as a link between part 1 of the draft, on the origin of international responsibility, and part 2, on the content, forms and degrees of international responsibility, did not mention international responsibility. That could be corrected by drafting article 1 to read:

"International responsibility deriving from an internationally wrongful act of a State entails obligations for that State and rights for other States."

As to the saving clause relating to the provisions of part 2 of the draft, the Commission could either add a reference to the other rules of international law, following the model provided by the Convention on the Law of the Sea,⁵ or add a suitable introductory clause to the article. It would also be possible to omit all reference to part 2 of the draft.

29. With regard to article 2, several members of the Commission had spoken of the criterion of proportionality, which he believed to be useful. Certainly there was automatic proportionality in the case of damage which could be assessed materially. In such cases, restitution or reparation must be proportionate to the damage caused. But proportionality was also very important in regard to countermeasures.

30. He endorsed Mr. Jagota's comments on the nature of article 3, its importance and the advisability of in-

⁵ See 1699th meeting, footnote 7.

cluding it among the general articles. Article 4, which dealt with peremptory norms of general international law, and article 5, which referred to the provisions and procedures embodied in the Charter of the United Nations, were both acceptable.

31. Article 6 was so important that it should be studied carefully and at length. It implicitly referred to the content of article 19 in part 1 of the draft, the article which undoubtedly constituted the Commission's main contribution to the progressive development of international law on the subject. Article 6 should certainly be expanded, but for the time being it was difficult to see where it might lead the Commission. For example, how should the three parameters adopted by the Special Rapporteur be combined with the different types of internationally wrongful acts to establish the legal consequences flowing from them? The rights of injured States and third States and the obligations of the author State could vary considerably, and the question of the relations between primary and secondary rules could arise. What should be the reaction to material or moral damage, or when there was no damage? What happened when there was one injured State, several injured States, or when all States were injured, as they were in the case of international crime? He wondered whether each of those possibilities would be considered from the point of view of each parameter, whether they would be partly regrouped or whether they would require the application of a new parameter. The Special Rapporteur had studied the question of international crimes, but it remained to be seen how his conception would fit into the general outline. It seemed that it would be necessary to devote a whole chapter to that question, regarding which he was concerned about the same points as Mr. Balanda.

32. For his other comments, he referred the Commission to those submitted by the Spanish Government on part 1 of the draft (A/CN.4/351 and Add.1-3). On the whole, the views expressed in regard to article 19 could be considered as his own. He believed it was necessary to set up institutional mechanisms for determining both the occurrence of international crimes and their legal effects.

33. Finally, he drew attention to a drafting point he had mentioned more than once in the Sixth Committee of the General Assembly: in accordance with the terminology traditionally used in Spanish-speaking countries, the expression "*acto internacionalmente ilícito*" should be used, rather than the expression "*hecho internacionalmente ilícito*".

34. Mr. JACOVIDES said he believed that the topic of State responsibility was perhaps the most important on the Commission's agenda, in both its scope and its implications. The "cornerpieces of the jigsaw puzzle", in the words of Sir Ian Sinclair (1733rd meeting), had been provided, but more effort would be needed to put the new draft articles 1 to 6 into acceptable form.

35. The element of proportionality, at present expressed in article 2 in the form of a double nega-

tive—"not ... manifestly disproportional"—was a key element that should be retained, either in its present position or elsewhere. Two other very important factors in providing the desired parameters were the peremptory norms of general international law and the provisions and procedures embodied in the United Nations Charter, which were dealt with in draft articles 4 and 5, respectively. In this third report (A/CN.4/354 and Add.1 and 2, paras. 148-149), the Special Rapporteur had rightly acknowledged that recognition of *jus cogens* constituted one of the most important elements in the progressive development of international law, and had pointed out that the legal principle stated in Article 103 of the Charter also applied to obligations not imposed by "any other international agreement". The Charter system in all its aspects, as authoritatively interpreted in such documents as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁶ and the Definition of Aggression⁷ also applied to the legal relationships between States resulting from an internationally wrongful act of a State.

36. Another important element which should be retained was the effect upon third States of an act of a State which constituted an international crime. That element derived from article 19 in part 1 of the draft, and the new article 6 rightly laid an obligation on third States not to recognize as legal the situation created by such act; not to render aid or assistance to the author State in maintaining the situation created by such act; and to join other States in affording mutual assistance in carrying out [those] obligations. Article 6 was well within the framework of the relevant provisions of the United Nations Charter and constituted progressive development in the proper sense of the term. The fact that it was not easy to apply in the present state of development of international society was not, in his view, sufficient reason for dropping it. The Commission's efforts looked to the long term, and it was to be hoped that what was not feasible today would become so in the future.

37. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his third report, which showed that the abstract way in which he had had to analyse the subject was not conducive to a series of simple and complete articles. There was a constant interaction between the various parts of the draft, which militated against crystallization into rigid forms. It was that special characteristic which had struck the members of the Commission who had spoken of overlapping of the parts, and even of steps backward. In view of the premises stated by the Special Rapporteur, however, it was not surprising that part 2 of the draft sometimes overflowed into concepts belonging in the two other parts.

⁶ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁷ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

38. In its entirely new drafting, article 1 was intended to serve as a link between part 1 and part 2. First of all, it should be borne in mind that the obligations and rights referred to in that article arose out of an internationally wrongful act and that that act, as defined in part 1 of the draft, was a breach of an international obligation by a State. That was a primary obligation, different from the new obligations referred to in article 1, which constituted the first parameter. But the second parameter was also introduced in that article, since it referred to the rights of other States; and since rights were the counterpart of obligations, it seemed appropriate to mention them. The other States referred to were obviously the injured States; but in order to provide a proper link between the two parts of the draft, article 1 should also mention the new obligations of third States, which were the subject of article 6. Furthermore, the words "in conformity with the provisions of the present part two" might be interpreted as meaning that there was only one regime of State responsibility: that laid down in part 2. Yet the Special Rapporteur had recognized (A/CN.4/354 and Add.1 and 2, para. 27) the validity of the comment made by the Commission in 1976, that it would be absolutely mistaken to believe that contemporary international law contains only one regime of responsibility applicable universally to every type of internationally wrongful act.

39. The wording of article 1 did not appear to bring out the residual nature of the draft. It was not until article 3 that the necessary saving clause appeared. Perhaps it would be appropriate to combine articles 1 and 3 by making article 3 a second paragraph of article 1—but article 1 would nevertheless have to be redrafted, placing the emphasis not on the internationally wrongful act, but on the breach of an international obligation. Taking as model the formula proposed in the second report (A/CN.4/344, para. 164), article 1 could be redrafted to read:

"1. A breach of an international obligation by a State entails other obligations and rights for that State, for the injured State and for third States, in conformity with the provisions of the present part.

"2. Paragraph 1 is without prejudice to the legal consequences of the breach to the extent that they are prescribed by the rules of international law establishing the international obligation."

40. Article 2 met the Special Rapporteur's concern to avoid a quantitative disproportion between the breach and its legal consequences. That disproportion must be manifest and must be assessed in relation to the seriousness of the internationally wrongful act. But who was to assess those two characteristics of "manifest" nature and seriousness? The Special Rapporteur left it to States, international organizations and bodies concerned with the peaceful settlement of disputes, which did not help solve the problem. Of course, that assessment should be guided by the rules adopted on attenuating and aggravating circumstances in criminal law, but it might be questioned whether such a reference to internal law was sufficient.

41. Article 4, which referred to the effect of a peremptory norm of general international law on performance of the new obligations laid down by article 1, and article 5, which contained the usual reservation on the precedence of the United Nations Charter, did not appear to raise any particular difficulties. However, the reference in article 5 to the procedures embodied in the Charter would probably be better placed in part 3, on the implementation of international responsibility.

42. Article 6 dealt with the position of third States in regard to the situation created by the internationally wrongful act, in other words the third parameter. Unlike the preceding articles, it contained, in paragraph 1, a list of responses or countermeasures; it dealt with reparation in the special case of international crimes. That article should, of course, be considered as the development of the general principle that should be stated in article 1. It might be asked, however, whether the list in paragraph 1 was exhaustive or merely declaratory, since the wording did not make that clear. His remark concerning the mention, in article 5, of procedures embodied in the Charter, was also applicable to article 6, paragraph 2. Finally, paragraph 3 of article 6 also referred to the precedence of the Charter; perhaps the two reservations on that subject—in articles 5 and 6—could form one separate provision.

43. Mr. USHAKOV said that he had always advocated beginning the work on State responsibility with responsibility for an international crime.⁸ He was not satisfied with the new article 6, which dealt with that question. The first obligation stated in paragraph 1, that of not recognizing as legal the situation created by an act of a State constituting an international crime, was an obligation deriving from a primary rule of international law, not from a rule of responsibility. Furthermore, that obligation deriving from a primary rule was valid for all wrongful situations, whether they resulted from an international crime or not.

44. As to the second obligation, that of not rendering aid or assistance to the author State in maintaining the situation created by the act, he wondered how it differed from the obligation referred to in article 27 of part 1 of the draft. That article provided that:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Thus the second obligation stated in article 6 was laid down by article 27, and did not apply only to international crimes.

45. The third obligation was to join other States in affording mutual assistance in carrying out the other two obligations. He did not see how a State could join other States in order not to recognize a situation and not to render aid or assistance to a State which had committed an international crime. Article 6 did not appear to contribute much to the progressive development of interna-

⁸ See *Yearbook ... 1981*, vol. I, p. 209, 1683rd meeting, para. 16.

tional law on responsibility for international crimes. Of course, measures did have to be taken against those crimes, but non-recognition of the wrongful situations they created was a primary obligation recognized by international law and affirmed, for example, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁹

46. Referring to article 4, he pointed out that, if a primary obligation was incompatible with a peremptory norm of general international law, that obligation was simply void under international law and could not be breached. But could obligations and rights provided for by international law be contrary to a peremptory norm of general international law? That did not seem possible, and that was why he did not understand the content of article 4.

47. Article 3 appeared to serve no purpose at the moment. The words "every breach by a State of an international obligation" could be replaced by the words "every internationally wrongful act of a State", since according to part 1 of the draft, it was such an act of the State that engaged its responsibility. The first clause of article 3 made it appear that all the provisions in part 2 of the draft would apply to internationally wrongful acts by States, whereas some of them would deal specifically with international crimes and delicts. The clause that followed seemed to refer to cases in which those concerned had agreed otherwise. It was, indeed, possible that the State which had committed the internationally wrongful act and the injured State could reach an agreement, either before or after the occurrence of the act. But it would be premature to provide for that possibility; the rules on the international responsibility of States should be established before specifying to what extent States could regard those rules as residual.

48. He was also perplexed by article 5. According to that provision, the States concerned should conform to the provisions and procedures embodied in the Charter of the United Nations. Yet the Charter contained nothing of the sort for States. It contained only provisions and procedures applicable to the organized international community, concerning the most serious crimes, such as aggression.

49. The Commission should begin by establishing the content, forms and degrees of State responsibility for international crimes, rather than the obligation not to recognize the wrongful situations.

The meeting rose at 1 p.m.

⁹ See footnote 6 above.

1735th MEETING

Monday, 28 June 1982, at 3.05 p.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report (A/CN.4/360), which contained, in chapter II, an outline for a set of draft articles which read:

Schematic outline

SECTION 1

1. Scope

Activities within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State.

[NOTES. (1) It is a matter for later review whether this provision needs to be supplemented or adapted, when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. Definitions

(a) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(b) "Activity": includes any human activity.

[NOTE. Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?]

(c) "Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.

(d) "Territory or control" includes, in relation to places not within the territory of the acting State:

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight.

3. Saving

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.

SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable and the remedial measures it proposes.

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury by an activity taking place within the territory or control of another State; the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable;

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

and the acting State has thereupon a duty to provide all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify a failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and, when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of, the inquiry; and, upon the establishment of the fact-finding machinery, Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(a) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications, and, to the extent possible, recommend solutions;

(b) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.

SECTION 3

1. If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of reference; or (b) any State concerned is not satisfied with the findings or believes that other matters should be taken into consideration; or (c) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a regime is necessary and what form it should take.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor including those set out in section 6; and may be guided by reference to any of the matters set out in section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles, and may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.

SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury, unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State. Account may also be taken of any relevant factor including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, "shared expectations" include shared expectations which:

(a) have been expressed in correspondence or other exchanges between the States concerned or, insofar as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice in relation to activities within their territory or control as is compatible with adequate protection for the interests of affected States.

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, insofar as that is not possible, measures of reparation; but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.

3. Insofar as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury.

SECTION 6

Factors which may be relevant to a balancing of interests include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);

2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);

3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);

4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;
5. The feasibility of carrying on the activity by alternative means or in alternative places;
6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);
7. The economic viability of the activity considered in relation to the cost of possible means of protection;
8. The availability of alternative activities;
9. The physical and technical capacities of the acting State (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);
10. The way in which existing standards of protection compare with:
 - (a) the standards applied by the affected State; and
 - (b) the standards applied in regional and international practice;
11. The extent to which the acting State:
 - (a) has effective control over the activity; and
 - (b) obtains a real benefit from the activity;
12. The extent to which the affected State shares in the benefits of the activity;
13. The extent to which the adverse effects arise from or affect the use of a shared resource;
14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;
15. The extent to which the interests of:
 - (a) the affected State; and
 - (b) the acting State
 are compatible with the interests of the general community;
16. The extent to which assistance to the acting State is available from third States or from international organizations;
17. The applicability of relevant principles and rules of international law.

SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation include:

I. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;
2. The establishment of procedural means for managing the activity and monitoring its effects;
3. The establishment of requirements concerning the structure and operation of the activity;
4. The taking of measures to assist the affected State in minimizing loss or injury.

II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;
2. A decision as to whether liability should be unlimited or limited;
3. The choice of a forum in which to determine the existence of liability and the amounts of compensation payable;
4. The establishment of procedures for the presentation of claims;
5. The identification of compensable loss or injury;

6. The test of the measure of compensation for loss or injury;
7. The establishment of forms and modalities for the payment of compensation awarded;
8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations of the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions, the responsibility for making recommendations or taking decisions as to the matters referred to in I and II.

SECTION 8

Settlement of disputes (taking due account of recently concluded multilateral treaties that provide such measures).

2. Mr. QUENTIN-BAXTER (Special Rapporteur) said that in preparing his third report he had attempted to focus on the real substance of the topic and to eliminate differences that were attributable mainly to misunderstandings. In drafting the schematic outline of the topic he had taken into account specific suggestions made in the Sixth Committee at the thirty-sixth session of the General Assembly (A/CN.4/L.339, paras. 131-155). He hoped that, by the end of the current session, the Commission would be in a position to provide him with specific instructions so that deliberate progress could be made.

3. Initially, the topic had grown out of the Commission's work on part 1 of the draft articles on State responsibility. Mr. Ago, the previous Special Rapporteur on State responsibility, had said that, whereas his own draft articles dealt with obligations arising out of breaches of international obligations, there was clear evidence of the existence of obligations arising independently of prior wrongful acts. In the context of the topic under consideration, however, the ordinary rules of State responsibility could come into play only when the mechanism provided for in the draft articles failed to ensure the fulfilment of a duty of reparation. But to deal with the duties which arose and could be defined under the current topic, it was necessary to look back, in order to determine whether any established regime existed which provided a measure of the duty of the acting State in respect of loss or injury caused to another State.

4. One factor that gave rise to difficulty in dealing with the topic was the tendency to regard it as a series of scattered problems, which were not easily dealt with by the ordinary rules of State responsibility. Naturally, if an act by one State resulting in loss or injury to another State was prohibited by international law, the regime of State responsibility was automatically brought into play. But if the act itself was legitimate, it might fall within the area covered by the topic under consideration. Again, in the case of an accident occurring as the result of an activity conducted within the territory of a State, or in an area under its control, it would be impossible to conclude that that State's responsibility was automatically engaged. Nevertheless, it could be argued that, while the specific accident was not in itself

foreseeable, it formed part of a series of activities the nature of which was such that an accident of some kind might be expected to occur sooner or later. In that event, there was a tendency to believe that some reparation was called for.

5. When seen as consisting of a number of scattered problems at the edge of the regime of State responsibility, the topic gave rise to all kinds of conceptual difficulties. There were those, for example, who felt the need to draw a line between the area of State responsibility and the topic under consideration, or even to have it stated clearly that the acts dealt with were lawful. That, of course, had not been the intention of the Commission when it had decided on the title of the topic. The words “acts not prohibited” in the title meant acts, whether or not prohibited. Once that had been understood, it became clear that the topic dealt, not with scattered areas where the rules of State responsibility had worked badly or not at all, but with the very nature of modern international life.

6. It was virtually impossible for any State to exercise fully its freedom to engage in creative activity without creating a risk of loss or injury to another State across a physical or national boundary, the transboundary element always being present. The situations in which such problems—many of them closely connected with technological progress—could arise were numerous and their number was increasing daily. An activity conducted within the territory of a State could not be regarded as wrongful simply because it caused loss or injury elsewhere. Nor could a State that used its own territory in a way which caused vast losses and injury to another State be said to be acting lawfully. The topic under consideration was concerned with drawing the boundary line between those two areas, in order to determine the conditions under which an activity could be conducted without ever incurring a risk of wrongfulness. The topic involved another way of looking at the vast area of international interests and transactions, where progress was made, not by assertions or counter-assertions that an activity was wrongful or legitimate, but by an accommodation of interests.

7. Situations in which activities in one State, or in areas under its control, caused injury to other States were a common feature of contemporary international life. If the rules of general international law were to help in resolving such situations, they must provide guidance as to the duties of the States concerned. There was no lack of relevant State practice. At the global, regional and local levels, there was a fast-growing pattern of State practice which provided a series of concrete rules drawing the boundary lines between the interests of the acting and the affected States. On the basis of that practice, the Commission could provide general guidelines for the course to be followed by States in dealing with areas as yet unregulated. The articles on the topic would thus become the basis for an umbrella convention, as in the case of the articles on succession of States in respect of matters other than treaties. It was important to move away from the cut and dried rules of general interna-

tional law and to provide a set of norms based on a balancing of the interests of the States concerned. In that regard, encouragement was to be found in article 235 of the Convention on the Law of the Sea,² which dealt jointly with the concepts of responsibility and liability, and in the text of Principle 22 of the United Nations Conference on the Human Environment (Stockholm Declaration).³

8. In chapter II of his report, he had perhaps placed too much emphasis on bilateral situations where all the benefits accrued to one State while all the losses were incurred by another. Such situations in fact occurred infrequently, and in most cases there was a broader range of possibilities. Chapter II was intended to provide a very general and preliminary outline of the scope and content of the topic. The scope clause itself, contained in section 1, meant little unless read in conjunction with the definition of the expression “territory or control”.

9. From the outset, it had been agreed not to deal with the treatment by a State of foreign persons or property within its territory. Such situations lacked the transboundary element essential to the topic. To define the topic in terms of territory alone would be simple, but consideration must also be given to areas outside the territory or control of any State. Ships in the course of innocent passage or aircraft in authorized over-flight, while technically within the territory of the State concerned, were really outside the territory of that State. The criterion must be a balance of responsibility. When an activity in the territory of a State was not understood by its authorities—as might be the case when an industry was exported from a developed to a developing country—safety standards might be relaxed, and an arrangement could be made for sharing responsibility for the industry between the two States concerned. The term “territory or control” excluded all questions affecting only the territory of the acting State, but included activities which took place under the control of one State, even within the territory of another.

10. The term “activity” was defined simply as including “any human activity”. The use of that term indicated that the field concerned was not that of State responsibility as such, but one in which States engaged in free negotiation, balancing costs and benefits, rights and interests and taking all the relevant factors into account. If negotiations were unsuccessful, there would be mechanisms to assess what duties of reparation existed, on the basis of the activities of the State and the consequences of those activities. The only act of a State which could engage its responsibility for wrongfulness would be failure to make due reparation.

11. The term “loss or injury” was not given any restrictive meaning; the loss or injury might be material or otherwise. It was essentially a question of fact and in-

² See 1699th meeting, footnote 7.

³ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part 1, chap. 1.

volved no legal judgement. It was conceivable that a loss or injury could be incurred and no reparation be due, on the grounds that such loss or injury was accepted as part of the ordinary incidents of life. The legal significance of the term "loss or injury" could be derived from sections 2, 3 and 4 of the schematic outline.

12. The saving clause (section 1, para 3) was designed specifically to remind all concerned that the topic to be dealt with in the articles was not a substitute for any other rights or obligations. If loss or injury was caused in such a way that the affected State believed that the responsibility of the acting State was immediately engaged by virtue of the breach of an existing rule of international law, the affected State might rely on that rule, and the articles would not be invoked. Conversely, the affected State might deem it preferable to leave aside the question whether the loss or injury had occurred as a direct result of an unlawful act of another State, and take the position that it had been suffered in circumstances in which reparation ought to be made.

13. Paragraph 1 of section 2 of the outline enunciated the rule that a State conducting an activity in the territory of another State had a duty to inform the other State of any risk of loss or injury to which it might be exposed as a result of that activity, and of any course of action proposed for dealing with the matter. Paragraph 2 dealt with the right of the affected State to seek such information when it believed that loss or injury might be incurred as a result of the activity of another State within its territory. The acting State had a duty to consider such representations and to provide such information as circumstances allowed. Paragraph 3 recognized the ineluctable fact that there were questions of such importance to the security of States that no pertinent information could be provided. In such situations, the interests of security could not justify concealment from the affected State of the fact that it was exposed to danger. Moreover, if information was limited on grounds of security, the affected State was not bound to be satisfied with a blanket assurance from the acting State, and was entitled to take the worst possible view of its situation and call for an appropriate regime to be drawn up. When information had been exchanged, either State could propose fact-finding machinery to assess the nature of the danger involved. State practice indicated that neither State should be committed to accepting the findings of such machinery, unless otherwise agreed. Paragraph 8 provided that failure to take any step required by the rules contained in section 2 would not in itself give rise to any right of action. If that were not the case, the rules of State responsibility would immediately come into play. Unless it had been agreed otherwise, however, the acting State continued to have a duty to take any measures necessary to protect the interests of other States.

14. Section 3 dealt with the question of negotiations entered into by States with a view to drawing the boundary lines between what could be done and what must be endured. Such negotiations could be initiated if it seemed that fact-finding machinery would never be set

up, that it would not be possible to agree on its terms of reference or that its conclusions were inadequate, or if the fact-finding machinery recommended such negotiations. The negotiations would apply the basic principles set out in section 5, would take account of any relevant factor, including those set out in section 6, and would be guided by the methods provided for in section 7. Section 3, paragraph 3, made it clear that if a regime was established by the States concerned, that regime would supersede any further application of rules relating to international liability. It was, after all, the basic aim of the articles to promote harmony between the activities of States through agreements which took particular account of the circumstances of each State and struck a balance between the freedom of each State to act and its right to be protected against undesirable consequences of another State's actions. An agreement reached pursuant to section 3 would also provide for the settlement of disputes arising in connection with international liability.

15. Section 4 dealt with the stage at which a regime had not been established and an actual loss or injury had occurred. In those circumstances, the expectation was once again that the existing duty of reparation would be determined by setting up a regime retrospectively and considering the rights and obligations of the parties by reference to the provisions for establishing a regime. With regard to the assessment of loss or injury, section 4 differed substantially from sections 2 and 3 in that, if the stage of reparation had been reached and there was no applicable regime, there had to be a threshold of loss or injury. It would not be enough for a State to say that transboundary pollution had caused loss or injury. Even if the facts of such loss or injury were not in doubt, the acting State could still say that they had been the result of a situation which had existed for a long time and that there was nothing in the shared expectations of the States concerned to suggest that reparation was payable. The question of shared expectations thus became a governing consideration when there was actual loss or injury and no established regime. There might, however, be an uncompleted negotiation which gave an indication of the expectations of the parties in a particular respect. "Shared expectations" were defined in paragraph 4.

16. Section 5 embodied the essential principles of the entire topic. Paragraph 1 emphasized the aim of reconciling the activities and interests of the parties with a view to avoiding conflict. Paragraph 2 contained basic provisions for the test of a balance of interests and stressed that prospective loss or injury should be dealt with by prevention rather than by reparation. If prevention was not possible, a regime providing for reparation was the alternative, but both prevention and reparation must be kept in balance with the importance of the activity and its economic viability. Paragraph 3 stated the obvious principles that an innocent victim should not be left to bear his loss or injury; that it was a reasonable test of protection that its costs should be distributed in accordance with the benefits of the activity; and that

standards of protection should take account of those currently applied in the affected State and in regional and international practice. Paragraph 4 provided that if the acting State had not made full information available to the affected State, the affected State should be allowed recourse to inferences of fact and circumstantial evidence to demonstrate its entitlement to reparation.

17. Section 6 listed some of the factors that might be of importance in assessing a balance of costs and benefits between parties, whereas section 7 listed procedures which States could use to establish regimes for prevention and reparation.

18. In drafting sections 5 to 7, he had received valuable assistance from the Codification Division in the preparation of materials relating to State practice. The time would come when the content of the schematic outline would have to be completed by detailed references to those materials, which would be of great benefit to the Commission in its study of the topic.

19. Mr. SUCHARITKUL said it was clear from the title of the topic that there were three elements to be taken into account, namely, international liability, injurious consequences and consequences of acts not prohibited by international law. The element of liability had a specific connotation in the common-law tradition, which distinguished it from the notion of "State responsibility". The liability under discussion was not civil or criminal liability under internal law, but international liability, which could be attributed or traced to a State—to which the Special Rapporteur had chosen to refer as the "acting State"—and which always involved some element of strictness or absoluteness.

20. When the Commission came to study the topic in greater depth, it would also have to consider the question of joint liability, which might, for example, arise in the case of transboundary pollution caused by an industry which had been established in a developing country by a private company based in a developed country. In such a case, it would have to be decided whether it was the developed country or the developing country that would be liable, or only the private company concerned. The Special Rapporteur had referred quite usefully in section 1, paragraph 1, of his schematic outline to activities "within the control" of the acting State. It must, however, be borne in mind that, compared with developed countries, countries that were in process of expanding their industrial capacities had less experience of, and less abundant legislation on, technical means of evaluating the risks involved in certain industrial activities. Liability could be attributed to those countries only if it could be assumed that they had been aware, or ought to have been aware, of the consequences of their acts. Such liability would then be known in the common-law system as either strict, absolute or vicarious liability. Japan had, for example, assumed vicarious liability for the damages suffered by Malaysia, Indonesia and Singapore when oil had spilled into the Malacca Strait from the *Nippon Maru*, a vessel flying the Japanese flag.

21. Although he approved of the scope of the topic as defined in section 1, paragraph 1, of the schematic outline, he thought that further consideration would have to be given to the definition in section 1, paragraph 2, of "territory or control... in relation to places not within the territory of the acting State". In that connection, he referred to the nuclear-weapons tests carried out by the United States of America in the 1950s. Although the aircraft carrying out the tests had not been flying within United States territory, they had been under United States control. The losses and injuries resulting from those tests had, however, occurred on the high seas, and it was Japanese fishermen and fishery resources that had been affected. Although no liability had been attributed to it, the United States had ultimately decided to pay compensation *ex gratia* to the nationals of the affected State. That case, to which the Special Rapporteur had referred in his second report (A/CN.4/346 and Add.1 and 2, para. 65) as a specific example of an act or activity of a State not prohibited by international law; it was thus the type of case on which the Special Rapporteur had recommended the Commission to focus its attention.

22. When a State was liable—or "answerable"—for injurious consequences arising out of an act not prohibited by international law, it was also actionable, provided, of course, that a remedy was available. The Special Rapporteur had, however, rightly pointed out that more emphasis should be placed on the prevention of loss or injury than on reparation. One of the primary duties of States was thus to prevent loss or injury; that duty was very similar to the "duty of care", a term which the Special Rapporteur had, regrettably, decided not to use in his third report (A/CN.4/360, para. 19).

23. Although he endorsed the approach and general principles, particularly that of the duty of co-operation, proposed by the Special Rapporteur in his third report, he thought the terms "acting State" and "affected State" would have to be defined with greater precision.

24. Mr. JAGOTA said that the topic under consideration, which was one of current and practical interest, was bound to take more definite shape as State practice developed in specific areas. One question that had continually arisen, both in the Sixth Committee and in the Commission, was that of the relationship between the topic of international liability and the topic of State responsibility. His own view was that international liability could be seen as a species of the genus State responsibility and that its consideration would be much easier once the Commission had completed its work on State responsibility. In the meantime, however, the Commission should concentrate on defining the elements of the two topics, without worrying too much about the relationship between them.

25. The element of the scope of international liability, for example, had not yet been defined clearly enough. In the topic of State responsibility, "acts" meant acts of the State, whereas, in the topic under consideration, "acts" or "activities" could mean acts or activities of

the nationals of a State, and it still had to be determined whether such acts or activities could be attributed to the State.

26. Account must also be taken of the fact that, although certain acts were not prohibited by international law, they could be deemed to constitute a kind of wrong, thereby entailing liability. Examples of such acts were to be found in cases of damage resulting from nuclear activities, damage caused by space objects or damage caused by ships carrying ultra-hazardous substances, which entailed absolute liability and to which a separate section of the study should, in his view, be devoted.

27. With regard to the material aspect of the topic, he disagreed with the Special Rapporteur (*ibid.*, para. 46) that the rules to be drafted by the Commission would apply only in respect of damage to the physical environment. Those rules would also apply to matters such as disputes concerning the joint exploitation and management of resources, industrialization and the law of the sea.

28. The rules to be worked out would thus relate to normal activities which caused loss or injury and entailed international liability, but not to activities which entailed absolute liability, in regard to which the international community was very reluctant to accept the idea of the payment of compensation. The Special Rapporteur had therefore been right to place less emphasis on reparation than on the duty of prevention, which States could, for example, discharge by exchanging information or establishing fact-finding machinery. Sections 5 to 7 of the schematic outline, which stressed the duty of prevention and co-operation between States, went straight to the heart of the matter and made a major contribution to the development of the topic of international liability.

The meeting rose at 6 p.m.

1736th MEETING

Tuesday, 29 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Visit by a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, a member of the International Court of Justice, a former member of the Commission and, in the latter capacity, the Special Rapporteur for part 1 of the draft articles on State responsibility.

State responsibility (continued) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

*Content, forms and degrees of international responsibility (part 2 of the draft articles)*³ (continued)*

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 6⁴ (*continued*)

2. Mr. RIPHAGEN (Special Rapporteur), replying to some of the questions raised by members of the Commission, said that discrepancies between the different language versions of the third report had perhaps given rise to some of the questions raised during the Commission's discussion. For example, in the English text of the new article 1 the word "right" should be replaced by the word "rights", and in the French text the words "*les autres Etats*" should be replaced by the words "*d'autres Etats*" (A/CN.4/354 and Add.1 and 2, para. 145).

3. His preliminary report⁵ had simply been an exploration of part 2 of the topic of State responsibility. It had led to the rather vague conclusions stated in paragraphs 97 to 100 of that report and repeated in paragraph 6 of his third report (A/CN.4/354 and Add.1 and 2). That preliminary report had introduced three parameters for the possible new legal relationship arising from an internationally wrongful act of a State, as well as the idea of proportionality. The second report (A/CN.4/344) had dealt largely with the first parameter, namely the new obligations of a State whose act was internationally wrongful. Paragraphs 51 *et seq.* had set out three rules of a preliminary nature, while in paragraph 164 he had proposed the original articles 1 to 3 and two further articles. The Commission had not received those five articles with great enthusiasm, as he had indicated in paragraphs 19 to 23 of the third report. In view of that, he had decided that for the time being the old articles 4 and 5 should be set aside and that the old articles 1 to 3 should be reviewed and amended. In chapters II and III of the third report, after focusing attention on the variety of regimes of State responsibility that existed, he had approached the general principles and rules set out in the second report from a fresh standpoint and had discussed the over-all problem underlying the drafting of part 2 of the topic.

4. The third report expressed the view that the topic of State responsibility could not be dealt with exhaustively

* Resumed from the 1734th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ For the texts, see 1731st meeting, para. 2.

⁵ *Yearbook ... 1980*, vol. II (Part One), pp. 107 *et seq.*, document A/CN.4/330.

in part 2; that it would be necessary to allow for a deviation from the rules embodied in a special regime established by States and imposing obligations; and that account should be taken of the question of the "implementation" of State responsibility. He had therefore proposed the new articles 4 to 6, which dealt with *jus cogens*, the Charter of the United Nations, and acts characterized as international crimes. In his view, those articles could be relevant to the legal consequences of any internationally wrongful act. The new articles 1 to 6 proposed in the third report did not, however, replace the old articles 1 to 5 proposed in the second report.

5. Although the question of what he intended to do in his fourth report was a very difficult one, he had hinted at an answer in paragraph 99 of his preliminary report. If the Commission reached conclusions on the new articles 1 to 6 proposed in the third report, it could begin to consider the catalogue of legal consequences of an internationally wrongful act in terms of the three parameters. It would have to determine which State or States could demand performance of the first-parameter obligations and which State or States could set in motion international enforcement provisions. The catalogue of legal consequences might establish a *scala* of the new obligations of the author State in the light of the *ex nunc*, *ex tunc* and *ex ante* aspects of the new legal relationship established; a *scala* of the new rights of the injured State, including non-recognition, counter-measures and self-help; and a *scala* of the rights of third States in respect of the situation created by the internationally wrongful act, including what might be called collective self-defence.

6. Once such an ordered *scala* of legal consequences had been established, the Commission might go on to consider the limitation or exclusion of some of those legal consequences as a result of qualitative proportionality and the peremptory rules laid down in the new articles 4 to 6. At that stage, the source, content and object of primary obligations and the special means of enforcement available would become relevant. The Commission could then make the transition from part 2 of the draft to part 3, which might start with examples of the loss of the right to invoke the new legal relationship arising from an internationally wrongful act of a State and end with a residual provision on the settlement of disputes, as suggested in paragraphs 57 to 62 of his third report.

7. It was, of course, still unclear whether any of the rules he had suggested in his three reports could stand the test of the practice and expectations of States with regard to the establishment of obligations and reactions to possible breaches of obligations. State practice was a highly political matter, and it was a well-known fact that States were very reluctant to be explicit about the establishment of obligations and even less inclined to say exactly how they would react if obligations were breached. It was therefore extremely difficult to propose hard and fast rules concerning State responsibility and to provide for the necessary exceptions to those rules.

8. Mr. DÍAZ GONZÁLEZ said that most of the questions he had had in mind had already been dealt with in detail by other members of the Commission. Like Mr. Ushakov (1732nd meeting), he was convinced that part 1 of the draft articles as adopted on first reading should stand as the philosophical and legal foundation of the draft articles as a whole. It was nevertheless understood that on second reading the Commission, taking account of the comments of Governments and the observations made in the Sixth Committee of the General Assembly, might reword some of the articles in part 1, including article 19, which was of crucial importance.

9. With regard to the new articles of part 2 submitted by the Special Rapporteur (A/CN.4/354 and Add.1 and 2, paras. 145-150), article 1 should not only be the counterpart of article 1 of part 1 but also establish the link between the two parts. He preferred the wording of the old article 1 because he felt that the phrase "in conformity with the provisions of the present part 2", which ended the new wording, was far too restrictive. Article 1 and the articles which followed it must conform to all the provisions of all the parts of the draft articles. That being so, in the Spanish version, the words "*hecho internacionalmente ilícito*" should be replaced by the words "*acto internacionalmente ilícito*".

10. He would leave the provisions in the new articles 2 and 3 to be dealt with by the Drafting Committee. He did in fact have some difficulties with article 2. It brought in two notions which had to be defined, as otherwise the draft articles would lose all their force, namely "seriousness" and "proportionality". With regard to the first, his reading of the Special Rapporteur's third report gave him the impression that there might be a number of degrees of seriousness of acts. Certain questions arose. When was an act serious? Who would be asked to determine the seriousness, and on what basis? When was an act serious enough to be characterized as internationally wrongful? It had been suggested that it would be for the competent organ of the United Nations, namely the Security Council, to say that an act was internationally wrongful, but an organ which could be both judge and party should not be empowered to do that, seeing that a permanent member of the Security Council, by means of its veto, was supporting a crime of genocide being committed at present. It was therefore pointless to think in terms of determination of the seriousness of an act. With regard to the rule of proportionality, both quantitative and qualitative, it was certainly interesting, but very complicated to apply; for example, when a State committed an act of genocide and murdered with impunity thousands of defenceless people, what was the rule of proportionality to be applied—to murder as many thousands of its nationals, or to make it pay damages to wipe out the memory of the genocide? He did not see how it would be possible to establish the criteria of seriousness and proportionality.

11. As to article 6, rather than giving an enumeration of the kind found in article 19 of part 1, the Commission should seek a formulation which would assure

the primacy of the right, or even better the primacy of equity and justice. That would be a long and exacting task, but it had to be done. In conclusion, he said that the topic of State responsibility was at the very centre of the progressive development of international law, which must be based on equality among States and the superiority of right to force.

12. M. THIAM said that he wished first of all to congratulate the Special Rapporteur, whose reports were helping the Commission to explore a difficult and controversial subject. With regard to method, he hoped the Commission would not succumb to the twin temptations of abstraction and philosophy, even though the topic lent itself to theorizing. One aspect of it was an ideal field for doctrine and consisted basically of the foundations, sources and origin of international responsibility—in other words, the subject matter of part 1. But it also had a more prosaic and extremely important aspect, namely the consequences of international responsibility, the very thing with which the Special Rapporteur was dealing.

13. In order to treat the subject properly, it was necessary that part 1 (The origin of international responsibility), which had been elaborated by Mr. Ago and about which there was nothing more to say, should be clearly separated from the consequences of internationally wrongful acts. Without necessarily approving any particular aspect of the subject dealt with by Mr. Ago, the Commission should regard a number of the propositions in part 1 as premises. In his own opinion, the entire section on general principles was useful but not absolutely indispensable. He felt that some of the distinctions made in part 1 for analytical reasons, such as the distinction between primary and secondary rules, were necessary, but at the level of consequences they were less so, because any wrongful act, whatever it might be, had consequences.

14. Precisely because the Special Rapporteur had not squarely focused his study on the consequences of international responsibility, he had at times restated a principle that was already in part 1, or had called one into question: the new article 1, for example, was both a repetition and a reconsideration of article 1 of part 1. It might therefore have been best, in the second part, to enumerate the consequences of internationally wrongful acts. The Special Rapporteur would then have needed only two parameters instead of three—reparation and sanctions—his report would have been clearer, and the Commission would have been able to approach the rule of proportionality differently; proportionality applied to countermeasures, to sanctions, whereas reparation was the act of furnishing an equivalent. He therefore hoped that the Commission would give some more thought to the method adopted so far.

15. With regard to the substance of the matter, namely the consequences of an internationally wrongful act—that being something which Mr. Ago had analysed without regard to extrinsic considerations—the Commission should regard the existence of an injury as fun-

damental. The notion of injury would probably have to be introduced into the draft in one way or another and could perhaps serve as a link between parts 1 and 2. When it came to sanctions, the draft articles would be going beyond the traditional concept of linking responsibility for an injury with reparation, and would be entering a highly controversial area. A regime of sanctions did exist at the level of the United Nations. It was a collective one and imperfect, because the sanctions were decided on by States, which could be both judges and parties. Would the sanctions be individual ones? If so, who could apply them? The weaker State would certainly be unable to do so. That was the crux of the problem. To the extent that States were not in fact equals, it was difficult to establish a sanctions regime that would be truly egalitarian.

16. Some speakers had mentioned self-defence, but he wondered whether that should really have a place in the draft articles; to his mind self-defence was not punitive or afflictive, but aimed at meeting a threat or guarding against a danger. It was not a sanction as such, except perhaps when measures taken in self-defence were disproportionate to the act it was sought to avoid. Moreover, at the practical level, self-defence could at times be confused with reprisals.

17. To sum up, he believed that the Commission should reconsider the method adopted and study certain questions in depth. He would refrain for the moment from commenting on the articles submitted by the Special Rapporteur. He was convinced that, with the help of the Special Rapporteur, the Commission would succeed in preparing further draft articles on State responsibility.

18. The CHAIRMAN, speaking as a member of the Commission, praised the Special Rapporteur for his courage in tackling a very difficult subject. He endorsed the remarks made by Mr. Jagota (1733rd meeting) and Mr. Thiam. The question was, what should the Commission do now? He did not know whether the Drafting Committee would have time to examine the articles submitted by the Special Rapporteur, but he hoped it would deal with some of them. The Committee would have to make a choice, and would help the Commission considerably if it gave it a few simple and really introductory articles. A list of questions requiring elucidation should then be drawn up, as the Special Rapporteur had suggested.

19. In his view, there were three broad substantive questions. The first concerned reparations: it was a traditional and familiar subject and the Commission might begin with it because it was the easiest. The second question was countermeasures. The Commission did not know what that expression covered; it was still in the stage of preliminary discussion and not far enough advanced to grapple with that problem. The third had to do with penalties—he was using the word employed by Mr. Ago, in order to avoid the word “sanctions” used by Mr. Thiam. In other words, did the State which had committed an internationally

wrongful act have a penal responsibility? Article 19 of part 1 provided for that possibility by defining the conduct from which an international crime might result, but considerable problems remained. First, there was no time limitation in regard to crimes, but what about delicts? The Commission had not taken a position on that point. Would it propose prescription rules for international delicts? It could do so, and if it did, it should be stipulated that there was no prescription in respect of crimes. But that was not a sufficient criterion for instituting a separate regime for crimes. Secondly, did crimes concern all States? In other words, were all States injured through a crime? In his view, the answer was yes. But there were also delicts which concerned all States, so that universal injury was not a very sound criterion either. Thirdly, what constituted a penalty? The Commission should deal with the penalty question last, since it was the most difficult of all. But that should not prevent its embarking on the question straightaway, tackling it step by step.

20. Mr. CALERO RODRIGUES said that in part 1 of the draft articles the Commission had recognized that every internationally wrongful act of a State entailed international responsibility, or in other words legal consequences—rights and obligations which were to be specified in part 2, dealing with the content, forms and degrees of international responsibility. In his three reports the Special Rapporteur had been seeking the best way of doing the task entrusted to him, namely to put forward ideas and concepts that would serve as a basis for drafting the articles in part 2. The Special Rapporteur was, however, somewhat concerned about the relationship between parts 1 and 2 and felt that they gave rise to problems. In that connection, he had referred in his third report to views expressed by the Commission at its twenty-eighth session, in 1976, and had observed that their impact on the task of drafting the articles in part 2 was “somewhat staggering” (A/CN.4/354 and Add.1 and 2, para. 27).

21. The Special Rapporteur believed that part 2 should not be as abstract as part 1 in the sense of making virtually no distinction at all between the content of the international obligation involved, but that it might be “reasonably abstract” and yet include some categorization of obligations—“some recognition of the difference between possible subsystems of rules of international law”—in order to make it meaningful (*ibid.*, para. 63). The Special Rapporteur also considered that the Commission had to seek a solution lying between the “two extremes” of dealing exhaustively with the legal consequences of every breach of an international obligation and of leaving the determination of those consequences to the bodies charged with the peaceful settlement of international disputes (*ibid.*, para. 55).

22. Although he himself could agree that some categorization or “scaling” was necessary, he had very serious doubts about the usefulness of introducing the concept of subsystems into the draft articles. It might have some value descriptively, but he did not think it could be used for normative purposes. To judge from

paragraphs 35 and 38 of his third report, the Special Rapporteur attached great importance to the concept of subsystems; further on, in paragraphs 39 and 117 *et seq.*, he had indicated some of the subsystems that might be possible. The examples given concerned treaty relations, but there was an implied assumption that different or parallel subsystems might be found in customary law. Quite apart from the fact that a distinction based on the source of the primary obligation would be difficult to accept for the purposes of part 2, the Special Rapporteur’s attempt to demonstrate that the concept of subsystems might play a useful role in the drafting of part 2 was not very convincing. It would probably give rise to more problems than it solved, because it would be difficult to categorize the subsystems and because any categorization that might be possible would be difficult to translate into suitably worded provisions.

23. Acceptance of the concept of subsystems would not be necessary if the Special Rapporteur followed the course he had suggested in paragraph 77 of his third report, namely, drawing up a catalogue of possible legal consequences of internationally wrongful acts and indicating the circumstances precluding legal consequences in a general way. The bulk of the articles of part 2 would then be a catalogue of legal consequences within a framework of safeguards. The framework would consist of the provisions contained in the proposed general principles and would make it clear that there could be a deviation from the regime set out in the articles—a deviation established in a particular set of primary rules—and that the rules embodied in the articles would not be exhaustive, in the sense that they would describe legal consequences that were automatic, regardless of the circumstances of a particular case.

24. If the new articles presented in the third report were accepted with some of the amendments and additions suggested during the Commission’s discussions, an acceptable framework would have been established. It would provide that the legal consequences of an internationally wrongful act, as established in the draft articles, would be of a residual nature and would not apply if the consequences of the breach of an obligation had been established elsewhere, either in the rule that created the obligation or in another rule of international law; that the legal consequences of an internationally wrongful act should be proportional to the seriousness of the act; that they should not conflict with a peremptory rule of international law, unless permitted by that rule or by another rule of the same kind; that they should be subject to the provisions and procedures of the Charter of the United Nations; that the legal consequences of international crimes differed fundamentally from the legal consequences of international delicts as far as the position of third States was concerned; that the breach of an international obligation would not affect the continuing legal validity of that obligation; and that the commission by a State of an internationally wrongful act would not in itself deprive that State of its rights under international law; the legal consequences of the act for the

author State, as for any other State, being those established by the draft articles or by other specific rules of international law.

25. On the basis of that framework, the Special Rapporteur could go on to state the legal consequences of an internationally wrongful act in his proposed "catalogue". The elements of the catalogue had been indicated by the Special Rapporteur in various parts of his three reports. A certain order had been suggested in the three parameters which he had proposed and which seemed to have gained wide acceptance in the Commission and in the Sixth Committee. Those parameters had been described in detail in paragraphs 86 *et seq.* of the third report. In addition, the Commission had made some helpful distinctions between modes of reparation and different types of penalties and the various material forms they could take.⁶

26. Although he was fully aware of the complexity of the questions involved in the drafting of part 2 and the many difficulties that would have to be solved, he believed that the Special Rapporteur had already provided a sound basis for a simple, but bold, approach to the subject. In his view, the Special Rapporteur had enough material to proceed with his work on part 2 of the topic. The Special Rapporteur should, however, follow Mr. Evensen's suggestion (1733rd meeting, para. 18) and draft a detailed schematic outline indicating how he intended to proceed in future reports, as Mr. Quentin-Baxter had done in his third report (A/CN.4/360).

27. Mr. KOROMA congratulated the Special Rapporteur on his erudite report. In view of the prevailing international situation, the elaboration of part 2 of the draft articles could not come at a more propitious time. Despite the failure to implement the collective security provisions contained in the Charter of the United Nations, States—in particular small States—had come to look to the United Nations for the maintenance of international security. That confidence had been repeatedly shattered, and the criticism was frequently heard that international law was ineffective. Breaches of international law had become a daily occurrence and went unpunished. At the international level, lawlessness was rapidly becoming the order of the day. One way in which the international community could demonstrate its aversion to that state of affairs was to give form and content to the concept of State responsibility. The Commission had the necessary resources to do that. Given the urgency and importance of the topic, it was perhaps time for the Commission to begin work on part 3 of the draft articles, which concerned implementation and the settlement of disputes; unless implementation machinery existed, the provisions elaborated by the Commission would remain a dead letter.

28. He agreed with the Special Rapporteur that, instead of elaborating further primary rules on the topic,

the Commission should attempt to categorize the content, forms and degrees of international responsibility. Such an approach would make the topic more comprehensible, enable the Commission to fulfil its mandate and facilitate the task of implementation or enforcement institutions. He also agreed with the Special Rapporteur that the purpose of article 1 was to link parts 1 and 2 of the draft. However, given the scope of the topic and the view of the Special Rapporteur that State responsibility could arise from customary international law, conventional law or judicial decisions, article 1 of part 2 should not be restricted to the confines of part 2, or even of the topic itself, but should draw on all the sources referred to.

29. He noted that one of the formulations suggested by Mr. Aldrich at the preceding session⁷ as a link between the first two parts of the draft served as a basis for article 3, proposed in the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2, para. 147). In his view, the new article 1 should be adopted with the amendments proposed by various members of the Commission, and might be linked with article 3. Eventually the new article 3 might even replace the new article 1.

30. The new article 2 introduced the important principle of proportionality between the action taken to remedy a wrongful act and the act itself. That principle was nowhere more important than in the realm of self-defence, as described in part 1 of the draft. Article 51 of the Charter of the United Nations permitted acts of self-defence in cases of armed attack. However, it was the responsibility of the States Members of the United Nations to ensure that self-defence was not pleaded as a pretext for the illegal use of force. In that regard, the Commission should present States with objective criteria for determining the scope of the right of self-defence. One such criterion was the principle of proportionality. No threatened State could be justified in taking over the government of another State, changing its existing political order or annexing its territory.

31. The new articles 4 and 5 should be adopted. However, the Special Rapporteur might perhaps explain further the function of the new article 5 in the existing structure of the draft. He agreed with the view expressed by Mr. Evensen (1733rd meeting) that the draft articles should emphasize the principle of the peaceful settlement of disputes rather than that of self-defence.

32. Referring to article 6, he said that paragraph 1 should not merely require States to do such things as refraining from recognizing the legality of situations created by acts of international crime or from assisting other States to maintain such situations. The paragraph should also deal with the taking of preventive measures, since one of the main purposes of the United Nations was the maintenance of international peace and security. Moreover, enforcement machinery would have to be established if preventive measures were to be effective.

⁶ *Yearbook ... 1975*, vol. II, p. 56, document A/10010/Rev.1, chap. II, para. 43.

⁷ *Yearbook ... 1981*, vol. I, p. 136, 1669th meeting, para. 6.

Perhaps the Special Rapporteur would explain how he intended to treat the enforcement issues raised by article 6.

33. Mr. USHAKOV said that he would like to make a few further remarks. In the first place, it was not for the Commission to interpret the Charter of the United Nations in the matter of self-defence. Article 51 of the Charter had been mentioned, but it was clearly not in relation to international responsibility that Article 51 conferred the character of an inherent right on self-defence. Article 34 of part 1 of the draft referred to a lawful measure of self-defence taken in conformity with the Charter of the United Nations. When that provision had been considered by the Commission on first reading, at its thirty-second session, he had opposed everything in the text of the provision and the commentary to it which suggested that the Commission was interpreting the notion of self-defence.⁸ The Commission had no mandate to do that. The interpretation of self-defence was a matter for States.

34. With regard to injury, part 1 of the draft did not make the existence of an internationally wrongful act dependent on the existence of an injury. As the Commission had observed, two positions could be adopted. On the one hand, it could be said that every breach of an obligation created an injury, since every obligation had the goal of protecting certain interests against certain injuries; since there was injury in all cases, it was not necessary to establish the existence of injury in order to be able to ascertain the existence of an internationally wrongful act. On the other hand, it could be considered that the existence of an internationally wrongful act did not necessarily imply an injury; if a State had the obligation to pass internal legislation prohibiting, for example, certain discriminatory measures, and failed to do so, the obligation was obviously breached, but the breach did not create any injury until a specific case of discrimination arose. Whichever position was adopted, the existence of an internationally wrongful act did not depend on an injury, either because the injury existed automatically or because it did not necessarily exist at all. But the Commission had never believed that injury should not be taken into consideration in order to evaluate reparation; on the contrary, it had always considered that, in part 2 of the draft, injury would play an important part in that respect, in particular with regard to material reparation.

35. Finally, the notion of a sanction must be clarified. It had two aspects. According to general legal theory, every norm must have some theoretical basis and lay down a sanction. If there was no sanction, or legal consequence, there was no rule of law. International law contained another notion of a sanction, namely, that it was a coercive measure or a countermeasure, but that was vague too; the notion did not embrace all enforcement measures and countermeasures, but only those which could be considered as sanctions in accordance with the Charter of the United Nations. The use of the

term "sanctions" should be avoided in the draft articles. As a matter of fact, when the Commission had used it in the commentaries to certain articles of part 1 of the draft, it had placed it between quotation marks in order to indicate that it referred to something uncertain. The Commission should examine the question of sanctions without delay. Alongside what was called political responsibility, which found expression in enforcement measures and countermeasures, there was material responsibility, which was evaluated more according to the injury caused and could give rise to damages. The Commission should begin with serious internationally wrongful acts and draw up a list of their legal consequences in international law, i.e. a list of the sanctions, in the meaning of general legal theory, to which they could give rise.

36. Sir Ian SINCLAIR said that he agreed entirely with Mr. Ushakov that it was not the function of the Commission to interpret the Charter of the United Nations, in particular in regard to self-defence. He himself had always doubted how far the notion of self-defence was really relevant to the contents of part 2 of the draft. Although under article 19 of part 1 the unlawful use of force was an element in international crimes, and although it gave rise to the inherent right of self-defence, that right did not in itself seem to be a sanction for the breach of the primary obligation of international law set out in Article 2, paragraph 4, of the Charter; under Article 51 of the Charter, it seemed rather to exist independently of the concept of such a breach. Perhaps too much had been said in the commentary to article 34 of part 1 of the draft. On the question of injury, there might be international obligations the breach of which caused no material damage to injured States, but the fact remained that in most cases the breach of an international obligation caused material damage to one or more injured States or to the international community as a whole.

37. In preparing part 2 of the draft, the Commission was constrained by the fact that it had to proceed on the basis of the articles adopted in part 1. One problem was that article 3 of part 1 defined an internationally wrongful act of a State in very simple terms, although a wide variety of international obligations of States existed, deriving from customary international law, conventional law or other sources of international law. In cases of breaches of international obligations resulting in material damage, the remedy could take the form of reparation. However, it was difficult to know what form of remedy was available in cases where no material damage had been caused. He accepted the idea that a breach of an international obligation constituted an internationally wrongful act. However, seen against the background of international law in general, the notion of an internationally wrongful act presented difficulties in that it implied a moral disapproval which might not apply to all breaches of international obligations. Another problem to be dealt with was the form of remedy in the event of a breach of a so-called "weak" obligation.

⁸ *Yearbook ... 1980*, vol. 1, p. 190, 1620th meeting, paras. 18-19.

38. At the present session the Commission had concentrated on the various introductory provisions proposed by the Special Rapporteur in his third report (A/CN.4/354 and Add.1 and 2), and had referred back to those proposed in the second report (A/CN.4/344). It might be worth while to refer the old articles 1 to 3 and the new articles 1 to 6 to the Drafting Committee, on the understanding that consideration of them would not prejudice their placement within the draft as a whole. The old articles 4 and 5 might be redrafted as safeguard clauses and placed at the end, rather than at the beginning, of part 2. With regard to article 6, the Commission might consider the possibility of devoting a separate chapter to the legal consequences of international crimes, as opposed to international delicts. Such a chapter would need to be fuller than the existing article 6, since it would have to deal with the question of international crimes within the broad framework of the three parameters to which the Special Rapporteur had drawn attention.

The meeting rose at 1.05 p.m.

1737th MEETING

Wednesday, 30 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (continued) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)³ (continued)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

ARTICLES 1 TO 6⁴ (continued)

1. Mr. McCaffrey said that it would be unfortunate if, for the second consecutive year, the Commission did not receive any draft articles on State responsibility from the Drafting Committee. He therefore strongly endorsed the suggestion (1736th meeting), made by Sir Ian Sinclair and Mr. Reuter that the Commission should select a manageable set of introductory general articles and refer them to the Drafting Committee. That step was important, not only for the information of the Sixth Committee, but also for the Special

Rapporteur in continuing his work on the topic. At the current stage, it would be preferable not to attempt to deal with articles which began to present a catalogue of possible legal consequences of internationally wrongful acts. The Commission should first agree on general introductory provisions, and then turn to articles dealing with breaches of obligations flowing from various types of primary relationships. While he appreciated the Special Rapporteur's projection of the direction to be taken in the study of the topic, he agreed with the suggestion made by Mr. Calero Rodrigues (*ibid.*), that the Special Rapporteur should try to provide the Commission with a schematic outline of the topic.

2. He appreciated the Special Rapporteur's explanation (*ibid.*) of the reasons for the almost total withdrawal of the draft articles submitted in his second report (A/CN.4/344, para. 164). While he agreed with the withdrawal of articles 4 and 5, the same was not true of articles 1 and 3. Those articles served a useful purpose—at least at the current stage of the Commission's work—in defining the scope and effects of the provisions of part 2, although it might subsequently be found that they had no role to play in the final draft. One of the main criticisms of those articles had been that they focused too much on the author State, rather than on the victim State. The principles which they embodied were important, however, and might perhaps be placed later in the draft, rather than at the beginning, so that they did not set the tone for part 2. Moreover, those principles were so closely related that the two articles might be combined. One possible way of doing that was suggested in paragraphs 29 and 31 of the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2). That formulation, though obviously much more general than the texts of the two separate articles, could be enlarged upon in the commentary. Moreover, in view of the escape clause contained in the new draft article 3 (*ibid.*, para. 147), which referred to other applicable rules of international law, the suggested formulation would not imply that part 2 contained a complete regulation of the three parameters.

3. Another possible way of combining the two former articles would be simply to delete article 3 and to add to article 1 the words "nor does such a breach in itself deprive that State of its rights under international law". Article 3 should be carefully examined, however, to determine whether it was necessary to add some qualification concerning the right of self-defence, so that the provision could not be interpreted as meaning that the author State was protected against self-defence, which was justified by Article 51 of the Charter. In that respect, the more general formulation that had been proposed had its advantages.

4. He noted that, at the previous session, the Special Rapporteur had explained⁵ that the former article 2 was meant to act as a kind of escape clause to enable any self-contained regime, established either by a treaty or by customary law, to be applied instead of the draft ar-

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ For the texts, see 1731st meeting, para. 2.

⁵ *Yearbook ... 1981*, vol. I, p. 130, 1667th meeting, para. 3.

ticles. The new article 3 performed the same function, though more effectively, because it was more clearly formulated. He agreed with previous speakers that article 3 could still be improved on and endorsed the suggestions made (1733rd meeting) by Mr. Jagota and Mr. Calero Rodrigues on that point.

5. While the principles stated in the former draft article 4 were of a fundamental character and had a place in chapter II of part 2, the Commission should not deal with those specific principles at the current stage, but should concentrate on laying a foundation, in the form of an introductory first chapter, for the following year's work. The same considerations applied to the former draft article 5.

6. He agreed with previous speakers that the new article 6 concerned an area in which the Commission would have to proceed very cautiously. Also like other speakers, he could not support it in its current form. It would be preferable for the Commission not to dissipate its energies on such a highly sensitive subject before laying the general groundwork for part 2 of the draft articles.

7. With regard to the relationship between the articles submitted in the second report and those in the third report, it would seem most practical, at that stage, to focus on the articles of a general or introductory nature, on the substance of which the Commission was in general agreement. One way of organizing the selected draft articles from the second and third reports would be to begin with the new article 3, placing after it the combined former articles 1 and 3, and then the new articles 2, 4 and 5, though not necessarily in that order.

8. As he had said earlier, he agreed with the Special Rapporteur that the new article 1 did not state a substantive rule and could therefore be omitted. Indeed, the fact that some members of the Commission thought it did state a substantive rule indicated that it was potentially misleading and should be deleted. In conclusion, he proposed that the former draft articles 1 and 3 in the second report, together with the new draft articles 2, 3, 4 and 5 in the third report, should be referred to the Drafting Committee.

9. Mr. YANKOV said he agreed with many of the proposals and comments made by previous speakers. He noted that, at both the preceding and the current sessions, the Commission had devoted much time to considering the question of the link between parts 1 and 2 of the draft. While that question was of some significance, the Commission should consider its practical, rather than its general conceptual or philosophical aspects. The question could not be debated exhaustively and, rather than attempt further analysis of the main features of the rules constituting the framework of part 1, the Commission should go on to consider the consequential nature of the rights and duties of States or the legal relationships deriving from them. Failure to adopt a more practical approach could leave the Commission open to criticism that it spent more time in doctrinal debate than in studying the urgent problems of in-

ternationally wrongful acts and State responsibility. The Commission also had a duty to provide the Special Rapporteur with specific guidelines for his future work. The first report on State responsibility had been submitted to the Commission in 1955, and since that time, all facets of the topic had been discussed, so it was not as though the Commission was only just beginning its work.

10. He agreed with a number of members of the Commission that the linking article, namely the new draft article 1, appeared to be a repetition of something already stated in part 1, and that it might ultimately prove to be of little significance. Article 1 was purely introductory, as the Special Rapporteur himself had said, so it could not be regarded as dealing with any essential aspect of part 2.

11. The main issues to which the Commission should address itself were those relating to the consequences and nature of the legal relationships arising out of internationally wrongful acts. It should define the nature and scope of the consequences and draw up a catalogue of them which, although it could not be exhaustive, could be sufficiently indicative to render the rules set out in the draft articles pertinent and give them legal weight.

12. Many members of the Commission had referred to the difficulties resulting from internationally wrongful acts or the abuse of power on the pretext of self-defence. It was generally agreed that international law, as a doctrine and a system of legal rules, had undergone significant changes where the concept of international responsibility was concerned. There had been a noticeable broadening in the scope of that concept, so that the consequential relationships arising out of internationally wrongful acts were currently seen in terms of both *ratione personae* and *ratione materiae*. Obviously, in most instances, the consequential relationship arising out of an internationally wrongful act would be a direct relationship between the author State and the injured State. Nevertheless, the global system of international relationships had undergone changes which should be taken into account in the Commission's consideration of the articles to be included in part 2. A case in point was the inherent right of self-defence. While it was true that that right was provided for in Article 51 of the Charter of the United Nations, the world had developed since the drafting of that provision. Unless the Commission attempted to define what constituted self-defence by States it would be failing to deal with a very important aspect of the topic under study.

13. In his view, the new draft articles 1 to 6, as contained in the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2, paras. 145-150), did not constitute an adequate basis for a set of viable and effective rules dealing with the relationships arising out of internationally wrongful acts.

14. With regard to the question of proportionality, he agreed with the views expressed by Mr. Ushakov (1733rd meeting), not only because of the difficulty of

defining the concept, but also because of the significant differences between the international legal order and internal law, in terms of material rules and institutional lawmaking, enforcement and adjudication machinery. How were damages to be assessed on a basis of proportionality, and who was to make the assessment? Even if the assessment was to be made in purely material terms, difficulties could arise, since questions of State responsibility and, in particular, those concerning the degrees of that responsibility, had very clear political connotations, which made objective and impartial assessment difficult. While he did not altogether rule out the enunciation of a principle of proportionality, the question should be approached with caution.

15. He doubted whether article 3 was adequate in its present form and agreed with the suggestions made by Mr. Calero Rodrigues (*ibid.*), Mr. Ushakov (1734th meeting), and other speakers for redrafting it. In conclusion, he agreed with the suggestion that the Special Rapporteur should provide a schematic outline of the draft in order to facilitate the Commission's work.

16. Mr. QUENTIN-BAXTER said he agreed with the emerging consensus in the Commission that a small group of draft articles could be adopted at the current session, in order to facilitate the future work of the Commission and of the Special Rapporteur and to provide a focus for discussion in the Sixth Committee of the General Assembly.

17. He also agreed with the view expressed by a number of members of the Commission that the new draft article 6 raised questions of such importance and of such a special nature that the Commission should not attempt to settle them in the short time available at the current session. It was important to include such an article in the draft, since it clarified a very important area of the Commission's work; but for the time being, greater progress could be made by considering the other articles.

18. He would be content to take no definitive action on the new draft article 1, which should not be seen as stating a broad positive rule, but as providing a link with part 1 of the draft. While there was nothing to be lost by postponing discussion on whether article 1 was necessary, he was not convinced that the draft would be complete without some provision on similar lines. Further consideration of the former draft articles 1 and 3 might help the Commission to reach a decision in that regard. Those articles had a place in the draft; the Commission should not hesitate to state even the most basic propositions when dealing with a topic of such great profundity. He would prefer the two articles not to be combined, since the propositions they contained were not linked. The texts could be considered by the Drafting Committee.

19. The Drafting Committee had received sufficient guidance from the Commission to enable it to deal with the new articles 3, 4 and 5. He agreed with the view that article 3 should be regarded as an improved version of

the former article 2. It drew attention to the fact that, in dealing with primary and secondary rules, the Commission was dealing with abstractions rather than ultimate realities, and the proposition it stated was sufficiently important to justify its inclusion in the draft. There appeared to be general agreement that the new articles 4 and 5 were pertinent to the Commission's work on the topic.

20. The new article 2 could give rise to difficulties. The concept of proportionality, though of considerable importance and having a place in the draft, was so vast that considerable thought would be needed to decide what could be said about it at that stage. Moreover, the article was drafted in such broad terms that it might even be thought to suggest that a great deal of disproportionality was to be expected. It went beyond the question of reparations into the difficult realm of countermeasures and sanctions. Draft article 2 should be referred to the Drafting Committee at the current session, but only after further consideration by the Commission.

21. Mr. KOROMA said he fully approved of the symmetrical approach to the structure of part 2 which had been proposed by Mr. McCaffrey, and which the Special Rapporteur should be encouraged to adopt, especially as several members of the Commission had said that the original structure of part 2 should not have been abandoned. The Commission should nevertheless be careful not to repeat every category of legal consequences in the articles relating to the three parameters. The proposed restructuring should not apply to article 6, which, like article 19 in part 1, could stand on its own.

22. There was definitively a case for establishing a link between parts 1 and 2 of the draft, as had been made abundantly clear in chapter V of the third report. (A/CN.4/354 and Add.1 and 2). That link could be established by deleting the words "in conformity with the provisions of the present part two" from the new article 1, which could then be referred to the Drafting Committee together with the new articles 2 and 3.

23. It would also be helpful to retain the former articles 1 to 5 proposed in the second report (A/CN.4/344, para. 164). Indeed, if the former articles 1 and 3 were combined, they would provide an obvious reference to the principle of proportionality embodied in the new article 2.

24. At the previous meeting he had expressed the view that, although it would be for States to determine criteria relating to self-defence, the Commission could suggest objective criteria to guide States in that undertaking. He had meant that the Commission should provide objective criteria which might help States to determine exactly when the exercise of the right of self-defence was tantamount to a breach of an international obligation entailing international responsibility.

25. Mr. USHAKOV suggested that part 2 of the draft should begin with an article 1, paragraph 1 of which could be worded on the following lines:

“The international responsibility of a State engaged under the provisions of part 1 of the present articles consists in measures, restrictions and other legal consequences of an internationally wrongful act of the State for the States concerned provided for by international law.”

The reference to the responsibility of a State engaged under the provisions of part 1 of the draft would provide a link between parts 1 and 2; the reference to measures, restrictions and other legal consequences of an internationally wrongful act covered sanctions in so far as they were defined as legal consequences. Paragraph 2 of article 1 could be drafted to read:

“The measures, restrictions and other legal consequences of an internationally wrongful act referred to in paragraph 1 may be applied, as appropriate, by the United Nations and/or by the State or States so authorized by international law.”

The provision would thus draw a distinction between legal consequences according to whether they could be applied by the organized international community or by the authorized State or States.

26. It was important to start by drawing up a list of the possible legal consequences of an internationally wrongful act. In drawing up that list, which could not be exhaustive, the Commission could be guided by the measures provided for in the Charter of the United Nations. But of course other legal consequences were provided for by international law. Once those legal consequences had been ascertained from practice and the list had been drawn up, it would be possible to specify when and how they could be applied. But it was with the most serious internationally wrongful acts, namely international crimes, that the Commission should begin. If it did not adopt that method, it would be bogged down in vain theoretical discussions. In his view, it was pointless to dwell on distinctions between a general regime of international responsibility and subsystems.

27. Mr. RIPHAGEN (Special Rapporteur), summing up the debate, said he had an open mind about the new article 1, which he had proposed in his third report in response to a request by the Commission. That article could either be regarded merely as a kind of “menu” and, therefore, as unnecessary, or it could be worded exhaustively to prevent it from being interpreted *a contrario*. Some members of the Commission had said that the new article 1 should refer to the three parameters, while others had suggested that a reference to “other rules of international law” should be added at the end; the inclusion of those words would, however, make it necessary to consider the relationship between article 1 and article 3. Mr. Jagota (1733rd meeting) had said that a reference to the rules of international law might give the impression that the articles the Commission was proposing were very tentative indeed. The drafting suggestions could be considered by the Drafting Committee.

28. Many members had referred to the former articles 1 and 3 proposed in his second report (A/

CN.4/344, para. 164) and had, in general, seemed to appreciate those articles more at the current session than they had at the previous session. Although he would, of course, be willing to retain those articles as a kind of framework for the various legal consequences that arose if the author State refused to stop a breach, they could be considered self-evident or even, as Mr. Barboza had said, illogical. In that connection, Mr. Barboza (1734th meeting) had cited the example of an international obligation to pay a specific sum of money on a certain date, payment made later being regarded only as a performance of a substitute obligation; but as Mr. Francis had said (*ibid.*), that was an exceptional case, because most international obligations were expressed in abstract terms. The rule stated in the former article 3 was, as many members had pointed out, already implied by the principle of proportionality; in their view, that rule gave too much protection to the author State. In any event, the former articles 1 and 3 could be discussed by the Drafting Committee in connection with its consideration of the new article 1.

29. Referring to the proposal made by a number of speakers that the new article 3 should be placed immediately after the new article 1, he said it was true that there was an obvious link between such a general article and the deviations that might be allowed to States which agreed *inter se* on certain obligations and on the legal consequences of a breach of those obligations. But there was also an obvious link between the new article 3 and the new articles 4 and 5, inasmuch as the special rules agreed on by States in establishing obligations were subject to the rules embodied in articles 4 to 6. Most members of the Commission had agreed that the wording of the new article 3 should not be so broad as to detract from the meaning of all the other articles. The words “to the extent” and the word “prescribed” in that article had been criticized, but the function of those words was merely to shift the burden of proof. The Drafting Committee could take that point into account and also discuss the use of the word “every”, which should probably be avoided in a legal text such as the one being prepared.

30. The new article 2 on proportionality had been both acclaimed and rejected. He had drafted it, however, only in order to deal with what was known as quantitative proportionality, namely, proportionality between the facts of the case. He attached considerable importance to the words “the performance of the obligations” and the words “the exercise of the rights”, because article 2 referred to the fact that, in each particular case, account had to be taken of the seriousness of the act and the seriousness of the response to that act, through the application of some rule of proportionality, and to the fact that every international obligation stated in abstract terms could be more or less seriously breached. Article 2 of the Definition of Aggression⁶ provided that the Security Council might, in certain circumstances, determine that an act of aggression was not

⁶ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

to be regarded as such because it had not been of sufficient gravity. It was thus not only a breach, but also an obligation, that might be more or less serious, but as Mr. Ushakov had pointed out (1733rd meeting), it was for the lawmakers to characterize certain types of obligations as being more important than others. In any case, the difference between the two types of proportionality should be taken into account.

31. Several members of the Commission had said that article 2 had not been drafted forcefully enough, particularly because of the use of the word "should" and the words "manifestly disproportional". He had decided to use the words "manifestly disproportional" after studying the Commission's comments and reports on the draft articles in part 1 and, in particular, article 34 on self-defence, in connection with which the Commission had referred to logic and the context of each particular case, in a vague reference to "proportionality".⁷ He nevertheless had an open mind about the use of the expression "manifestly disproportional", which could be discussed by the Drafting Committee.

32. The new article 4 had not met with much criticism, except by Mr. Ushakov (1734th meeting), with whom he agreed that the concept of *jus cogens* was not entirely clear, although he did think that it was concerned with the safeguarding of the human being, who must not be the victim of a response to an internationally wrongful act. Under the humanitarian law relating to armed conflict, for example, restrictions on methods of warfare were, after all, valid both for an aggressor State and for a State acting in self-defence. Even if self-defence could be invoked, account still had to be taken of humanitarian rules. It was to a limitation on possible reactions to an internationally wrongful act that article 4 related.

33. Article 5, which had met with little criticism, referred to the peremptory rules embodied in the Charter of the United Nations, which applied to any internationally wrongful act. Mr. Malek (1732nd meeting) had maintained that the Commission should also deal with the concept of self-defence and indicate in greater detail whether that concept was or was not applicable. That view had been supported by Mr. Koroma, but opposed by Mr. Evensen (1733rd meeting), Sir Ian Sinclair (1736th meeting), Mr. Ushakov (*ibid.*) and Mr. Yankov. His own view was that the Commission would have a hard time dealing with the question of self-defence, because States had expressed very different views on it. Indeed, the widely varying practice and views of States in regard to self-defence would make it very difficult for the Commission to propose any provision that would be acceptable to all of them.

34. The new article 6 had received as much criticism as was to be expected. What he had attempted to do in that article was to explore an uncharted area of State practice. The notion of an international crime defined in ar-

ticle 19 of part 1 of the draft was a new one, and there had not been much experience of the responses of States to such crimes, especially as article 19 covered so many different matters. Article 6 was thus an attempt to start a discussion, but it was certainly not intended to give an exhaustive list of the consequences of international crimes. Perhaps Mr. Calero Rodrigues had been right in suggesting (1733rd meeting) that, at that stage, it would be better only to refer in article 6 to the fact that the obligations arose for "every other State". That would certainly make it easier to draft article 6. He would also urge the Commission not to follow the *a contrario* argument that whatever was not stated in article 6 was not a legal consequence of an international crime. It seemed obvious to him that, in regard to some of the crimes referred to in article 19, some States might be more concerned than others; what article 6 was intended to do was merely to describe the minimum for all States.

35. In reply to a question put by Mr. Balanda (1734th meeting), he said that, since the obligations provided for in article 6 applied to victim States, such States were indeed under an obligation to exercise their rights.

36. He had to disagree with Mr. Ushakov (*ibid.*) that article 6, subparagraph 1 (a), applied to all breaches of international obligations. There were international obligations within the meaning of part 1 of the draft which played a role only in bilateral relations. In such cases, third States were not necessarily under an obligation not to recognize the result of a breach. For example, a treaty between State A and State B, relating to the protection of investments, might contain a rule providing that the investments of one of those States in the other State must not be nationalized without adequate compensation. He submitted that if it was alleged by State A that State B had not acted in accordance with that bilateral obligation, a third State could not take a stand on that matter, which concerned only State A and State B. He therefore doubted that subparagraph 1 (a) of article 6 applied to the breach of all international obligations.

37. Mr. Ushakov had also criticized subparagraph 1 (b) as being a modification of article 27 in part 1 of the draft. He did not think that was true, because article 27 dealt with aid and assistance given by one State to another State for the commission of an internationally wrongful act, whereas article 6, subparagraph 1 (b), referred to the situation created by such an act. As far as subparagraph 1 (c) was concerned, there might be some circumstances in which third States had an obligation to help other States to redress the situation created by an internationally wrongful act.

38. Since there were so many unsolved problems concerning article 6, particularly as a result of its relationship with article 1, it might be better to wait until more work had been done on the article before referring it to the Drafting Committee.

39. He wished to make it quite clear that, contrary to what Mr. Ushakov had said (1732nd meeting), the ar-

⁷ *Yearbook ... 1980*, vol. II (Part Two), p. 60, para. (22) of the commentary to article 34.

ticles proposed in his third report had in no way been intended to depart or detract from the articles in part 1. With regard to the sources of obligations, Mr. Ushakov had referred to article 17, which was, of course, very relevant to part 1, though it was less relevant to part 2, because a technical breach of a bilateral treaty would not have the same legal consequences as an international crime and because, in principle, the breach of a bilateral treaty had consequences only for the parties to that treaty. In any event, article 17 did not prejudice the legal consequences of the breach of an international obligation. Although it was open to discussion whether a treaty establishing a boundary in itself created obligations, the Commission had, in the past, recognized that there were special treaties which created objective regimes, the object and purpose of which were different from those of other treaties and which must be taken into account at some point in the Commission's work on the topic of State responsibility.

40. Mr. Malek (1731st meeting) had referred to article 35 in part 1 and asked whether it should not be enlarged upon in part 2. The Commission had discussed that question and agreed that it should be dealt with in the context of Mr. Quentin-Baxter's topic.

41. Sir Ian Sinclair (1733rd meeting) had requested him to explain the meaning of the terms "system" and "subsystem". Other members had also had difficulty with those terms, which he had attempted to define in his oral introduction to the third report (1731st meeting) and which, as he had said, referred to substantive, procedural and status rules. He would never use those terms in the text of an article, however; they had merely been suggested as "background" terms to illustrate the great difficulties involved in fitting all the elements of the topic into a set of draft articles.

42. In reply to some of the questions raised at the current meeting, he noted that criticism had been directed at the new introductory articles in general and the new article 2, on proportionality, in particular. In trying to answer the question who was to be the judge of proportionality, it would be difficult for the Commission to avoid using terms that required interpretation. He would be glad if the members of the Commission were in favour of including a provision on the settlement of disputes, because it was unlikely that States would ever agree to rules on State responsibility unless provision was made for a dispute settlement procedure, and because part 2, like part 1, was bound to refer to rules of *jus cogens*.

43. Mr. McCaffrey had made some comments on the structure of part 2, and of part 3 on implementation, suggesting that separate chapters should contain introductory articles and articles on the three parameters. He had taken note of that suggestion and of the remarks made by other members to the effect that the three parameters should not put the articles in a straight-jacket. He had introduced the three parameters only in order to provide a background or framework for the

Commission's thinking, however, and he was not absolutely sure that it would be possible to fit them into the text of the draft articles.

The meeting rose at 1 p.m.

1738th MEETING

Thursday, 1 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (concluded) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)³ (concluded)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (concluded)

ARTICLES 1 to 6⁴ (concluded)

1. Mr. RIPHAGEN (Special Rapporteur), continuing his summing up, said he had been pleased to note that the members of the Commission seemed to agree that a number of framework articles would be useful; that a catalogue of the legal consequences of an internationally wrongful act should be drawn up; that consideration should be given to the circumstances in which legal consequences might be precluded; and that a part 3 on implementation would be necessary.

2. Although there had been some criticism of the content and wording of the new articles 2 and 6, the idea that provisions along those lines should be included somewhere in the draft had been generally supported. The problem of the order in which the articles would be placed in the draft was of minor importance at the current stage and could be solved by the Drafting Committee.

3. The new article 6 had been criticized mainly because it might be interpreted as a provision which prescribed all the legal consequences of an international crime. Such an interpretation would, however, be incorrect and might be the result of the persistent tendency of lawyers to reason *a contrario*. The Drafting Committee might therefore consider Mr. Calero Rodrigues' suggestion (1733rd meeting) that, in article 6, account should be taken only of some of the legal consequences of an

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ For the texts, see 1731st meeting, para. 2.

international crime and, in particular, of the consequence that an international crime entailed obligations for all States.

4. Some drafting changes would, in his opinion, help to make the meaning of the new article 2 clearer. It should be borne in mind that that provision dealt with the balance to be struck between the seriousness of an internationally wrongful act and the seriousness of the reaction to it. Indeed, every situation created by an internationally wrongful act was unique and the reaction to such an act would depend on the circumstances of the particular case.

5. He proposed that the Commission should refer the new articles 1 to 6 and the former articles 1 to 3 to the Drafting Committee, on the understanding that the latter would prepare framework provisions and decide whether an article along the lines of the new article 6 should have a place in those provisions.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed, on that understanding, to refer the new articles 1 to 6 and the former articles 1 to 3 to the Drafting Committee.

It was so decided.

The meeting rose at 10.25 a.m.

1739th MEETING

Monday, 5 July 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT BY THE SPECIAL RAPPORTEUR
(continued)

SCHEMATIC OUTLINE² (continued)

1. Mr. MALEK said he would confine himself to some preliminary comments on the Special Rapporteur's third report (A/CN.4/360), which was so complex that it could not be assimilated without reference to the two previous reports and to the Commission's debates on them. The Commission's study of the subject had made considerable progress, but was still in the initial stage. Members had expressed different and sometimes conflicting views on questions that were often fundamental

and called for prior general agreement in the Commission. None of them, however, had seemed to doubt the advisability or the necessity of persevering with the topic. Thus the Commission had not been discouraged when noting the complexity of the problems involved and discussing the difficulties inherent in solving them. After having devoted so much time and effort to studying the topic of State responsibility, the Commission could not leave in abeyance a subject that could not be separated from it, no matter what efforts were made to do so.

2. In his second report, the Special Rapporteur noted that "the regime of responsibility for wrongful acts and the regime with which the present topic deals are not mutually exclusive" and that "the regime described in the title of the topic is not, as has often been thought, an anomalous collection of limiting cases for which the regime of State responsibility for wrongfulness fails to provide" (A/CN.4/346 and Add.1 and 2, paras. 9 and 10). Serious doubts had, indeed, been expressed in the Commission as to whether the distinction between the two topics was justified. For instance, Mr. Reuter had said at the previous session that "certain lawful activities" which the Commission had in mind "were in the process of becoming wrongful".³ It might be asked what would become of the rules the Commission was to draw up if that prediction came true in the near future.

3. Doubts had also been expressed in the Commission as to the pertinence of the distinction between primary and secondary rules for the purposes of the topic under study, and as to whether the texts to be prepared would belong in either of those categories of rules. His own view was that the discerning comments made on that point by the Special Rapporteur in his first two reports, and during the Commission's discussions, were of undoubted scientific interest.

4. It seemed that the Commission ought to reach general agreement, preferably at the current session, on a number of basic questions. In particular, it should adopt a general approach for the continuation of its work and delimit the scope of the topic. It should also take decisions on certain concepts such as the balance of interests, the criterion of foreseeability or duty of care, and the criterion of causality. Not only did the third report deal with all those matters; it also contained proposals on each of them that took account of the views expressed both in the Commission and in the Sixth Committee. The report, which was of high scientific value, had the merit of putting forward a general plan which would be extremely useful for the drafting of articles.

5. Mr. RIPHAGEN reminded the Commission that, in introducing his own topic at the 1731st meeting, he had said that, represented graphically, the topic under consideration would be near the centre, while the topic of State responsibility would be more towards the periphery. In a way, the topic of international liability

* Resumed from the 1735th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1735th meeting, para. 1.

³ *Yearbook ... 1981*, vol. I, p. 220, 1685th meeting, para. 27.

started with part 3 of the draft articles on State responsibility, on “implementation”, as shown in sections 2 to 4 of the schematic outline, which related to information and fact-finding, regime-building, and reparation respectively. Moreover, section 1 of the schematic outline corresponded to part 1 of the draft on State responsibility in that it dealt with what might be called the imputability of the conduct both of the acting State and of the affected State, and raised the question whether consideration should be given to “omissions” or “lack of activity”, which terms were similar to the term “related conduct” used in part 1 of the draft articles on State responsibility.⁴ The central theme of the topic under consideration was the “contribution/distribution” issue. Paragraphs 24 to 29 of the third report (A/CN.4/360) referred specifically to the distribution of costs and benefits, which corresponded to the notions of obligations and rights that were of such great importance in the topic of State responsibility.

6. The ultimate normative basis of the entire regime of liability was to be found in what the Special Rapporteur had called, in section 4 of the outline, the “shared expectations” of the States concerned. The notion of “shared expectations” was not unlike that of the “general principles of law” referred to in Article 38 of the Statute of the International Court of Justice. It was interesting to note that according to section 4, subparagraph 4 (b), of the schematic outline, shared expectations could be “implied from common legislative or other standards” or, in other words, from internal law, and that section 5, paragraphs 2 and 3, referred to some of those shared expectations. Thus, in section 5, paragraph 2 required “measures of prevention” and paragraph 3 stated that “an innocent victim should not be left to bear his loss or injury”. He believed that meant that the activities with which the topic was concerned should somehow be governed at the internal level and that section 5, paragraphs 2 and 3, might serve as a kind of common internal regulation for the States concerned.

7. He wondered whether it would not be possible to go even further and require that, if there was a national regulation concerning the activities in question, it should be applied without discrimination to the effects of both activities conducted within and activities conducted outside “the territory or control” of the State concerned. It might even be possible to state the principle that the victims or prospective victims should have equal access to any administrative, quasi-judicial or even judicial machinery provided for in a national regulation.

8. The question arose, however, whether such an “extended” rule should not, as was so often the case in matters of national jurisdiction, be subject to the requirement of reciprocity. Some kind of reciprocity did seem to be implied in the notion of “shared expectations”. Indeed, there might be a rule that one State could not re-

quire another State to do more in the field of prevention and reparation than it was prepared to do itself within its own jurisdiction. The notion of reciprocity was obviously not a formal one, since national regulations could differ according to differences in national “environments”. It was global or overall reciprocity that counted. The Special Rapporteur, who had referred to the notion of “shared expectations” only in regard to reparation, should also refer to that notion in connection with the preventive aspects of the topic.

9. In dealing with “circumstances precluding wrongfulness” in chapter V of part 1 of the draft articles on State responsibility⁵ and, in particular, in article 31, paragraph 2, article 32, paragraph 2, and article 33, subparagraph 2 (c), the Commission had referred to the circumstances to which the author State contributed, but as that chapter was not exhaustive, it had not referred to the circumstances to which the victim State contributed, the victim State being the one against which the circumstance precluding wrongfulness was invoked. It had been pointed out during the Commission’s discussions on article 33 (State of necessity) that a “grave and imminent peril”, which was the first condition for invoking a state of necessity, might well be blamed on the injured State; in such a case, a plea of state of necessity might be more easily acceptable.

10. In the areas covered by the topic under consideration, the relationship between the acting State and the affected State was much closer than in classical State responsibility, as suggested in section 6, paragraph 14, of the schematic outline, which included, as a factor that might be relevant to a balancing of interests, the “extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury”. That paragraph established a close link between contributions to, and the distribution of, benefits between the States concerned. Both the acting State and the affected State might have technical means of preventing loss or injury caused by pollution. The co-ordination or lack of co-ordination of land use in border areas provided an example of the close connection between the conduct of the acting State and the conduct of the affected State. If State A planned to build an industrial area on its border with State B and State B planned to build a residential or recreational area on the opposite side of the border, the two States would inevitably face problems of transboundary pollution.

11. The treatment of third States was of great importance both in the law of treaties and in the law of State responsibility. Indeed, a bilateral approach was typical of classical international law and the Special Rapporteur had perhaps wisely given his schematic outline a bilateral slant, referring, as he had, to the acting State and the affected State. Unfortunately, however, there were often more than two States involved, and the balancing of interests then became even more complicated. According to section 1, paragraph 1, of the

⁴ *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁵ *Ibid.*, pp. 33 *et seq.*

schematic outline, activities within the territory or control of State A might give rise to loss or injury to persons or things within the territory or control of State B, through the territory or control of State C, the "transit State". What would be the legal position of the transit State in the regime provided for in the outline? That question would be of particular importance if the transit State was able to do something about the activities in State A which gave rise to loss or injury in State B. A simple answer would be that in such a case State C was not a third State, but although that answer might be correct as far as the physical use of the environment was concerned, it might not be valid in other fields covered by the topic under study.

12. Although the Commission had dealt with the question of the active attribution of conduct in articles 5 to 15 of part 1 of the draft articles on State responsibility,⁶ it still had not considered the question of passive attribution, which meant the factual circumstances in which a State was injured or considered to be injured. For the topic under consideration, the active and passive attributability of conduct had been covered by the words "within the territory or control of a State" in section 1, paragraph 1, of the schematic outline. The complications that might arise as a result of the use of those words had been discussed in paragraphs 44 and 45 of the third report. Whether or not those complications had to be dealt with in the context of the topic was, however, a matter for future consideration.

13. For the time being, it might simply be noted that the activities of one State could affect the activities of another State as a result of a pure relationship of fact. For example, the fact that, in France, large amounts of salt were dumped into the Rhine every day in the course of industrial activities meant that agricultural activities in the Netherlands could be carried out only at the considerable cost of "de-polluting" the Rhine water. There was no doubt about the factual relationship between those two activities; the main question to be answered was what legal consequences should be drawn from that factual relationship in terms of some kind of "shared management". In the present context, therefore the legal niceties of the meaning of the term "territory" or the term "jurisdiction", which were so important in other fields of international law, were hardly relevant at all. The example he had just given related to activities which were quite normal and which involved a fairly obvious chain of causation, but what it really involved was the use of a shared resource, which was only one of the seventeen factors mentioned in section 6 of the schematic outline.

14. It was nevertheless clear from paragraphs 19 to 23 and 35 to 42 of the third report that the Special Rapporteur planned to apply the regime proposed in the schematic outline to other situations as well. One of those situations involved the co-existence of ultra-hazardous and normal activities, which often led to the enactment of special provisions of international law

relating to risk allocation and shifts in the burden of proof in relation to the chain of causality. Another situation to which the proposed regime would apply was that in which international economic and monetary action by one State caused loss or injury to persons or things in another State, through the medium of more or less predictable human behaviour. For example: devaluation of a national currency, a policy on interest rates followed by the central bank of a State, Government regulation of wage levels, or national legislation on quality standards—all of which could have a tremendous impact on economic activities in another State. It was quite clear from the practice of States, however, that virtually no degree of shared management in such areas was acceptable, at least by the States which "called the tune" in economic or monetary matters.

15. In paragraph 43 of his third report, the Special Rapporteur had said that "matters relating to the treatment of aliens are outside the scope of the present topic". In paragraph 45, he had added that "Quite conceivably, there are situations of this kind [situations involving exported industries] in which the 'exporting' State should be prepared to share with the receiving State authority and responsibility for the establishment and monitoring of appropriate technical standards". Although he fully agreed with that statement, he had to point out that it concerned the question of the treatment of aliens and that he was not sure that the words "should be prepared ..." reflected the practice of States. It was at that point that the question arose of what the Special Rapporteur had referred to, in paragraph 46 of his report, as the "natural boundaries of [the] topic". It was extremely difficult to ignore the fundamental difference between natural movement across political borders and human movement across those borders in the form of international trade in the broad sense of the term. Although an individual State could control the second kind of movement, it could not control the first. In the third sentence of paragraph 47 the Special Rapporteur had seemed to recognize the difference between natural and human movements. That important difference should be taken into account in section 1 of the outline, because the question whether it was materially possible for the affected State to prevent movement through which activities in the acting State might cause loss or injury in the affected State was of crucial importance for the structure outlined in the third report.

16. Another aspect of the question of movement, which had already been touched upon in connection with the criterion of "territory or control", was that of human transboundary movement which could be protected by conventional or customary rules of international law. A legal impossibility was thus created for a potentially affected State and it might be asked whether such a legal impossibility could be equated with a factual impossibility, thus bringing into play the regime of the schematic outline, which was a regime of "shared management". Such a regime did not seem to be in keeping with the practice of States, at least so far as the

⁶ *Ibid.*, pp. 30-31.

international movement of ships and aircraft was concerned. Indeed, existing international conventions on ships and aircraft provided for a division of jurisdiction, which always involved some degree of extraterritoriality of the *res in transitu*, since the movement itself was considered to be in the interests of the international community as a whole. He therefore had some reservations about subparagraph (d) (ii) of section 1, paragraph 2, of the outline, and thought the Commission would be well advised not to deal with the particular regime pertaining to ships and aircraft.

17. Mr. NI said that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was a difficult one, not only because it had not been explored in detail in the past, but also because it entailed an attempt to resolve the contradiction between a State's freedom to conduct creative activities within its own borders and the concern of other States to avoid harm resulting from such activities. The Commission's work on the topic would require a high degree of creativity, but not sheer speculation or conjecture. The available source materials were limited both in scope and in quantity, but they would have to suffice.

18. At the Commission's last two sessions, it had been said that the topic was concerned with "primary" rules of obligations and that it in no way affected the "secondary" rules of State responsibility. Various theories, such as "strict liability", "no-fault liability", the "duty of care" and the "special situation of ultra-hazards" had been advanced, but none seemed to be generally acceptable. Answers had also been sought in materials of jurisprudence such as the *Trail Smelter* arbitration,⁷ the *Corfu Channel* case,⁸ the *Lake Lanoux* arbitration⁹ and the *Nuclear Tests* case¹⁰ and in the Stockholm Declaration.¹¹ In view of the great complexity of interrelationships in the modern world, however, it had been found that different interests had to be carefully weighed and accommodated and it was thus that the balance of interests test had begun to take shape.

19. The Commission's task was to supplement the maxim *sic utere tuo ut alienum non laedas* by other relevant principles in the light of the requirements of the modern world. In paragraph 85 of his second report (A/CN.4/346 and Add.1 and 2), the Special Rapporteur had stated that:

The topic is the product of interdependence among States and peoples. They have to regulate their affairs with minimum resort to prohibition, but also without lawlessness. They need rules that persuade compliance, because observance will correspond with interest.

In paragraph 2 of his third report (A/CN.4/360), the Special Rapporteur had also said that the Sixth Com-

mittee had encouraged the Commission to pursue its work by "finding firm foundations in existing law and building creatively upon those foundations a structure that would serve the cause of interdependence in the modern world". The interests of different States and peoples would, of course, have to be taken into account if the idea of interdependence was to survive at all.

20. The Special Rapporteur's basic aims of placing emphasis upon prevention and reparation and striking a balance between freedom to act and the duty not to injure, would serve as important guidelines for the Commission's work on the topic. Emphasis was not placed on prevention alone, because prevention would imply a duty of care and to establish enforceable rules of prevention would be to depart from the terms of reference laid down for the topic, which was not concerned with rules of prohibition. With regard to the question of the legal relationship between the duty of prevention and the obligation to make reparation, the Special Rapporteur had ingeniously suggested in paragraph 21 of his third report that:

Elements of reparation ... fall into their proper perspective as a commutation of the duty of prevention, when the prevention of all risks can be achieved only by desisting from the activity, or when the costs of the latter duty are punitive in relation to the magnitude of the risk and the added financial burden upon a beneficial activity,

thereby striking a balance between freedom to act and the duty not to injure. Instead of taking measures to prohibit an activity which was useful and beneficial, the acting State assumed the duty of reparation for risks when such risks might cause injury in the future. But what should be done if the risks became overwhelming? Could the operator of the activity go ahead without interference because it was able to assume, either in law or in fact, a blanket obligation to pay compensation? Such questions would require further consideration.

21. In practice, prevention and reparation occurred at different stages. Only when prevention had failed would reparation come into play. The Special Rapporteur had indicated that it would be better for the rights and interests of the States concerned to be regulated before loss or injury occurred. He had also stressed the point that the topic was ultimately concerned with the obligation to make reparation for a loss or injury actually sustained, with minimizing the risk of loss or injury; and with making appropriate provision for risks which could not be reasonably avoided. The acting State was encouraged, but not required, to minimize risks and arrange suitable coverage for them.

22. The most important aim was, as the Special Rapporteur had pointed out, to promote agreements between States in order to accommodate, rather than inhibit, activities which were predominantly beneficial. The first step towards reconciliation of the interests of States was, according to the Special Rapporteur, recognition of the duties to provide information, to consider representations, to negotiate in good faith and, in general, to co-operate. Failing agreement, the acting State would have the duty of establishing its own regime based on its own estimate of the dangers involved, but if

⁷ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁸ *I.C.J. Reports 1949*, p. 4.

⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281.

¹⁰ *I.C.J. Reports 1974*, p. 253, and *ibid.*, p. 457.

¹¹ See 1735th meeting, footnote 3.

loss or injury occurred, it could negotiate a settlement with the other State or States concerned. That was the main thrust of the primarily procedural rules to be developed, which would serve as guidelines for the negotiation of agreements. By proceeding empirically, examining materials, demonstrating principles that appeared to be consistently reflected in those materials and generalizing from the practice of States in reconciling and accommodating conflicting interests, it might be possible to find some rules that would justify the attempts made in the balance of interests test. Care must be taken, however, not to impair the interests of the developing countries, which lacked experience and technological skills and might therefore not be able, for some time to come, to meet the requirements and standards which were valid for the more advanced countries. That concern had been taken into account in Principle 23 of the Stockholm Declaration.

23. The approach to be followed was basically a gradual one. The Special Rapporteur had rightly noted that the best course was to suspend judgement about the unresolved question of scope until the content of the topic had been more fully explored (A/CN.4/360, para. 48). There should, however, be some idea of what would eventually be covered. For in the long term the Commission's work should not be limited to considering materials relating only to the physical use of the environment. Liability for risks from activities in outer space and for the adverse effects of economic activities were important issues in modern international life and they should be kept within the purview of the study, even though work on them might not be initiated immediately.

24. The schematic outline contained in the third report gave a comprehensive idea of what the Special Rapporteur had in mind, as well as of the questions that were relevant to the topic, which, in his own view, involved not only codification, but also progressive development of international law. The Secretary-General of the United Nations had indicated, in his introduction to the "Survey of International Law", that "the present needs of the world are such that a vastly more active attitude is now taken to the development of international law".¹² It had rightly been said in the Sixth Committee of the General Assembly that "the articles the Commission prepares on particular topics combine elements of both *lex lata* and *lex ferenda*" (A/CN.4/L.339, para. 225). And lastly, the late Judge Lauterpacht had said that, in most cases, the work of the Commission on a given topic partakes of the nature both of codification and of development of international law.¹³ Those statements were, in his view, particularly applicable to the topic under consideration.

¹² *Yearbook ... 1971*, vol. II (Part Two), p. 7, document A/CN.4/245, para. 19.

¹³ "Second report on the law of treaties", submitted to the Commission's sixth session (1954) by the Special Rapporteur, H. Lauterpacht (*Yearbook ... 1954*, vol. II, p. 131, document A/CN.4/87, para. 3 of the commentary to article 9).

25. Mr. BALANDA said that the report before the Commission was lucid and the Special Rapporteur had taken care to reflect the comments made by members at the previous session. The idea of submitting a schematic outline attested to the foresight of the Special Rapporteur, but that method of work had the disadvantage of being slow, since after the Commission had decided on the broad content of the draft, it would still have to consider the wording of the articles and integrate them into the general structure.

26. In his second and third reports, the Special Rapporteur had often used the word "wrongful". His own view was that that word was not appropriate for the topic under consideration, which related only to acts "not prohibited" by international law. The same applied to the idea of the point at which liability was incurred. According to the Special Rapporteur, any activity that went beyond a certain point would become wrongful. But the topic under consideration did not seem to come within the field of liability for wrongfulness.

27. As was clear from its title, the topic was concerned *inter alia* with the position of international organizations, which were not only subjects of international law but could, like States, carry out activities that came within the scope of the topic. If harm was done, would the international liability incurred be that of an organization, of all its member States, or of the State on whose territory the harmful activity was carried out?

28. With regard to the term "acting State", he noted that in reply to a question put by Mr. Ushakov, the Special Rapporteur had explained at the previous session that the words "acts" and "activities" referred both to positive acts and to omissions.¹⁴ During the discussion on article 1, submitted in his second report (A/CN.4/346 and Add.1 and 2, para. 93), the Special Rapporteur had said that the word "activities", in the sense in which it was used in that article, "referred not to the acts of the State itself, but to the activities within the State, or within the jurisdiction or control of the State, in respect of which the State itself had obligations". He had added that the word "activities" referred to "what people did within the territory of the State".¹⁵ In paragraph 42 of the third report (A/CN.4/360), the Special Rapporteur confirmed that point.

29. He (Mr. Balanda) therefore wondered whether the draft was intended to make the State liable for the consequences of activities which it did not itself carry out; it would thus be presumed to derive benefit from an activity that took place on its territory. That was a very questionable presumption, particularly from the economic viewpoint, considering the case of multinational companies which, in order to benefit from a more favourable tax regime or because they were looking for new markets, set up in business outside their territory of

¹⁴ *Yearbook 1981*, vol. I, p. 224, 1686th meeting, para. 18.

¹⁵ *Ibid.*, pp. 219 and 220, 1685th meeting, paras. 17 and 22.

origin. By doing so, not only did they export high risks, especially in regard to pollution, but they also made enormous profits which were then repatriated. The establishment of such industries benefited from favourable treatment, including exemption from customs duties, and the selling price of their products was often left to the discretion of the manufacturer. So what benefit did the new countries derive from such situations? In those circumstances, one could hardly speak of a balance of interests. Moreover, the idea that the State would be responsible for the consequences of activities carried out by individuals in its territory or under its control, seemed to conflict with the definition of the expression “territory or control”, given in the schematic outline (sect. 1, para. 2), according to which it included “any activity which takes place within the substantial control of that State”. Could States, at any rate those of the third world, claim to exercise substantial control over the activities of transnational companies in their territory? That part of the definition also meant that the State would only be responsible for activities which it carried out itself, as was clear from the word “substantial”. The proposed text, however, sought to establish the contrary. Similarly, if only the activities of individuals were to be considered, the expression “acting State” should not be used.

30. In his second report the Special Rapporteur expressed the view that, as an almost invariable rule, the conventional regimes did not distinguish cases according to whether the activities were carried out by individuals or by agencies of the State (A/CN.4/346 and Add.1 and 2, para. 71). He also referred to the Convention on International Liability for Damage Caused by Space Objects,¹⁶ which defined the term “launching State” as a State which “launches or procures the launching of a space object”, as well as a State “from whose territory or facility a space object is launched”. Nothing in that definition said that the State would be responsible for the acts of individuals. The activity could indeed be carried out by individuals, provided that the State assumed responsibility for it either by prior authorization of the launching from its territory or by allowing its facilities to be used for the purpose. The State thus accepted the risk of injurious consequences of activities it authorized and might conceivably assume responsibility for them. On the other hand, commercial companies did not necessarily receive such authorization. Their legal framework was laid down by law and, once they had adopted one of the prescribed forms, they acquired legal personality.

31. With regard to causality, the Special Rapporteur had said the previous year that he had not urged that causality, as such, should be adopted as a basic generating force.¹⁷ Where reparation for injury was concerned, however, that concept could not be entirely discarded. It would increase the burden of reparation if a State were to be held liable for all the consequences of

an activity carried out on its territory. Internal law held that in regard to compensation for damage, only the direct or immediate consequences must be taken into account, and the Commission could be guided by that principle.

32. As to the concept of foreseeability, he noted that the Special Rapporteur had said that the problem of strict liability was limited to cases in which damage could not be foreseen.¹⁸ If it was really implicit in the idea of strict liability that damage could not be foreseen, he wondered why the Special Rapporteur had dwelt on the duty to foresee in his third report.

33. The concept of the balance of interests was an *idée force* of the third report. It applied to legally protected interests—a notion that had not been defined. It should be specified whether those interests were protected by international law or by internal law. Furthermore, the idea of balance postulated the existence of reciprocal interests; but in the case of transboundary damage, were reciprocal interests of States always involved? Since, according to the Special Rapporteur, the activity to be considered was not that of the State, but that of persons acting on its territory, very few interests of the State in whose territory the activity was carried out would be directly affected. The beneficiaries of the activity would certainly be the persons carrying it out, so that one could not speak of interests of the State in whose territory the activity was carried out. The neighbouring State, on the other hand, had an interest in being protected against the possible consequences of harmful activities. In the event of damage, loss or injury, it also had a right to reparation.

34. The Special Rapporteur was inclined to be guided by the situation existing in regard to environmental protection. But in that sphere, everyone had an interest in benefiting from protection that was as effective as possible, whereas in the case of transboundary damage, all the parties concerned did not necessarily have an interest, so that it was not possible to speak of a balance of interests. In the absence of definite reciprocal interests, could one speak of “distribution of costs and benefits” and require a State to participate financially in the fact-finding machinery if it had suffered injury?

35. He also noted that the Special Rapporteur said, in his third report (A/CN.4/360, para. 14), that:

To give effect to such a rule, a balance of interest test has to be applied to find the point of intersection of harm and wrong.

Any idea of wrong should be excluded from the draft articles, however, because they applied to activities not prohibited by international law. The balance of interests, if there were interests, should be assured at the outset, that was to say, before the activity in question was undertaken, since in the field considered, injury was assumed to be always unforeseeable and possible. In addition, the balance of interests should also—and mainly—be determined in terms of the benefit derived by the author of the activity and the harm it might cause.

¹⁶ United Nations, *Juridical Yearbook*, 1971 (Sales No. E.73.V.1), p. 111.

¹⁷ *Yearbook ... 1981*, vol. 1, p. 222, 1686th meeting, para. 7, *al fine*.

¹⁸ *Ibid.*, p. 217, 1685th meeting, para. 3.

36. If, as appeared from paragraphs 21 and 24 of the third report, a State could be made to suffer loss or injury, it would also be advisable, in the name of the balance principle, to recognize that the acting State should sometimes be dissuaded from undertaking an activity, even if it could derive benefits therefrom, in cases which entailed grave risks for man or his habitat.

37. Referring to section 2 of the schematic outline, he observed that compliance with the provisions of paragraphs 1 and 3 would depend solely on the goodwill and good faith of the acting State, which, in the event of loss or injury, had a duty to provide "all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable ...". But there was every reason to believe that for fear of increasing the burden of reparation, the acting State would minimize the losses. It would thus be both judge and a party to the case.

38. The provisions set out in paragraph 2 would be difficult for new States to apply, because they often lacked the technology and, in particular, the personnel to inform them in good faith of the degrees of loss or injury which, according to their estimate, could result from an activity carried on in the territory of another State. For such information the new States would be practically compelled to apply to foreign technicians who, out of solidarity with the foreign enterprise whose activities they were investigating, would tend to minimize the effects, in order to protect the interests of their compatriots.

39. With regard to paragraphs 4 and 5, he wondered how fact-finding requirements provided for there could be reconciled with the reasons of national or industrial security mentioned in paragraph 3. The affected State might find that, on the pretext of national or industrial security, it was disarmed and powerless to establish as accurately as possible the nature and extent of the possible or actual loss or injury. The effects of the fact-finding machinery were virtually obliterated by the terms of subparagraph 6 (b), which provided that its report would not be binding on the States concerned. Paragraph 7 recommended a rule that was bold, to say the least, since it provided that the affected State would contribute to the costs of the fact-finding machinery, although it had not contributed to causing the harm.

40. The whole edifice which section 2 was intended to build by laying specific duties on the State that caused the actual or possible loss or injury was demolished by the provisions of paragraph 8, as also by those of section 3, paragraph 4, which stipulated that "Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action". He would rather have expected the statement of a duty which would have made it possible to establish some sort of link between strict liability and responsibility for wrongful acts, in the sense that failure to fulfil the obligations laid down in section 2 would constitute an internationally wrongful act. The State which was, or might be, affected was at the mercy of the acting State,

since according to section 2, paragraph 8, the affected State's right of action was paralysed whereas the acting State had complete freedom to decide on the kind of action it would condescend to take in order to limit the loss or injury.

41. Section 3, paragraph 1, of the outline also stated a weak rule, imposing a duty on the States parties to a dispute to enter into negotiations if it did not prove possible to establish fact-finding machinery within a reasonable time. In other words, the paragraph established the obligation to settle disputes peacefully, and the fact-finding procedure was one way of doing so. But although that obligation was laid down in the Charter of the United Nations, it had never prevented States from resorting to force to settle their disputes. Why did section 2 limit the freedom of States to a procedure for establishing the facts and circumstances relating to the loss or injury? It would be wiser not to impose a single type of procedure on States: it was for them to decide, in each specific case, on the procedure that they considered most appropriate.

42. Although the principle of reparation for loss or injury was stated in paragraph 2 of section 4, it was given a very minor role in paragraph 2 of section 5; there, the initial emphasis was on measures of prevention, and the duty to make reparations arose only to the extent that, despite the precautions taken, loss or injury occurred. Thus the very concept of liability seemed to be minimized, whereas once it existed, liability entailed the duty of reparation, even in the form of token compensation. The duty to make reparation for injurious consequences of activities not prohibited by international law should be affirmed and laid down in a fundamental rule.

43. According to section 5, paragraph 2, of the outline, "the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability". He supposed that a State might thus decide to discontinue any preventive measure if it was likely to disrupt the financial balance of the enterprise concerned. In those circumstances, a State or group of States might be exposed to a permanent danger on the pretext that measures to prevent the harm were too costly; but that would be overlooking the balance principle which, according to the Special Rapporteur, lay at the very centre of the mechanism of strict liability. It therefore seemed that the interests of the State carrying out the harmful activity were preferred to those of the victim. For how long would the affected State continue to put up with that state of affairs?

44. Section 5, paragraph 3 introduced, for the first time, the idea of an innocent victim, which implied that there was also another kind of victim. He was inclined to believe that in the context of the general mechanism of international liability for injurious consequences of activities not prohibited by international law, any State that suffered injury should, by definition, be regarded as an innocent victim. Indeed, any consideration of participation in causing the harm should be excluded. He also considered that the fact that the victim had agreed

that the acting State could carry out the harmful activity if it took measures to prevent loss or injury would not deprive the affected State of the character of an innocent victim.

45. In the light of the Special Rapporteur's remarks in paragraph 10 and 41 of his third report, he thought the principle of reparation could be worded on the following lines:

“Any injury resulting from an activity of a State carried on outside the territory of the said State or within the limits of its jurisdiction must give rise to fair reparation.”

That wording would avoid any reference to liability; for, in the context of the draft articles, the element of imputability did not have to be either discussed or proved: it could be assumed to exist, because the author of an activity which had caused, or which could cause, loss or injury was known. The only elements to be taken into consideration would be the activity and the injury or the reparation, without, of course, forgetting prevention.

46. The notion of reparation for injury and the modalities of compensation should be further developed later. As some members had said at the previous session, the idea of automatism should not be entirely rejected, and that applied in all cases. Despite the difficulties of defining the term “exceptional risks”, the notion of automatism could perhaps be retained, if only in that particular case, since certain human activities, by their very nature, obviously involved a greater or lesser degree of danger. After all, the Special Rapporteur himself was in favour of the principle of reparation, for he had written in his second report (A/CN.4/346 and Add.1 and 2, para. 47):

Can it really be true that States ... are content to regard the existing law as requiring them to endure the harmful consequences of activities conducted with due care within the territory or jurisdiction of other States?

47. Mr. USHAKOV said that the Special Rapporteur's third report (A/CN.4/360) strengthened his conviction that the topic under study was, for the time being, entirely artificial. There was, indeed, no general rule of international law that imposed a duty on a State to indemnify its nationals, another State or the nationals of that other State for injury suffered as the result of an activity not prohibited by international law which it had carried out. Such an obligation existed only by virtue of the agreements in force: it bound the States parties to those agreements in any case, and perhaps also States that were not parties to them. That was equally true in internal law: harm caused by human activities which were not prohibited by law—and all human activities, agricultural or industrial, could ultimately be harmful although they were essential to progress—could not give rise to compensation. Moreover, he considered that the Commission should not concern itself with environmental protection, which hardly fell within the scope of the topic under consideration.

48. The international community was currently engaged in drawing up agreements to govern the conduct of harmful activities that were not prohibited by international law, so presumably such activities could only be restricted in the future, not prohibited: only then would primary obligations come into being, which would entail international responsibility in the event of violation. For the time being, it would be utopian to draw up general rules of international law on international liability for injurious consequences arising out of acts not prohibited by international law.

49. Mr. CALERO RODRIGUES said that the acts or activities referred to in the title of the topic differed from those dealt with in the context of State responsibility in that they did not constitute breaches of international obligations and that they included acts not only of States but of State organs or agencies, as well as of private individuals and juridical persons. He understood the fact that only States were referred to as meaning that States would be made accountable for the consequences of any such acts or activities and would enjoy special powers to simplify any reparation, or even prevention, procedures.

50. In the final analysis, the term “international liability” meant an obligation of compensation. It was the task of the Commission to endeavour to define the content, forms and degrees of such liability. While the acting State was unquestionably accountable for any loss or injury caused, it was by no means certain that it could be held accountable in respect of preventive measures. Such measures could be applied in some cases, but not in others, and the possibility of unforeseen consequences always existed.

51. In his second report (A/CN.4/346 and Add.1 and 2, para. 92) the Special Rapporteur had referred to the necessity of avoiding the monster of strict liability and giving pride of place, in the draft articles, to the concept of prevention. In his own view, it might not be possible entirely to avoid all reference to the concept of strict liability. Nor was he convinced that the emphasis should be placed on the concept of prevention.

52. In his third report (A/CN.4/360), the Special Rapporteur had set a very useful course. His schematic outline of the topic was of particular importance to the Commission for determining whether the approach adopted was viable. The Commission should now indicate whether it considered that the schematic outline constituted a basis for further work on the topic. In an area which was so ill-defined, a definition of the scope of the topic was of particular importance. While he agreed in general with the definition proposed by the Special Rapporteur in section 1, paragraph 1, of his outline, he had difficulty with the words “which give rise or may give rise to loss or injury”. He was glad to note that the Special Rapporteur had decided not to retain the concept of potentiality referred to in his second report and had reached the conclusion that, in relation to the establishment of a regime of prevention, all injury was prospective, whereas, in the context of reparation,

all injury was actual (*ibid.*, para. 35). In that connection, he noted that in paragraph 27 of his third report the Special Rapporteur described the occurrence of loss or injury as "a pure question of fact", whereas in paragraph 34, he referred to loss or injury as being "material or non-material". In his own view, what distinguished liability from responsibility was, precisely, that liability was concerned with material loss or injury, whereas responsibility was concerned, first and foremost, with a legal loss or injury resulting from the breach of an obligation. With those reservations, he found the definition of the scope of the topic proposed by the Special Rapporteur generally acceptable.

53. In section 2 of his schematic outline, the Special Rapporteur proposed a regime for prevention. Paragraph 1 of that section contained a reference to loss or injury: it should be made clearer that whereas a regime of compensation applied if a loss or injury actually occurred, a regime of prevention could apply only with respect to continuation of the activity concerned. In the same paragraph, the Special Rapporteur had emphasized the duty of the acting State to take remedial or preventive measures in order to avoid future loss or injury. While that was an essential part of any regime of prevention, the Special Rapporteur had perhaps given too much prominence to the procedures to be followed in adopting such measures. It was most important to recognize that the international responsibility of a State was not engaged if it failed to follow the recommended procedures. It might, in fact, be possible for a State to determine the remedial measures to be taken without any reference to those procedures.

54. In section 3, paragraph 3, of the outline, the Special Rapporteur referred to the rights and obligations of the States parties under the draft articles. In that context it would be more appropriate to speak of satisfying interests than of satisfying rights and obligations. The regime of reparation proposed by the Special Rapporteur in section 4 appeared somewhat limited. In paragraph 3 of that section, it was stated that the reparation due was to be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5, taking into account the factors set out in sections 6 and 7. The concept of shared expectations was unsatisfactory. In section 4, paragraph 4, it was defined as a sort of consensus between the States concerned, expressed in exchanges between them or implied by common legislative or other standards or patterns of conduct observed by the States concerned or even by the international community. That definition raised the problem of the different stages of development of different countries. The standards applied in industrialized countries might not be applicable in developing countries. In any event, the concept of shared expectations contributed little to a regime of reparation.

55. One of the main principles set out in section 5, to be applied in ascertaining the reparation due to the affected State, was that an innocent victim should not be left to bear his loss or injury. While he considered the

word "innocent" to be more literary than legal, the principle itself was essential. However, a number of other concepts referred to, such as those of adequate protection, freedom of choice compatible with adequate protection and liberal recourse to inferences to establish whether an activity did, or might, give rise to loss or injury, seemed somewhat questionable.

56. It was difficult to see what role could be played by the factors set out in sections 6 and 7 in determining reparations. A number of the provisions in those sections could be better developed as specific provisions of the regimes of prevention or compensation, or as general principles to be placed at the beginning of the draft. Alternatively, if they were to serve merely as guidelines, they could be included in an annex to the articles. Part II of section 7, for example, could be developed as an aspect of the regime of reparation or compensation.

57. He found the schematic outline proposed by the Special Rapporteur generally acceptable.

The meeting rose at 6.10 p.m.

1740th MEETING

Tuesday, 6 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/L.341)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
DRAFTING COMMITTEE

ARTICLE 2, subparas. 1 (*c bis*) and (*h*), ARTICLE 5, ARTICLE 7, para. 4, ARTICLE 20, para. 3, ARTICLES 27 to 36, 36 *bis*, 37 to 80 and ANNEX.¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts of article 2, subparagraphs 1 (*c bis*) and (*h*); article 5; article 7, paragraph 4; article 20, paragraph 3; articles 27 to 36, 36 *bis* and 37 to 80 and the annex, as well as the titles of the corresponding parts and sections of the draft, adopted by the Drafting Committee (A/CN.4/L.341).

2. The texts and titles proposed by the Drafting Committee were the following:

* Resumed from the 1728th meeting.

¹ For the texts of draft articles 2, 7 and 20, adopted on second reading, and the original text of draft article 5, see *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.* For the text of draft articles 27 to 80 and the annex, adopted on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 71 *et seq.*

[PART I
INTRODUCTION

...]

Article 2. Use of terms

1. For the purposes of the present articles:

...

(*c bis*) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the organization to be bound by a treaty or for accomplishing any other act with respect to a treaty;

...

(h) "third State" and "third organization" mean respectively:

- (i) a State, or
- (ii) an international organization,

not a party to the treaty;

...

Article 5. Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.

[PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

...]

Article 7. Full powers and powers

...

4. A person is considered as representing an international organization for the purpose of expressing the consent of that organization to be bound by a treaty if:

- (a) he produces appropriate powers; or
- (b) it appears from the practice of the competent organs of the organization or from other circumstances that that person is considered as representing the organization for such purpose without having to produce powers.

...

[SECTION 2. RESERVATIONS

...]

Article 20. Acceptance of and objection to reservations

...

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

...

[PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

...]

Article 27. Internal law of States, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29. Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or an organization or, as the case may be, towards another organization or a State not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

SECTION 3. INTERPRETATION OF TREATIES

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4 TREATIES AND THIRD STATES OR THIRD ORGANIZATIONS

Article 34. General rule regarding third States and third organizations

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35. Treaties providing for obligations for third States or third organizations

1. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the relevant rules of that organization.

Article 36. Treaties providing for rights for third States or third organizations

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of international organizations to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the relevant rules of the organization.

3. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 36 bis. Obligations and rights arising for States members of an international organization from a treaty to which it is a party

Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

(a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and

(b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.

Article 37. Revocation or modification of obligations or rights of third States or third organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

5. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

Article 38. Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and contracting organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. Agreement to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45. Loss of a right to invoke a ground for invalidating, terminating withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

SECTION 2. INVALIDITY OF TREATIES

Article 46. Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case of paragraph 1, a violation is manifest if it would be objectively evident to any State or any international organization referring in good faith to normal practice of States in the matter.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

4. In the case of paragraph 3, a violation is manifest if it is or ought to be within the knowledge of any contracting State or any contracting organization.

Article 47. Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations or, as the case may be, to the other negotiating organizations and negotiating States prior to his expressing such consent.

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49. Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. Corruption of a representative of a State or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52. Coercion by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties, after consultation with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations.

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties, after consultation with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

- (i) in the relations between themselves and the defaulting State or international organization, or
- (ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present articles; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations, if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more inter-

national organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. When an objection is raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. Procedures for arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or article 64 may, by written notification to the other party or parties to the dispute, submit it to arbitration in accordance with the provisions of the annex to the present articles, unless the parties by common consent agree to submit the dispute to another arbitration procedure;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in motion the conciliation procedure specified in the annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations, unless the parties by common consent agree to submit the dispute to another conciliation procedure.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of

Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5 CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or instruments of acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the organization concerned.

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or the organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

ANNEX

Arbitration and conciliation procedures established in application of article 66

I. ESTABLISHMENT OF THE ARBITRAL TRIBUNAL OR CONCILIATION COMMISSION

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a State party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph (a), the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph (b), the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States and international organizations which constitute one of the parties to the dispute shall appoint by common consent:

(a) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one arbitrator or, as the case may be, one conciliator, who shall be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute.

The States and international organizations which constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way.

The four persons chosen by the parties shall be appointed within sixty days following the date on which the other party to the dispute receives notification under article 66, paragraph (a), or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within sixty days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or of any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

II. FUNCTIONING OF THE ARBITRAL TRIBUNAL

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the chairman shall have a casting vote.

6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. FUNCTIONING OF THE CONCILIATION COMMISSION

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in

writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

11. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

13. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

CONSIDERATION BY THE COMMISSION OF THE DRAFT ARTICLES

3. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee was submitting, in document A/CN.4/L.341, the text of the draft articles it had adopted on the law of treaties between States and international organizations or between international organizations, which had been referred to it by the Commission during the current session, namely article 2, subparagraph 1 (*h*), articles 27 to 36, 36 *bis*, 37 to 80 and the annex. Pursuant to a decision of the Commission, the Drafting Committee had also examined article 5, which had been added to the draft only at the previous session, as well as its consequential effects on article 20. The document therefore included the texts of article 5 and of a new paragraph 3 to be added to article 20. Furthermore, in its consideration of certain of the articles referred to it at the current session, in particular article 47, the Committee had seen fit, taking into account the debate in the Commission on those articles, to recommend that changes should be made to two of the articles which had been adopted on second reading at the preceding session of the Commission, relating to the "powers" of the representative of an international organization. Therefore new versions of article 2, subparagraph 1 (*c bis*), and article 7, paragraph 4, were included in the document for the consideration of the Commission.

4. He thanked all the members of the Drafting Committee, and in particular the Special Rapporteur, Mr. Reuter, for their co-operation, which had enabled the Committee to complete its work on the topic in virtually record time. That might make it possible for the Commission to finish the second reading of the draft articles at its present session, as requested by the General Assembly in its resolution 36/114.

5. The Committee had been guided in its work by a number of criteria, which explained many of the drafting changes made. First, as the Commission itself had done throughout its work on the topic, the Committee had kept constantly in mind the intention to preserve as far as possible the spirit of the 1969 Vienna Convention

on the Law of Treaties,² and in particular, in the wording of the articles, to reproduce the Convention's precision and flexibility while at the same time making the adjustments required because of the specific characteristics of treaties to which international organizations were parties. In some cases, however, especially with regard to the Spanish version of the articles, slight changes had been introduced for purely linguistic and grammatical reasons. In other cases minor stylistic alterations had been made or punctuation modified in order to align the texts more closely with the corresponding articles of the Vienna Convention. Secondly, the Committee had followed the method adopted by the Commission at the preceding session, when it had begun the second reading of the articles, of endeavouring to simplify the texts without sacrificing the clarity and precision needed to facilitate the application and interpretation of the rules embodied in the articles. That was in keeping with the proposals of the Special Rapporteur, the comments made by members of the Commission and the concerns expressed by representatives in the Sixth Committee of the General Assembly and by Governments in their written comments.

6. The Drafting Committee had also sought to achieve terminological consistency throughout the draft. For example, it had included or deleted the word "international" before the word "organization" according to the circumstances; as a general rule, "international" had been placed before "organization" the first time that term appeared in a given paragraph, whereas in the remainder of the paragraph the word "organization" appeared alone. The same rule had been followed with regard to subparagraphs unless the term "international organization" appeared in the introductory wording. That general technique did not apply when the word "international" was part of a full description of the treaty in question, as happened in one or two instances. Furthermore, when terms defined in article 2 were used elsewhere in the draft, irrespective of where they were situated in a paragraph or subparagraph, it was not appropriate to use the adjective "international" unless it formed part of the defined term. The terms "negotiating organization", "contracting organization" and "third organization" were used systematically throughout the draft without the adjective "international".

7. In a further attempt to achieve terminological consistency, the Drafting Committee had seen to it that the reference in an article to States or to a treaty between States and international organizations always preceded the reference to international organizations or to a treaty between international organizations. That drew attention to the principal subject-matter of the article, paragraph or phrase.

8. At its preceding session, the Commission had attempted to make the text somewhat neater by deleting the words "between one or more States and one or more

international organizations" in those cases where it was clear from the contents of the paragraph that only that type of treaty was referred to. The same had been done in the case of the articles at present before the Commission. The words in question had been deleted from article 27, paragraph 1, article 45, paragraph 1, and article 46, paragraph 1. Also, following the practice begun by the Commission last year, the Committee had deleted throughout the draft any square brackets which had been inserted in texts adopted on first reading.

9. In accordance with a decision taken at the thirty-second session and endorsed by the Commission,³ the Drafting Committee had deleted the word "concluded" from the phrase "treaty concluded between" throughout the draft. Lastly, the Committee had considered the question of the final numbering of the draft articles and of the designations to be given to certain subparagraphs of article 2. He recalled that, in accordance with its general approach to the topic, the Commission had given each draft article the same number as that of the corresponding article of the Vienna Convention. For articles which had no equivalent in that Convention, the Commission had used the designation *bis* or *ter*. Thus, an article 36 *bis* appeared in the draft adopted on first reading, as well as subparagraphs 1 (*b bis*), (*b ter*) and (*c bis*) of article 2. For ease of reference to the corresponding article of the Vienna Convention, the Drafting Committee had decided to maintain those designations for the final draft rather than to renumber articles and subparagraphs. Similarly, it had not altered the general structure of the draft as far as parts and sections and their respective titles were concerned.

10. Before concluding his general remarks, he wished to draw the attention of the Commission to paragraph 105 of the report on the work of its thirty-third session, in which the Commission stated that it reserved the possibility of making minor adjustments to articles 1 to 26 of the draft, which had been adopted on second reading at that session, if in the interests of clarity and consistency it was so required.⁴ The Drafting Committee had therefore reviewed those twenty-six articles and recommended that minor modifications be made to them so as to achieve consistency in presentation and terminology with the articles now before the Commission. The changes in question were merely consequential to the general considerations he had just put forward with regard to the use of the word "international", the employment of defined terms, the deletion of the word "concluded", the order in which States and international organizations were mentioned and the deletion of the treaty description where it was found unnecessary. If the Commission approved the general considerations and drafting techniques he had described, which were incorporated in the articles now before it, he suggested that, in drafting the Commission's report, the Special Rapporteur and the Commission's Rapporteur should

² Hereinafter called the Vienna Convention.

³ *Yearbook ... 1980*, vol. I, p. 209, 1624th meeting, para. 32.

⁴ *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

modify the articles adopted at the preceding session accordingly, so that in their final form the articles would all be consistent in pattern and identically presented from the point of view of terminology, language and drafting. When the draft report was submitted to the Commission, the final text of each article would be accompanied by a draft commentary explaining in detail the substantive considerations which had led the Commission to adopt the article.

11. The document submitted by the Drafting Committee contained new texts for article 2, subparagraphs 1 (*c bis*) and (*h*), and article 7, paragraph 4. Since those texts resulted from decisions taken with regard to subsequent articles, he proposed to revert to them when introducing the articles in question.

ARTICLE 5⁵ (Treaties constituting international organizations and treaties adopted within an international organization) *and*

ARTICLE 20⁶ (Acceptance of and objection to reservations), paragraph 3

12. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, after carefully considering the text of article 5 included in the draft at the preceding session of the Commission, the Committee had decided to maintain the text unchanged, in spite of the questions raised concerning the appropriateness of keeping the reference to "any treaty which is the constituent instrument of an international organization". The Committee had therefore found it necessary to use for paragraph 3 of article 20 the text of the corresponding paragraph of the same article of the Vienna Convention. That paragraph did not appear in the text of article 20 adopted on second reading, in view of the Commission's earlier decision not to include an article 5 in its draft. Following the inclusion of the new paragraph 3 in article 20, the remaining paragraph of the article had been renumbered accordingly.

Article 5 and Article 20, paragraph 3, were adopted.

ARTICLE 27⁷ (Internal law of States, rules of international organizations and observance of treaties)

13. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in the title of the article, the plural had been used instead of the singular for the terms "State" and "organization". In paragraph 2, the Drafting Committee, in the light of the lengthy debate held in the Commission, had chosen the first solution proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 17), namely to delete from paragraph 2 the exception contemplated in the clause "unless performance of the treaty, according to the in-

⁵ For consideration of the text initially submitted by the Special Rapporteur, see 1727th meeting, paras. 14-20.

⁶ *Idem.*

⁷ For the text submitted by the Special Rapporteur and consideration of the text by the Commission, see 1699th meeting, paras. 27-31, and 1700th meeting.

tion of the parties, is subject to the exercise of the functions and powers of the organization". In paragraph 3, to conform with the corresponding text of the Vienna Convention, the Committee had added a proviso concerning article 46.

14. Mr. YANKOV said that, while he understood the Drafting Committee's desire to avoid repetition of the expression "between one or more States and one or more international organizations", he felt that paragraph 1 of draft article 27, as it stood, was too general. While he did not wish to make a formal proposal to amend the paragraph, he suggested that the point should be explained in the commentary.

Article 27 was adopted.

SECTION 2 (Application of treaties)

The title of section 2 was adopted.

ARTICLE 28⁸ (Non-retroactivity of treaties)

Article 28 was adopted.

ARTICLE 29⁹ (Territorial scope of treaties)

Article 29 was adopted.

ARTICLE 30¹⁰ (Application of successive treaties relating to the same subject-matter)

15. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in the light of the discussion in the Commission, the Drafting Committee had decided to replace the text of paragraph 4 of the article by the text proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 19), with minor drafting changes. In paragraph 5, the Committee had used the formula "another State or an organization or, as the case may be, ... another organization or a State", which had been employed throughout the draft.

Article 30 was adopted.

SECTION 3 (Interpretation of treaties)

The title of section 3 was adopted.

ARTICLE 31¹¹ (General rule of interpretation)

Article 31 was adopted.

ARTICLE 32¹² (Supplementary means of interpretation)

Article 32 was adopted.

ARTICLE 33¹³ (Interpretation of treaties authenticated in two or more languages)

Article 33 was adopted.

⁸ *Idem*, 1701st meeting, paras. 2-10.

⁹ *Idem*, paras. 11-21.

¹⁰ *Idem*, paras. 22-31; 1702nd meeting, paras. 1-29; 1727th meeting, paras. 21-31.

¹¹ *Idem*, 1702nd meeting, paras. 30-33.

¹² *Idem*, paras. 34-35.

¹³ *Idem*, paras. 36-37.

SECTION 4 (Treaties and third States or third organizations)

The title of section 4 was adopted.

ARTICLE 34¹⁴ (General rule regarding third States and third organizations) *and*

ARTICLE 2, subpara. 1(h)¹⁵ (Use of terms: “third State” and “third organization”)

16. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in the light of the discussion in the Commission, the Drafting Committee had replaced the text of article 34 adopted on first reading, which had consisted of two paragraphs, by the single paragraph proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 24).

17. In connection with article 34, the Drafting Committee had adopted the text of article 2, subparagraph 1 (h), which defined the terms “third State” and “third organization”, and it had given that definition the same structure as the other definitions in article 2.

Article 34 and article 2, subparagraph 1 (h), were adopted.

ARTICLE 35¹⁶ (Treaties providing for obligations for third States or third organizations) *and*

ARTICLE 36¹⁷ (Treaties providing for rights for third States or third organizations)

18. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, as suggested in the debate in the Commission, the Drafting Committee had simplified the text of the two articles by combining paragraphs 2 and 3. In addition, the introductory phrase in paragraph 1 of each article, “subject to article 36 *bis*”, which had been placed in square brackets, had been deleted as unnecessary. Finally, in article 35, the expression “in the sphere of its activities”, which did not appear to reflect the general sentiment of the Commission, had been deleted.

Articles 35 and 36 were adopted.

19. Mr. KOROMA asked whether, at the present stage of the deliberations, members of the Commission could speak on the substance of draft articles or whether they should limit themselves to commenting on the changes made by the Drafting Committee.

20. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that members of the Commission were at liberty to speak on the substance of a draft article at any time. Usually, however, once draft articles had been proposed by the Drafting Committee, that was no longer considered necessary.

ARTICLE 36 *bis*¹⁸ (Obligations and rights arising for States members of an international organization from a treaty to which it is a party)

21. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the text proposed for article 36 *bis* had been adopted unanimously by the Drafting Committee after it had been drafted by a working group of the Committee. In the light of the very extensive debate on the article in the Commission, and bearing in mind the observations of Governments and international organizations, the Committee had felt that there was justification for having a separate article dealing with the obligations and rights arising for States members of an international organization from a treaty concluded by that organization.

22. In the text adopted on first reading, article 36 *bis* had been placed in square brackets. Certain aspects of the same question had been dealt with in paragraphs 5 and 6 of article 37, and those paragraphs had also been placed in square brackets. The Drafting Committee had decided to deal with the entire matter in a single provision. Consequently, the present text of article 36 *bis*, from which the brackets had been removed, had meant the deletion of paragraphs 5 and 6 of article 37.

23. The proposed text referred to both obligations and rights, in order to conform with the wording of articles 35 and 36. The introductory wording reflected in a more precise manner part of the provisions originally in subparagraph (b), by the use of the formula “when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights”, which had been borrowed from articles 35 and 36. The words “and have defined their conditions and effects in the treaty or have otherwise agreed thereon” in the introductory part of the article reproduced the substance of the former paragraphs 5 and 6 of article 37, in a manner that was more succinct and extended the applicability of the rule, as appropriate, under the draft. Finally, the expression “third States which are members of an international organization” had been simplified to read “States members of an international organization”.

24. Subparagraph (a) had been redrafted to highlight even further the fundamental element of the consent of the States members of an international organization. Subparagraph (b) spelt out the other aspect of former subparagraph (b) not incorporated in the introductory wording, namely the requirement that the negotiating States and negotiating organizations should be duly informed of the assent of States members of an international organization to be bound by the relevant provisions of a treaty concluded by that organization.

25. Sir Ian SINCLAIR thanked the members of the Drafting Committee and its working group for having produced a text which, he hoped, would secure a consensus in the Commission. The key element of the text

¹⁴ *Idem*, paras. 38-50 and 1703rd meeting, paras. 2-13.

¹⁵ *Idem*.

¹⁶ *Idem*, 1704th meeting, paras. 1-31.

¹⁷ *Idem*, paras. 32-41.

¹⁸ *Idem*, paras. 42-51; 1705th to 1707th meetings; 1718th meeting, paras. 40-46; 1719th meeting, paras. 1-25.

proposed by the Drafting Committee was the expression "and have defined their conditions and effects in the treaty". It would be extremely helpful, not only to the Commission but also to the Sixth Committee of the General Assembly and to lawyers, if an explanation of that wording similar to the explanation just provided by the Chairman of the Drafting Committee could be included in the commentary to the article.

26. Mr. OGISO said that the words "when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights" seemed redundant, since it was difficult to imagine a situation in which an international organization could become a party to a treaty the intention of which was not to establish obligations or accord rights for that organization.

27. Referring to the word "unanimously" in subparagraph (a), he said that cases existed where the constituent instrument of an international organization provided that the organization could become a party to a treaty by a decision of an organ of the organization taken by a majority vote, unanimous agreement being unnecessary. That was so in the case of IAEA, for example. He wondered how subparagraph (a) would become applicable in such cases. It might be preferable to state in the article that unanimity was required only in cases where the constituent instrument of an international organization did not provide for any specific decision-making procedure.

28. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the words "when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights" could not be considered redundant, since the States members of an international organization were not themselves parties to a treaty concluded by the organization. Accordingly, the intention of the parties to the treaty to create obligations for non-parties or directly grant them rights would seem highly relevant.

29. Referring to the word "unanimously", he said that article 36 *bis* was not designed to exclude the possibility of creating obligations for States members of an international organization whose constituent instrument clearly provided for some other kind of procedure. However, Mr. Ogiso might be thinking of the obligation of States members of IAEA to be bound by treaties concluded in the future by the Agency. That kind of obligation applied to the organization itself and not to non-member States. For example, the headquarters agreement of ASEAN was, by unanimous agreement of the member States, binding on all of them. All the same, article 36 *bis* had given rise to many delicate political questions and perhaps was not expected to cover all possible situations.

30. The CHAIRMAN, speaking as Special Rapporteur, said that he wished to expand on the reply given by the Chairman of the Drafting Committee. Mr. Ogiso seemed to him to have interpreted subparagraph (a) correctly: the States concerned were re-

quired to have given their assent unanimously. If they were members of the organization they were bound to have done so. The circumstance envisaged was that in which the assent had been given not in the constituent instrument but in a separate act which might have preceded the conclusion of the treaty; in such a case, unanimity was clearly required. The Commission had thus excluded from article 36 *bis* the case of treaties which had not been concluded unanimously; the highly complex situations to which that gave rise were not of interest, although they were still germane to the draft articles, and in particular to the rules set forth in article 30 (Application of successive treaties relating to the same subject-matter).

31. He wished to point out that the text of article 36 *bis* proposed by the Drafting Committee had nothing in common with the text which the Commission had discussed initially; in fact, it was very closely related to the work of the Third United Nations Conference on the Law of the Sea. In substance, in regard to the circumstance envisaged, it gave States complete freedom to do as they wished, provided they all wished the same thing and wished it clearly; in other words, provided they expressed the consequences of their wishes for the benefit of those whom the consequences would affect and who must therefore give their assent incontrovertibly. It was really a kind of warning.

32. Regarding Sir Ian Sinclair's suggestion that the "conditions and effects" mentioned in the article should be explained, he said that in the French version of the text the term "*régime*" had been envisaged at that point; it was a broader expression and fully appropriate to designate the rules which governed the rights and obligations concerned. He anticipated that it would be an arduous task to draft the commentary to article 36 *bis*.

33. Mr. KOROMA observed that the article as it stood seemed to establish more than one set of rules. The introductory part seemed to apply to new members of an organization and to their agreement to be bound by a treaty concluded by the organization on their behalf. Was it conceivable that an international organization would decide to conclude a treaty without the agreement of the member States? And would the treaty cease to have any object if the parties did not intend its provisions to be the means of establishing obligations and according rights? Personally, he could not imagine that an organization would conclude a treaty without the prior assent of its members.

34. Subparagraph (a) seemed to establish another set of rules for the initial members of an international organization, whereby they must agree unanimously to be bound by a treaty. Although that was understandable, he feared that such a provision would induce parties negotiating a treaty to look beyond the ostensible capacity of an international organization to conclude treaties on behalf of its member States. It would be sufficient for the article to provide that such ostensible capacity should exist.

35. Mr. USHAKOV said that he was perfectly satisfied with the proposed new text; it dispelled ambiguities and did away with the obstacles inherent in the earlier wording. Although some provisions of a treaty concluded by an international organization necessarily bound all the States members of that organization, it was right that all member States should assent expressly to be bound by them and that the States and organizations which had negotiated the treaty should be duly informed of that unanimous assent.

36. Mr. OGISO, referring to subparagraph (a), said that the constituent instrument of an international organization might either remain silent on the procedure whereby the organization could conclude treaties, or make some provision about that procedure. The draft article should indicate that, in the latter case, the States members of the organization would be bound by the relevant provisions of the constituent instrument, whereas, in the former case, their agreement to be bound by the provisions of the treaty must be unanimous.

37. Mr. FRANCIS said that he was entirely satisfied with the text proposed by the Drafting Committee. The crucial provision of the draft article was in subparagraph (a). The constituent instrument of an international organization might omit to provide for the circumstances in which its member States could be bound by the provisions of a treaty concluded by the organization. In that case, a member State would be justified in refusing to be bound by those provisions on the grounds that such was not the original intention of the organization. Nevertheless, there was nothing to prevent members from agreeing unanimously to be bound by a treaty concluded by the organization.

38. Mr. KOROMA said that the word “unanimously” in subparagraph (a) appeared superfluous, because if the States members of an international organization had agreed to be bound by the provisions of a treaty concluded by the organization, there was no need to investigate the way in which that agreement had been reached. Moreover, a requirement of that kind might create a loophole in treaties of that kind.

39. Mr. SUCHARITKUL (Chairman of the Drafting Committee), referring to the observation made by Mr. Koroma, said that the draft article was not designed to negate other provisions regarding the capacity of organizations to conclude treaties or the requirement of authorization to conclude them. The requirement of unanimity was in no way related to the capacity of an international organization to conclude treaties, since international organizations could always conclude treaties which would be binding on the organization itself and possibly even on its members, since the treaty might have been approved either unanimously or otherwise. However, unanimity was required if the constituent instrument of the organization so provided. If the instrument stipulated clearly that the provisions of treaties concluded by the organization would be binding on its member States, the intention to create obligations was

evident. That concerned something rather different from the capacity of organizations to conclude treaties or the validity of treaties concluded without unanimous approval.

40. Mr. FRANCIS, also referring to the comment made by Mr. Koroma, said that the deletion of the word “unanimously” would not solve the problem of organizations in which unanimous agreement to be bound by the provisions of a treaty was unnecessary. However, unanimous agreement would be needed before third party States could be bound by the provisions of a treaty in the context of draft article 35.

Article 36 bis was adopted.

ARTICLE 37¹⁹ (Revocation or modification of obligations or rights of third States or third organizations)

41. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, as he had explained earlier (para. 22 above), paragraphs 5 and 6 of the text had been deleted. Former paragraph 7 had been renumbered accordingly.

Article 37 was adopted.

ARTICLE 38²⁰ (Rules in a treaty becoming binding on third States or third organizations through international custom)

42. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that no comment was needed from him on article 38 as no change had been made.

Article 38 was adopted.

PART IV (Amendment and modification of treaties)

The title of part IV was adopted.

ARTICLE 39²¹ (General rule regarding the amendment of treaties)

43. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that at the end of paragraph 1, in accordance with the suggestion made by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 33), the Committee had added the words “except in so far as the treaty may otherwise provide”, which existed in the corresponding provision of the Vienna Convention. In accordance with its decision to delete the word “concluded”, the Committee had also decided to delete the words “the conclusion of an” in paragraph 1.

Article 39 was adopted.

ARTICLE 40²² (Amendment of multilateral treaties) *and*

ARTICLE 41²³ (Agreement to modify multilateral treaties between certain of the parties only)

¹⁹ *Idem*, 1719th meeting, paras. 26-36.

²⁰ *Idem*, paras. 37-43.

²¹ *Idem*, paras. 44-45.

²² *Idem*, paras. 56-58.

²³ *Idem*, paras. 59-62.

44. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that articles 40 and 41 required no comment from him as no changes had been made.

Articles 40 and 41 were adopted.

PART V (Invalidity, termination and suspension of the operation of treaties)

The title of part V was adopted.

SECTION 1 (General provisions)

The title of section 1 was adopted.

ARTICLE 42²⁴ (Validity and continuance in force of treaties)

45. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in the light of the Commission's discussions and as proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 35), the Drafting Committee had combined former paragraphs 1 and 2. Paragraph 3 as adopted on first reading had thus become paragraph 2.

Article 42 was adopted.

ARTICLE 43²⁵ (Obligations imposed by international law independently of a treaty)

46. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the words "of any international organization or, as the case may be," had been deleted because they had been found unnecessary within the context of the article.

Article 43 was adopted.

ARTICLE 44²⁶ (Separability of treaty provisions)

47. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that no comment from him was needed on article 44 as no change had been made.

Article 44 was adopted.

ARTICLE 45²⁷ (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

48. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, after careful consideration, the Drafting Committee had decided to preserve the difference in wording between subparagraphs 1 (b) and 2 (b) which had existed in the text adopted on first reading. In subparagraph 2 (b), the Committee had seen fit to replace the words "its conduct" by the more precise words "the conduct of the competent organ". It had also decided to delete paragraph 3 as being superfluous.

Article 45 was adopted.

SECTION 2 (Invalidity of treaties)

The title of section 2 was adopted.

ARTICLE 46²⁸ (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)

49. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the title of article 46 had been brought into line with the title of article 46 of the Vienna Convention. In paragraph 2, the words "or any international organization" had been added after the words "if it would be objectively evident to any State" in order to take account of the views expressed in the Commission's discussions. To make the text of paragraph 2 clearer and more precise, the words "conducting itself in the matter in accordance with normal practice and in good faith" had been replaced by the words "referring in good faith to normal practice of States in the matter".

50. In paragraph 3, the Drafting Committee had added the words "and concerned a rule of fundamental importance", which were similar to the words "and concerned a rule of its internal law of fundamental importance" in paragraph 1.

51. In paragraph 4 of the English version, the word "cognizance" had been replaced by the more appropriate word "knowledge". Lastly, at the beginning of paragraphs 2 and 4, the words "referred to in" had been replaced by the word "of".

Article 46 was adopted.

ARTICLE 47²⁹ (Specific restrictions on authority to express the consent of a State or an international organization)

ARTICLE 7 (Full powers and powers), para. 4, and

ARTICLE 2, subpara. 1 (*c bis*) (Use of terms: "powers")

52. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in the light of the Commission's discussions, the Drafting Committee had concluded that the verb "to express", which had been used exclusively for the consent of the representative of a State, could also be used for the consent of the representative of an international organization. It had therefore replaced the verb "to communicate" by the verb "to express" in article 47, article 7, paragraph 4, and article 2, subparagraph 1 (*c bis*). That change, which had made it possible to combine the former paragraphs 1 and 2 of article 47 into the single paragraph now before the Commission, had meant that the title of article 47 could be brought into line with the title of the corresponding provision of the Vienna Convention.

53. The Committee had introduced a further change in article 7, paragraph 4, by replacing the ambiguous word "practice" by the more precise words "the practice of the competent organs of the organization".

²⁴ *Idem*, paras. 63-65, and 1720th meeting, para. 1.

²⁵ *Idem*, 1720th meeting, paras. 2-4.

²⁶ *Idem*, paras. 5-7.

²⁷ *Idem*, paras. 8-35.

²⁸ *Idem*, paras. 36-46, and 1721st meeting, paras. 1-14.

²⁹ *Idem*, 1721st meeting, paras. 15-27.

Article 47, article 7, paragraph 4, and article 2, sub-para. 1 (c bis), were adopted.

ARTICLE 48³⁰ (Error)

54. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 48 required no comment from him, as no change had been made.

Article 48 was adopted.

ARTICLE 49³¹ (Fraud) *and*

ARTICLE 50³² (Corruption of a representative of a State or of an international organization)

55. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee had made articles 49 and 50 clearer and more precise by wording them affirmatively instead of conditionally.

Articles 49 and 50 were adopted.

ARTICLE 51³³ (Coercion of a representative of a State or of an international organization)

56. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that no comment was needed on article 51 since no change had been made.

Article 51 was adopted.

ARTICLE 52³⁴ (Coercion by the threat or use of force)

57. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in order to bring the title of article 52 into line with the text, the Drafting Committee had deleted the words “of a State or of an international organization” from the title.

Article 52 was adopted.

ARTICLE 53³⁵ (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)),

SECTION 3 (Termination and suspension of the operation of treaties),

ARTICLE 54³⁶ (Termination of or withdrawal from a treaty under its provisions or by consent of the parties),

ARTICLE 55³⁷ (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force),

ARTICLE 56³⁸ (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal),

ARTICLE 57³⁹ (Suspension of the operation of a treaty under its provisions or by consent of the parties),

ARTICLE 58⁴⁰ (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only),

ARTICLE 59⁴¹ (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty),

ARTICLE 60⁴² (Termination or suspension of the operation of a treaty as a consequence of its breach) *and*

ARTICLE 61⁴³ (Supervening impossibility of performance)

58. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 53, the title of section 3 and articles 54 to 61 required no comments from him as no changes had been made.

Article 53, the title of section 3 and articles 54 to 61 were adopted.

ARTICLE 62⁴⁴ (Fundamental change of circumstances)

59. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, after careful consideration of the views expressed during the Commission's discussions, the Drafting Committee had decided, apart from two drafting changes, to maintain the text of article 62 adopted on first reading. The words “by a party” after the word “invoked” in paragraphs 2 and 3 had been regarded as unnecessary and had been deleted. In order to bring the text of paragraph 2 into line with the corresponding provision of the Vienna Convention, the paragraph had further been reworded to read:

“A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations, if the treaty establishes a boundary”.

Article 62 was adopted.

ARTICLE 63⁴⁵ (Severance of diplomatic or consular relations) *and*

ARTICLE 64⁴⁶ (Emergence of a new peremptory norm of general international law (*jus cogens*))

60. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that no comments from him were needed on articles 63 and 64, as no changes had been made.

Articles 63 and 64 were adopted.

SECTION 4 (Procedure)

The title of section 4 was adopted.

³⁰ *Idem*, paras. 28-33.

³¹ *Idem*, paras. 34-38.

³² *Idem*, paras. 39-46, and 1722nd meeting, paras. 1-5.

³³ *Idem*, 1722nd meeting, paras. 6-8.

³⁴ *Idem*, paras. 9-26.

³⁵ *Idem*, paras. 27-28.

³⁶ *Idem*, paras. 29-37.

³⁷ *Idem*, paras. 38-39.

³⁸ *Idem*, paras. 40-43.

³⁹ *Idem*, paras. 44-54 and 1723rd meeting, para. 1.

⁴⁰ *Idem*, 1723rd meeting, paras. 2-6.

⁴¹ *Idem*, paras. 7-8.

⁴² *Idem*, paras. 9-10.

⁴³ *Idem*, paras. 11-12.

⁴⁴ *Idem*, paras. 13-35.

⁴⁵ *Idem*, paras. 36-39.

⁴⁶ *Idem*, paras. 40-42.

ARTICLE 65⁴⁷ (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

61. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Committee had decided to retain the text of article 65 adopted on first reading, with one change in paragraph 3, in which the words "If, however, objection has been raised" had been replaced by the words "When an objection is raised".

Article 65 was adopted.

ARTICLE 67⁴⁸ (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

62. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, in accordance with a suggestion made by the Special Rapporteur (1724th meeting, para. 39) during the Commission's discussion of article 67, the Drafting Committee had decided to replace the words "shall produce appropriate powers" at the end of paragraph 2 by the words "may be called upon to produce powers".

Article 67 was adopted.

ARTICLE 68⁴⁹ (Revocation of notifications and instruments provided for in articles 65 and 67),

SECTION 5 (Consequences of the invalidity, termination or suspension of the operation of a treaty),

ARTICLE 69⁵⁰ (Consequences of the invalidity of a treaty),

ARTICLE 70⁵¹ (Consequences of the termination of a treaty),

ARTICLE 71⁵² (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law),

ARTICLE 72⁵³ (Consequences of the suspension of the operation of a treaty),

PART VI (Miscellaneous provisions),

ARTICLE 73⁵⁴ (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization),

ARTICLE 74⁵⁵ (Diplomatic and consular relations and the conclusion of treaties),

ARTICLE 75⁵⁶ (Case of an aggressor State),

⁴⁷ *Idem*, paras. 43-56.

⁴⁸ *Idem*, 1724th meeting, paras. 34-43.

⁴⁹ *Idem*, paras. 44-45.

⁵⁰ *Idem*, paras. 46-47.

⁵¹ *Idem*, paras. 48-49.

⁵² *Idem*, paras. 50-52.

⁵³ *Idem*, paras. 53-54.

⁵⁴ *Idem*, paras. 55-56, and 1725th meeting, para. 1.

⁵⁵ *Idem*, 1725th meeting, paras. 2-4.

⁵⁶ *Idem*, paras. 5-6.

PART VII (Depositaries, notifications, corrections and registration) *and*

ARTICLE 76⁵⁷ (Depositaries of treaties)

63. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 68, the title of section 5, articles 69 to 72, the title of part VI, articles 73 to 75, the title of part VII and article 76 required no comments from him, since no changes had been made in any of them.

Article 68, the title of section 5, articles 69 to 72, the title of part VI, articles 73 to 75, the title of part VII and article 76 were adopted.

ARTICLE 77⁵⁸ (Functions of depositaries)

64. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 77 had been maintained as adopted on first reading, with the exception of changes in subparagraph 1(f) and subparagraphs 2(a) and 2(b). In subparagraph 1(f), the words "instruments of ratification, formal confirmation, acceptance, approval, or accession" had been replaced by the words "instruments of ratification, instruments relating to an act of formal confirmation, or instruments of acceptance, approval or accession". In subparagraph 2(a), the words "or, as the case may be, the signatory organizations and the contracting organizations" had been deleted in order to make the text less cumbersome. In subparagraph 2(b) of the English version, the word "of" following the words "where appropriate" should be deleted.

Article 77 was adopted.

ARTICLE 78⁵⁹ (Notifications and communications)

65. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that no comment from him was needed on article 78, as no change had been made.

Article 78 was adopted.

ARTICLE 79⁶⁰ (Correction of errors in texts or in certified copies of treaties)

66. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee had deleted the words "or, as the case may be, the signatory organizations and contracting organizations" in paragraph 1; the words "or, as the case may be, to the organizations" in subparagraph 2(a); and the words "or, as the case may be, to the signatory organizations and contracting organizations" in subparagraph 2(b).

Article 79 was adopted.

ARTICLE 80⁶¹ (Registration and publication of treaties)

⁵⁷ *Idem*, paras. 7-9.

⁵⁸ *Idem*, paras. 10-25.

⁵⁹ *Idem*, paras. 26-27.

⁶⁰ *Idem*, paras. 28-31.

⁶¹ *Idem*, paras. 32-39, and 1727th meeting, paras. 1-13.

67. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the text of article 80 adopted on first reading had been maintained.

68. Mr. USHAKOV said that, although he had not objected to the text of article 80 in the Drafting Committee, he continued to believe that it would be best to split paragraph 1 of the article into two paragraphs; one would establish an obligation to transmit to the United Nations Secretariat treaties to which States were parties, and the other would establish a faculty to do so for treaties concluded between international organizations. Since the United Nations Charter did not attach any consequences to the registration of treaties in the latter category, it would be preferable to use the term “faculty” in connection with those treaties. His suggestion should at least be mentioned in the commentary to article 80.

Article 80 was adopted.

ARTICLE 66⁶² (Procedures for arbitration and conciliation) *and*

ANNEX⁶³ (Arbitration and conciliation procedures established in application of article 66)

69. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 66 as adopted on first reading had drawn a distinction regarding the procedures to be followed if, under paragraph 3 of article 65, no solution had been reached within a period of twelve months following the date on which the objection had been raised. If the dispute concerned the application or interpretation of articles 53 or 64, article 66 had provided that, if the objection had been raised by a State against another State, the dispute could be submitted to the International Court of Justice, but if an international organization was involved and the dispute concerned any of the articles in part V, the procedure that could be set in motion was the conciliation procedure specified in the annex. Any dispute involving a State concerning any of the articles of part V other than articles 53 or 64 could also be submitted to conciliation. That distinction had been made in the three paragraphs which had constituted the original text of article 66.

70. Taking into account the views expressed during the Commission's discussions of article 66 at its present session, the Drafting Committee had, with the exception of one member, decided that there were not sufficient grounds for maintaining the distinction between the procedures open respectively to States *inter se* and to international organizations, regarding disputes involving the application or interpretation of articles 53 to 64. Since, however, it would not have been correct to provide for international organizations to submit disputes to the International Court of Justice on the same footing as States, it had been necessary for the Drafting Committee, in order to give States and international

organizations equal status with regard to the settlement of disputes, to eliminate the possibility under article 66 of recourse to the International Court of Justice, to offer States and organizations the possibility of recourse to arbitration, and to retain the possibility of recourse to conciliation.

71. It had thus been possible to simplify the text of article 66, which had been reduced to two paragraphs, namely subparagraph (a) dealing with arbitration as the means of settling disputes concerning articles 53 or 64—regardless of whether the parties to them were States or international organizations—and subparagraph (b) dealing with conciliation. It had then been logical to adjust the text of the annex accordingly by adding a reference to arbitration wherever appropriate. The Drafting Committee had also decided to add a new section II, which related to the functioning of the arbitral tribunal and was based on the corresponding provisions of annex VII to the Convention on the Law of the Sea.⁶⁴

72. Mr. USHAKOV said that in the Drafting Committee he had objected to subparagraph (a) of article 66, under which any one of the parties to a dispute, including an international organization, could submit the dispute to arbitration. Even as far as States were concerned it was unrealistic to provide for compulsory arbitration, since not all States were prepared to limit themselves to that particular means of settlement of disputes. Moreover, the practice of international organizations offered no example of recourse to arbitration, either in the case of a dispute between an international organization and a State or in the case of a dispute between organizations; nor did it offer any example of organizations which, in a treaty, appeared to have given their consent in advance to recourse to arbitration. He therefore preferred that the draft articles should provide for a compulsory conciliation procedure only in regard to treaties to which international organizations were parties. It was true that practice did not show any examples of compulsory conciliation for treaties of that kind either, but provision for it would nevertheless represent the progressive development of international law. He therefore favoured the deletion of subparagraph (a) of article 66 and the retention of subparagraph (b).

73. Mr. RIPHAGEN, referring to the first sentence of paragraph 10 of the annex, asked whether the Drafting Committee had taken account of the fact that annex V of the Convention on the Law of the Sea provided in article 13 that:

A disagreement as to whether a conciliation commission acting under this section has competence shall be decided by the commission. He also asked whether the Drafting Committee considered that the idea embodied in that provision was implicit in the idea of compulsory conciliation.

74. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that, although the Drafting Committee

⁶² *Idem*, 1724th meeting, paras. 1-33.

⁶³ *Idem*, and 1725th meeting, paras. 40-50, and 1726th meeting, paras. 1-27.

⁶⁴ See 1699th meeting, footnote 7.

had not specifically considered the point raised by Mr. Riphagen, he himself felt that the idea that the Conciliation Commission should be able to decide on its own competence was implicit in the idea of compulsory conciliation.

75. Mr. USHAKOV said that he found the annex unacceptable. First of all, since he opposed the compulsory arbitration procedure, he could not accept the provisions in the annex which related to it. What was more, even the provisions concerning the conciliation procedure were not entirely appropriate. It would be better for the draft to be based on the example provided by the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Article 85 of that instrument made no mention of a list of conciliators and the conciliation commission for which it provided consisted of only three members. Moreover, under paragraph 2 of the annex under consideration, the important question of the choice of the members of the Conciliation Commission was not dealt with in a fully satisfactory manner. That paragraph read: "The States and international organizations which constitute one of the parties to the dispute shall appoint by common consent ... one conciliator, who may or may not be chosen from the list referred to in paragraph 1"; that said nothing about the nationality of the members of the Conciliation Commission, whereas paragraph 2 of the annex to the 1969 Vienna Convention on the Law of Treaties provided that the State or States constituting one of the parties to the dispute should appoint one conciliator of the nationality of that State or of one of those States. Even as far as international organizations were concerned, the nationality of the conciliator appointed by an international organization was of great importance; the conciliator, if he was a national of a State member of the organization, would be inclined to favour that organization.

76. In addition, under paragraph 2 of the annex under discussion, the States and international organizations which constituted one of the parties to the dispute must appoint by common consent "one conciliator, who shall be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute". That provision did bring in the nationality of the conciliator, although it seemed peculiar to speak of a conciliator who "shall not be of the nationality of any of the States", an expression which seemed to refer to a stateless person. Also, the words "which constitute that party to the dispute" seemed to relate to the organizations alone, whereas they also referred to the States mentioned earlier in the phrase.

77. With regard to the procedure provided for in the case in which the chairman of the Conciliation Commission or any of the conciliators had not been appointed within the period prescribed, it was not absolutely necessary to call on the Secretary-General of the United Nations or the President of the International Court of

Justice to make the appointment. The 1975 Vienna Convention laid down a different procedure.

78. In conclusion, he pointed out that paragraph 1 of the annex under consideration was a totally unexpected innovation in that it provided for the establishment of a list of qualified jurists who could be both arbitrators and conciliators. Previously, no international convention which had provided for the establishment of such a list had stipulated that the jurists on the list could act in two capacities. That innovation was due to the fact that the Drafting Committee, in going about amending the wording of the annex, had touched on questions of substance.

The meeting rose at 1.05 p.m.

1741st MEETING

Wednesday, 7 July 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (concluded) (A/CN.4/L.341)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

ARTICLE 66 (Procedures for arbitration and conciliation) *and*

ANNEX (Arbitration and conciliation procedures established in application of article 66) (concluded)

1. Mr. LACLETA MUÑOZ said that the changes made by the Drafting Committee in the texts of article 66 and the annex had been based on amendments which he had proposed. Those amendments had been intended not only to preserve the parallelism between the provisions under consideration and the corresponding provisions of the Vienna Convention on the Law of Treaties, particularly with regard to the settlement of disputes which concerned rules of *jus cogens*, but also to provide, in so far as possible, for the submission of disputes to the International Court of Justice. However, when article 66 and the annex had been discussed in the Commission and in the Drafting Committee, it had been agreed that, in view of the requirements for submission of disputes to the International Court of Justice, recourse to an arbitral tribunal should be substituted for recourse to the Court. He had no difficulty in supporting the texts of article 66 and the annex proposed by the Drafting Committee.

2. He found the text of the annex satisfactory because it offered the advantages of being simple and of incorporating the provisions of the annex to the Vienna Convention. Any criticism of the annex would imply criticism of the annex to the Vienna Convention as well. Although the reluctance of some States to agree to procedures for the peaceful settlement of disputes was a political issue and outside the Commission's terms of reference, he did think that the Commission was competent to suggest such procedures. It had been said that, in so doing, the Commission would be doing more than merely codifying existing rules of international law, but in his opinion the Commission should not confine itself to codification; it should also engage in the progressive development of international law and, in the present case, in the progressive development of the rules relating to procedures for the settlement of disputes.

3. Subparagraph 2 (b) of the annex had been said to suggest that the conciliator or arbitrator in question would have to be stateless (1740th meeting, para. 76), but in his view the paragraph 2 made it quite clear that the only persons from the list not eligible for nomination were those who were of the same nationality as any of the States, or nominated by any of the organizations, that constituted a party to the dispute.

4. A further criticism of the annex had been that it provided for only one list of persons to constitute both arbitral tribunals and conciliation commissions, although the qualifications required of conciliators and arbitrators were not the same (*ibid.*, para. 78). However, paragraph 1 of the annex to the Vienna Convention, which related to conciliation alone, referred to a "list of conciliators consisting of qualified jurists". The same requirement could certainly be said to apply to arbitrators. Accordingly he did not foresee any problem with the fact that the proposed annex provided for only one list of persons for both functions, who would all be required to be qualified jurists.

5. Sir Ian SINCLAIR said he had always believed that there should be as much parallelism as possible between the proposed article 66 and annex and the corresponding provisions of the Vienna Convention. Unfortunately, however, exact parallelism was not possible because the draft articles dealt with treaties to which international organizations were parties, and an international organization could not submit a dispute to the International Court of Justice.

6. At the United Nations Conference on the Law of Treaties, particular emphasis had been placed on the importance of ensuring a binding judicial determination of any dispute concerning the application or interpretation of rules of *jus cogens*. That applied to the draft articles under consideration too. For technical reasons, disputes which concerned rules of *jus cogens* and to which international organizations were parties could not be referred to the International Court of Justice, but the Commission should none the less ensure that such disputes were subject to some kind of binding determination. The obvious alternative was recourse to arbitration, for

which article 66 and the annex provided. He therefore fully supported the texts proposed by the Drafting Committee. The reluctance of some members of the Commission to accept those texts was, in his view, based essentially on political considerations and did not take account of the technical merits of the solution proposed.

7. With regard to the doubts raised about the technical suitability of specific provisions of the annex, he agreed with the comments just made by Mr. Lacleta Muñoz. The fact that the annex provided for a single list of conciliators and arbitrators was not likely to cause insurmountable problems. Although conciliation and arbitration admittedly involved different techniques, the basic requirement for nomination to the list was the same. Moreover, the purpose of subparagraphs 2 (a) and (b) was to ensure parallelism with the annex to the Vienna Convention by providing that States or international organizations which constituted one of the parties to a dispute were entitled to appoint their own conciliator or arbitrator, in accordance with the principle that they should be able to nominate a person of their own choice, as well as another person who was regarded as "neutral". Thus, although the annex did have some rough edges, it would be technically operable. He felt that some of the criticisms of the annex tended to exaggerate the difficulties involved.

8. The CHAIRMAN said that, if there were no objections, he would take it that, subject to the observations expressed during the discussion, the Commission agreed to adopt article 66 and the annex.

Article 66 and the annex were adopted.

9. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee had drawn inspiration from the title of the Vienna Convention in deciding on the title of the draft articles. It proposed that the title should read: "Draft articles on the law of treaties between States and international organizations or between international organizations".

The title of the draft and the titles and text of all the draft articles were adopted.

10. Mr. USHAKOV congratulated Mr. Reuter warmly on the enormous task he had accomplished as Special Rapporteur. It was thanks to his skill, patience and devotion that the Commission had been able to codify virtually the whole of the law of treaties. His name would remain linked to articles which would be decisive for the stability of treaty relations, from the standpoint of both States and international organizations.

11. Sir Ian SINCLAIR said that, during the years in which the Commission had been engaged in the study of the topic of treaties concluded between States and international organizations or between international organizations, the Special Rapporteur had displayed qualities of patience and erudition which had earned him the admiration of lawyers throughout the world. The international community as a whole would be

grateful to the Special Rapporteur for the work he had done.

12. Mr. QUENTIN-BAXTER paid tribute to the Special Rapporteur for successfully completing the task entrusted to him. The Special Rapporteur had brought to the Commission unrivalled knowledge and understanding of international organizations and of the valuable role they played in the work of the international community.

13. Mr. THIAM said that, in addition to his vast erudition, Mr. Reuter was noted for two qualities essential in a Special Rapporteur—wisdom and patience. During the ten or so years that he had devoted to the study of a difficult topic, he had also been extremely fair and had always sought to reflect the general point of view of the Commission. Moreover, his detailed knowledge of international organizations had enabled him to take account of practical realities.

14. Mr. FRANCIS said that he had been greatly impressed by the Special Rapporteur's authority and the depth of his understanding of the topic entrusted to him. The Special Rapporteur's outstanding contribution to international law and the degree of excellence which he had brought to the Commission's work would be of lasting inspiration to less experienced jurists, particularly those in the developing world.

15. Mr. YANKOV said that he also wished to pay a tribute to the Special Rapporteur, whose wisdom, patience and high standards of intellectual endeavour had enabled the Commission to complete its work on the topic under consideration. That represented a valuable contribution to the codification and progressive development of international law.

16. Mr. McCAFFREY congratulated the Special Rapporteur on the magnificent accomplishment represented by the completion of the study of the topic of treaties to which international organizations were parties. As a new member of the Commission, it had been an honour and privilege for him to take part in the Commission's work on the topic and to witness the Special Rapporteur's patience and ability to understand and reconcile the positions of members from developing and developed countries alike.

17. Mr. NI said that he wished to join other members in paying tribute to the Special Rapporteur for the successful completion of the work on the present topic. It was an achievement of monumental importance in view of the growing number of international organizations and the significance of their work.

18. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur was to be commended for the patience and skill he had displayed in guiding the Commission through its work on the question of treaties to which international organizations were parties and for the qualities of intellectual honesty and objectivity on which he had drawn during the many years he had devoted to the codification and progressive development of the law on that subject.

19. He proposed that the Commission, in accordance with its usual practice, should adopt a resolution that would express appreciation to the Special Rapporteur and be included in the Commission's report on the work of its current session.

20. Mr. BARBOZA said that the Special Rapporteur was to be congratulated on the completion of the study of his topic. The Commission's work on the subject had been greatly influenced by the Special Rapporteur's deep knowledge and understanding of international organizations and his political awareness and ability to reconcile differing points of view.

21. Mr. MALEK joined in the tributes paid to Mr. Reuter. The admiration he had long felt for him as a great master of international law had been strengthened since he had seen him at work in the Commission.

22. Mr. LACLETA MUÑOZ said that, as a new member of the Commission, it had been a great honour for him to work under the guidance of the Special Rapporteur, who was to be congratulated for the admirable skill he had displayed in dealing with the vast amount of material requiring study and in reconciling different points of view.

23. Mr. STAVROPOULOS said that he had constantly been impressed by the depth and breadth of the Special Rapporteur's knowledge of international organizations. He had therefore never had any doubt that the Special Rapporteur's work on the topic under consideration would be an outstanding achievement.

24. Mr. CALERO RODRIGUES joined in the tribute paid to the Special Rapporteur. He said that the Special Rapporteur's many qualities were a confirmation of the high regard in which he was held.

25. The CHAIRMAN, speaking as Special Rapporteur, said that he was extremely moved by the kind words which the members of the Commission had addressed to him and he thanked them sincerely. Compared with the topics which other Special Rapporteurs had been bold enough to undertake, his own had been fairly easy.

26. It was not only the Special Rapporteur who deserved merit for having brought the work on the law of treaties to a successful conclusion. He wished to emphasize the contribution made by all those who had taken part in preparing the text which had become the 1969 Vienna Convention on the Law of Treaties, a remarkable achievement of which the draft articles were but a pale reflection. He also wished to stress the part which the present members of the Commission had played, in particular Mr. Ushakov, who was noted for his devotion to work and for the courage with which he defended the ideas that prevailed in the great country from which he came. All in all, the fact that the Commission had adopted the draft articles unanimously, with due regard to the excepted question of settlement of disputes, which was not within its competence, was due in part to Mr. Ushakov's spirit of collaboration.

International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/346 and Add.1 and 2, A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

SCHEMATIC OUTLINE² (continued)

27. Mr. EVENSEN said that the task of the Special Rapporteur was enormous and challenging, involving as it did the progressive development of international law more than anything else. The issues raised by the topic had become especially vital as a consequence of the technological revolution that had taken place since the Second World War; it had transformed human society and had created hazards many of which were so far-reaching as to be beyond man's comprehension. In many respects that revolution had operated in a legal vacuum, yet at the same time it had made States and peoples interdependent.

28. The Commission's work on the topic should perhaps be based on four main elements: first, recognition of the fact that the technological revolution had created new situations in a number of relationships, which in turn called for a legal framework entailing the progressive development of international law; second, recognition of the fact that those new situations had engendered an interdependence which transcended frontiers and differing legal, economic and political systems and which must be reflected in the articles to be drafted by the Commission; third, as rightly emphasized by the Special Rapporteur, the need for the articles to be designed to prevent, minimize or repair, either physically or economically, the injurious consequences of certain lawful activities; and fourth, the requirement that the articles should not unduly or unreasonably prohibit or hamper States' creative activities—including economic ones—or unduly infringe their sovereign rights in respect of activities within their territories.

29. In his third report (A/CN.4/360, para. 11) the Special Rapporteur had emphasized the importance of employing a balance-of-interest test broadly corresponding to Principle 21 of the Stockholm Declaration¹ in assessing obligations of reparation for the injurious consequences of lawful activities. That seemed generally acceptable to the Commission as a starting-point for its treatment of the subject, but he fully agreed with the Special Rapporteur (*ibid.*, para. 22) that at the same time the articles must take account of the idea expressed in Principle 23 of the Stockholm Declaration, namely that environmental standards valid for the most advanced countries might be completely inappropriate for developing countries. He also fully endorsed the Special Rapporteur's view (*ibid.*, para. 9) that the elaboration

of primary rules of obligation to make reparation was an important part of the Commission's task.

30. He agreed too with the Special Rapporteur (*ibid.*, para. 23) that the criterion of foreseeability was of major importance and—in view of the magnitude of the technological revolution, which in many fields might produce material consequences beyond human understanding—that foreseeability must be supplemented by other principles if unforeseen accidents were to be covered as well as foreseeable ones. The Special Rapporteur (*ibid.*, para. 35) had been right to discard the concept of potentiality (of loss or injury), although the considerations underlying it should be borne in mind. The potential of high-technology activities to cause damage and injury in both space and time was almost unlimited. Some nuclear isotopes, for example, retained their devastating radioactivity for millions of years. The manner in which nuclear waste and nuclear weapons were handled and disposed of within the territory of one State was therefore of relevance for other States. The articles must provide for the consequences of high-technology activities, which included the launching of space objects, which might have damaging effects on the ozone layers surrounding and protecting the earth; the wilful modification of the climate; the harnessing of ocean currents; and the manipulation of major international river systems. The Anglo-American concept of "nuisance" might also be considered, in the context of good neighbourliness, friendly relations and peaceful coexistence.

31. The schematic outline presented by the Special Rapporteur in his third report constituted a major contribution to the Commission's work on the topic. The expression "loss or injury" obviously called for further elaboration. Factors to be taken into account included the nature and magnitude of the damage; questions such as whether the acting State could have taken preventive measures and whether it had consulted the affected State beforehand and given it information as to the nature and scale of the consequences of its activity; and the categories of States involved.

32. Section 1, paragraph 2, of the outline raised the question whether omissions on the part of the acting State and its nationals should be considered as activities. In his view they should, and not only in the case of failure to remove a natural danger mentioned in the paragraph. The definition of the expression "territory or control" brought up a number of very delicate legal issues, particularly in relation to ships and aircraft, including that of the extent to which a State could be held responsible for loss and injury caused by vessels or aircraft flying its flag. In view of the technological revolution he had referred to, liability might assume enormous proportions in the case of supertankers carrying highly explosive cargoes such as oil or liquefied gas and that of nuclear-powered or nuclear-armed vessels. Perhaps nuclear-powered ships and supertankers should be placed in separate legal categories and State-owned vessels, particularly those used for State purposes, be treated differently from privately-owned ships used for

* Resumed from the 1739th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1735th meeting, para. 1.

³ See 1735th meeting, footnote 3.

commercial purposes. Accidents involving nuclear-armed vessels and causing devastation outside the limits of the owner State created particularly difficult legal and political problems.

33. Bearing in mind section 2, paragraph 2, of the outline, he could not see the merit of the Special Rapporteur's suggestion that loss or injury caused by vessels in course of innocent passage through the territorial sea of another State should not entail liability. On the contrary, the right of innocent passage called for the exercise of special care on the part of the passing vessel in preventing accidents which might damage the interests of the coastal State. Nuclear-powered ships were a source of special concern in that connection.

34. In section 2, the Special Rapporteur had suggested principles which seemed fair and effective. The fact-finding procedure described in paragraphs 4, 5 and 6 should be mandatory. He fully agreed with the Special Rapporteur that any report from a fact-finding body should be advisory and not binding on the States concerned.

35. With regard to section 3 of the outline, he was not entirely convinced that the starting-point suggested by the Special Rapporteur was satisfactory. Regardless of whether a fact-finding body had been established or whether its recommendations were satisfactory, the parties should have an obligation to negotiate unless they found negotiations unnecessary. From that point of view section 3, paragraph 1, which did not make negotiations obligatory in all cases, seemed at variance with section 4, paragraph 1, the last sentence of which appeared to prescribe a wider scope for mandatory negotiations. The expression "shared expectations", defined in section 4, paragraph 4, seemed rather unsatisfactory. Who was to decide, for example, whether shared expectations existed? In any case, shared expectations were only one of many elements to be taken into account in negotiations between the parties.

36. Section 5, paragraph 4, did not seem to have any practical reason for being included in the outline and was perhaps superfluous. Section 7, part II, might contain a reference to material reparation and the prevention of future injuries as well as to pecuniary reparation. Some type of compulsory conciliation might perhaps have a role to play in the disputes settlement procedure covered by section 8.

37. In conclusion, he looked forward to the work which would emerge from the material on the topic which was being put together by the Codification Division, as indicated by the Special Rapporteur in paragraph 49 of his third report.

38. Mr. FRANCIS thanked the Special Rapporteur for his excellent and detailed report, which had clarified a number of very difficult issues and had given the Commission a clear indication of the direction it should take in its work on the topic.

39. When in 1973 the General Assembly had recommended to the Commission that it undertake the study

of the topic, many members of the Sixth Committee might not have realized that it would involve almost exclusively the progressive development of international law. That was an emotive and sometimes contentious area, but past experience had shown that, however divergent the views of its members might be, the Commission always managed to reach an accommodation and discharge its mandate. He was convinced it would be creative and equal to the task in the present case.

40. The two basic principles running through the Special Rapporteur's third report were, first, that States should enjoy freedom of activity within their territory or other areas under their control, subject to municipal law, and second, that loss or injury of a transboundary character should be remedied. In that regard, the Special Rapporteur had been right to clarify the distinction between his own topic and that of State responsibility, which was concerned predominantly with wrongfulness. In the present topic lawfulness was not an issue. The Special Rapporteur had said that the articles would contain a single primary rule, namely the obligation to make reparation for loss or injury; moreover, that only a breach of that obligation would engage the responsibility of a State, and not merely non-compliance with the rules or procedures established by the draft articles. That was only logical, since the rules and procedures to be established would not be exhaustive. Their predominant aim was to bring the States concerned together in order to establish an appropriate regime for the prevention or minimization of loss or injury and the determination of reparations.

41. He was in general agreement with the approach adopted by the Special Rapporteur in his third report and with the overall direction of his schematic outline. In paragraph 10 of his report, the Special Rapporteur stated that the topic was concerned mainly with minimizing the risk of loss or injury and making appropriate advance provision for such risks as could not reasonably be avoided. In the succeeding paragraph he referred to a balance between the freedom to act and the duty not to injure. Those two factors inevitably suggested the notion of a duty of care. While he agreed with the Special Rapporteur's observation, in paragraph 19 of the report, that the term "duty of care" had too many overtones to justify its retention in the vocabulary of the topic, he nevertheless saw the idea of a duty of care as relevant to the articles in two ways: either it was an obligation not to cause injury, the breach of which engaged the responsibility of the State, in which case it would have no place in the present draft, or else it was an obligation to encourage the establishment of an efficient regime for protection against loss or injury and for the minimizing of risks, in which case it would be an essential component of such a regime.

42. In section 2, paragraph 8, of the outline, the Special Rapporteur said that failure to take any step required by the rules of that section would not in itself give rise to any right of action, although the acting State had a continuing duty to keep under review the activity that gave or might give rise to loss or injury, and to take

the necessary remedial measures to safeguard the interests of the affected State. That implied a duty of care and should be included in the articles.

43. Balancing the interests of the acting and affected States was an essential element of the draft articles. The absence of such a balance would affect the negotiation of an appropriate regime or of reparations. It would be relatively simple to strike one where the States concerned had a similar level of development or identical interests, but more difficult where the acting State was determined to pursue certain activities and the affected State was particularly concerned that its nationals or territory should not be harmed by them.

44. In regard to reparation, section 4, paragraph 2, of the outline referred to the concept of shared expectations. On that point he was in general agreement with Mr. Evensen at the present meeting and with Mr. Calero Rodrigues (1739th meeting). Since it would not be possible to identify shared expectations in every situation, it might be best if the section omitted any reference to them at all. Perhaps it would be sufficient if the paragraph simply established the need for the acting State to make reparations, unless the affected State agreed otherwise. Paragraph 3 of section 4 referred to the principles set out in section 5 of the outline, namely that States should be free to pursue activities with due regard to the interests of other States, that standards of protection should be commensurate with the nature of the activity in question and that loss or injury should be remedied; in respect of the second principle, he felt that the economic viability of an activity should not be taken into account in determining standards of protection. Section 4, paragraph 1, required States concerned to negotiate in good faith. The obligation to negotiate in good faith was a factor of the utmost importance for the draft articles, as was the section on settlement of disputes.

45. With regard to fact-finding, the report made no reference to the possibility of the acting State inspecting the damage caused by its activity. That was an important consideration in situations where the affected State did not possess the expertise to determine the scale or consequences of a loss and where the acting State could help it to do so. In paragraph 40 of the report it was proposed that the construction of regimes of strict liability should be left to the States concerned. If that was to be the case, he wondered whether the saving clause contained in section I was sufficiently broad to enable States to enter into a special regime to limit liability among themselves.

46. He was gratified to note the comments in paragraph 45 of the report about the "export" of the hazards of high-technology industries to developing countries. He considered that the articles should be drafted in such a way as to protect the interests of developing countries.

The meeting rose at 1 p.m.

1742nd MEETING

Thursday, 8 July 1982, at 11.05 a.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

SCHEMATIC OUTLINE² (continued)

1. Mr. KOROMA said that the decision taken by the General Assembly at its thirty-fifth session that the Commission should continue its study of the topic was an indication of the importance and relevance of the subject. It was essential that the Commission should concern itself with issues of immediate relevance to the international community.

2. The subject, although controversial, was one in which the need for codification and progressive development of international law was overwhelming. At present the causing of injury by one State to another was not in itself sufficient to engage the acting State's responsibility. Responsibility could be engaged only by the violation of an existing rule of international law, guilt and fault being separate considerations. However, circumstances had changed since the formulation of those rules. Modern scientific and technological developments had given rise to situations which threatened the welfare of States and could have catastrophic results. In some fields, no protection was afforded by customary international law; affected States could neither prevent such activities nor claim compensation for loss or injury arising from them. An appropriate regime must be elaborated in order to make acting States liable for the consequences of their activities.

3. The Special Rapporteur had indicated in his third report (A/CN.4/360, paras. 24 *et seq.*) that the basic aim of such a regime should be to promote harmony between the activities of States through agreements which took account of the circumstances of each State and struck a balance between States' freedom to act and their right to be protected against the consequences of the activities of other States. The maxim *sic utere tuo ut alienum non laedas* was clearly reflected in the title of the topic. States were not prohibited from engaging in activities such as the operation of ships or aircraft, the improvement of soil quality to increase food production or the carrying out of nuclear explosions. However, when any such activity had injurious consequences,

¹ Reproduced in *Yearbook ... 1981* (Part One).

² For the text, see 1735th meeting, para. 1.

liability arose and reparation must be made. The first task of the Special Rapporteur should be to establish the basis of liability for injuries caused by acts which had injurious consequences. The test for liability would be not whether the act was wrongful, but whether it caused injury. The type of injury which attracted liability would have to be determined.

4. The Special Rapporteur had referred in his report to the concept of prevention, but a regime of prevention alone would be insufficient when injury had been caused and liability had to be established. At the same time he did not disagree with the Special Rapporteur's view (*ibid.*, para. 9) that pride of place should be accorded to the duty not to cause injury rather than to the duty to repair damage. That approach would be valuable not only in establishing the relationship between the acting State and the affected State but also in setting the standard of behaviour required of every State. That was possibly what the Special Rapporteur had had in mind in stating, in paragraph 18 of his report, that failing all else, if loss or injury did occur, the acting State could negotiate a settlement with the other State or States concerned. Nevertheless, the Commission should clearly identify the elements of liability. If the acting State failed to adopt the disputes settlement procedure suggested by the Special Rapporteur, its responsibility would be engaged.

5. The scope of the regime should not be confined to the territory under the control of a State, but should extend to the high seas, in order to cover situations in which the depletion or extinction of economic resources had injurious consequences.

6. Mr. YANKOV congratulated the Special Rapporteur on his third report and expressed appreciation of his efforts to take account of the observations made on the topic at the preceding session of the Commission and in the Sixth Committee of the General Assembly. A number of revealing observations had been made in the Sixth Committee regarding the difficulties that were inherent in the topic and of which the Special Rapporteur was undoubtedly well aware. One very positive element of his report had been its emphasis on the fact that the problems involved did not lend themselves to solution by traditional legal means. The main task of the Special Rapporteur was to identify the legal features of liability and to ascertain the grounds for it. The schematic outline given in the report provided an indication of the scope and content of the topic and would be a practical guide for future work on the subject. The outline might also serve to test the viability of the rules which the Commission was to elaborate.

7. The three basic aims set out in the third report were very pertinent to the Commission's examination of the issues, but some points needed further elaboration, in particular the primary nature of the rules of obligation which the topic concerned. In paragraph 9 of the report, the Special Rapporteur stated that pride of place should be given to the duty to avoid causing injury, rather than to the duty to provide reparation for injury caused.

However, he himself was not convinced that such an approach would be effective, since the duty to avoid causing injury, if formulated in a general way and not supported by specific agreements, would resemble a norm of moral behaviour rather than a rule of law. As Mr. Ushakov had stated earlier,³ agreements between the States concerned were important as a legal foundation for the operation of the whole range of rules relating to liability for the consequences of activities which were not prohibited, particularly in regard to reparations. The Special Rapporteur was well aware of the importance of the role of such agreements, as his observations with regard to fact-finding machinery, negotiations and the assessment of costs and benefits indicated. With regard to the question of distribution of costs and benefits, the mere statement of a general principle of international law would not be sufficient. The relevant elements should be defined in such a way as to provide a reliable basis for the activities of States, whether preventive or reparative.

8. In paragraph 24 of his report, the Special Rapporteur stated that the underlying purpose of the topic was to enable States to harmonize their aims and activities so that a benefit which one State chose to pursue did not entail loss or injury to another State. While he agreed with that proposition, he wondered whether it should be elaborated as a rule to operate independently of the sphere of special regimes. Recent legislation contained examples of specific provisions designed to mitigate the adverse economic effects of the legitimate activities of States. Article 151 of the recent Convention on the Law of the Sea,⁴ for example, was designed, through the setting of production ceilings, to prevent the adverse effects of deep-sea mining of minerals which were also produced onshore. But it was doubtful, even if the rules envisaged by the Special Rapporteur acquired the form of a general code of conduct, whether and to what extent States would act on them. The question of special regimes was therefore very important. He agreed with Mr. Ushakov that the Commission should proceed with great caution and not attempt to generalize the harmonization rule too much, otherwise it would defeat its aims.

9. The system for assessing loss or injury referred to in paragraph 26 of the report was unlikely to be very viable in the absence of prior agreement or recourse to a dispute settlement procedure. The establishment of general rules to be followed by specific agreements might provide the basis for an effective regime. For example, article 192 of the new Convention on the Law of the Sea stated the obligation of States to protect and preserve the marine environment and had been conceived as a general rule to be implemented by specific arrangements. The same was true of article 196 of that Convention, concerning the use of technologies in the marine environment and the introduction of new and alien species.

³ *Yearbook ... 1981*, vol. I, p. 225, 1686th meeting, para. 33.

⁴ See 1699th meeting, footnote 7.

10. The scope of the topic, as defined in section 1 of the schematic outline, was expressed in very general terms; for instance, it was difficult to assess the possible implications of defining, in subparagraph 2 (b), the term "activity" as "any human activity". In section 2, paragraph 6 (b) of the outline, the Special Rapporteur indicated that reports produced by fact-finding machinery should be advisory. He himself believed that that matter too should rest on a contractual basis. Although paragraphs 1 and 2 of section 2 appeared to strike a balance between the duties of the acting State and the interests of the affected State, greater safeguards of the interests of the affected State seemed called for, bearing in mind the implications of paragraph 3, according to which the acting State would be entitled to withhold relevant information for a number of reasons. As far as remedial measures or negotiations to determine an effective regime were concerned, specific agreements were once more crucial, since without them any general provisions formulated by the Commission would be ineffective.

11. The notion of shared expectations described in paragraphs 3 and 4 of section 4 was not sufficient to alleviate legitimate concerns or to ensure the effectiveness of the future articles. A clear definition of the concept of shared expectations should be worked out. Specific agreements were also a basic prerequisite for the effectiveness of any disputes settlement procedure. In general, the Commission should adopt a cautious approach to the topic and not press the Special Rapporteur to provide easy and rapid solutions to the problems which the subject posed.

12. The CHAIRMAN, speaking as a member of the Commission, thanked the Special Rapporteur for his report. Chapter II, containing the schematic outline, was a model of its kind and noteworthy for the determination, clarity and intelligence which it displayed. The questions it raised must be answered, but that could not be done immediately.

13. In his view, the Commission had reached a crossroads. Unlike Mr. Ushakov (1739th meeting), he felt that the Commission could at least elaborate a framework arrangement without drafting those primary rules that would involve it in dealing with questions such as the environment and marine pollution, at the expense of liability. Its first task should be to define the scope of the articles, in other words to identify a number of kinds of situation, such as high-risk activities, activities at the limits of territorial sovereignty, without necessarily specifying examples of each kind. After that, as the Special Rapporteur had suggested, it should draw up procedural rules on consultations and fact-finding.

14. Sir Ian SINCLAIR said that he too realized that the topic under consideration was a difficult and controversial one. In particular, it was difficult to draw a dividing line between the present topic and the separate but closely related topic of State responsibility, which was based on the notion of an internationally wrongful act attributable to the author State. According to ar-

ticle 3 of part 1 of the draft articles on State responsibility,⁵ an internationally wrongful act of a State existed when conduct consisting of an action or omission attributable to that State constituted a breach of an international obligation of that State. Because all of part 1 of the draft articles on State responsibility was conceived in terms of "secondary" rules, there was no clear indication of the meaning, in the context of those articles, of the expression "breach of an international obligation". As a result, the Commission was faced with considerable problems in defining the scope of the present topic, whose very title concealed ambiguities.

15. As Mr. Sucharitkul had pointed out (1735th meeting), the first two words of the title immediately raised the question, whose liability? Was it correct to assume that the liability concerned was that of the State which had permitted the conduct in its territory of an activity which had given rise to injurious consequences in the territory of another State? Was it possible to ignore the question of attributability? He raised those questions because at the present stage he was not sure of the answers to them.

16. The regimes of strict liability established by international conventions, many of which were listed in the Special Rapporteur's third report (A/CN.4/360, para. 20, footnote), related to activities in which the State itself was engaged or over which it had at any rate a predominant degree of active control. Accordingly, he did not think that it was necessarily correct to draw from those regimes the conclusion that attributability presented little or no problem in regard to the topic under consideration. He did not think that the principles deriving from the "*Alabama*" arbitration⁶ or the *Corfu Channel* case⁷ provided a complete answer to the question either. It was one thing to maintain that the author State had been or ought to have been aware that fitting out a vessel to engage in belligerent operations or laying mines in an international strait were likely to have injurious consequences for another State, but it was quite another to assume that the principles involved in those situations necessarily held good where injurious consequences were caused to persons or things in another State as a result of the lawful or apparently lawful activities of a private company located in the State from which the damage was alleged to have occurred. He would therefore welcome any further thoughts which the Special Rapporteur might wish to express on the question of attributability. For example, did the Special Rapporteur agree that what States might accept in the way of strict liability regimes for activities in which they were directly engaged or over which they had predominant control might not be what they would accept for activities over which their powers of regulation were more limited?

⁵ *Yearbook ... 1980*, vol. II (Part Two), p. 30.

⁶ J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. I, p. 653.

⁷ *I.C.J. Reports 1949*, p. 4.

17. Another element in the title of the topic, "injurious consequences", seemed quite straightforward, but it had to be determined whether the State to which such consequences were attributable was liable for all of them or only for the ones that could reasonably have been foreseen. That question often arose in domestic law; he thought he was right in saying that, under English law, the author of a wrongful act would be held responsible for all the direct consequences of that act, even if those consequences could not reasonably have been foreseen. The same might not be true of an act which was attributable to a State and which had injurious consequences in another State.

18. To give an example, as a result of internal administrative procedures in State A, a factory in that State which emitted poisonous fumes had installed devices that had reduced the level of toxicity of the fumes so that asparagus being grown in State A within 30 miles of the factory was not harmed. As a result of a change in the direction of the prevailing winds, however, the toxic fumes from the factory were carried over into State B, where the soil differed from that in State A and the main agricultural crop on the border with State A was not asparagus but corn. The toxic fumes destroyed the corn crop. Since State A had not foreseen a change in the prevailing winds or the fact that the toxic fumes from the factory located in its territory would destroy the corn crop in State B, was it liable for the loss sustained? That was a simple example, but one which he believed required further reflection, because if the test of reasonable foreseeability was applied there would be one answer to the question of State A's liability, while if the test of direct consequences was applied there would be another answer.

19. It seemed to him that private law analogies might be more helpful to the Commission than the Special Rapporteur had so far acknowledged. The topic lay in the borderland between State responsibility and no responsibility. Domestic legal systems had developed forms of redress for acts which, although not wrongful in themselves, nevertheless had harmful consequences for others. The development of the law of negligence in the English common law system in the past fifty years constituted a dramatic example of how the law could be adopted and moulded to meet new challenges, particularly through the refinement and enlargement of the concept of the duty of care.

20. With regard to the third element in the title of the topic, "acts not prohibited by international law", the Special Rapporteur had explained (1735th meeting) that what was really meant were "acts whether or not prohibited by international law". As far as the Special Rapporteur was concerned, the wrongfulness or otherwise of an act was irrelevant in the sense that his proposals were intended to be applicable in either case, assuming that the complainant State did not specifically allege wrongfulness. That approach did have a definite advantage in that it did not require the Commission to draw a clear dividing line between acts prohibited by international law and acts not so prohibited, but it also

presented certain dangers, the most important of which was that it might have a stultifying effect on the development of the law of State responsibility.

21. Many members of the Commission would agree that there was a nascent norm of international law that no State was entitled to use or permit the use of its territory in such a manner as to cause loss or injury to another State or to persons or things in that other State. That norm was a norm of existing positive international law in that it related to the use of the territory of a State as a base for the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. In that form it was a clear corollary of the peremptory norm of international law prohibiting the threat or use of force; the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations⁸ made that clear. Although that norm might constitute clear recognition of the fact that a State committed an internationally wrongful act when it permitted its territory to be used for the purpose of conducting hostile operations against another State, there was no such recognition that the norm governed every activity which might take place in the territory of the author State and cause loss or injury to another State or to persons or things in another State.

22. In other words, the conduct of certain activities in the territory of the author State which had injurious consequences elsewhere might engage that State's international responsibility, whereas the conduct of other activities, particularly if they involved no injurious consequences elsewhere, would not. What the present topic was concerned with was the point at which the author State, if the activities carried out in its territory could be attributed to it, found itself in the borderland between responsibility and no responsibility. Mr. Ushakov would probably deny the existence of such a borderland. At the present stage of development of international law, however, he himself was convinced that there was a grey area in which a penalty, in the form of reparation, might have to be exacted from the author State if the activities which had resulted in injurious consequences for another State or for persons or things in that other State could be attributed to the author State.

23. Consequently, in dealing with the topic under consideration the Commission was concerned not with the law of State responsibility or with the law of no responsibility, but with the law of the borderland. From the positive point of view, the topic was one aspect of the duty to co-operate. The modern world was an increasingly interdependent one where things done or not done in the territory of one State could have harmful consequences in another State. But international law had not reached the stage at which it would prohibit everything of that kind. It therefore seemed to him that the Special Rapporteur would be wise to confine himself largely, if

⁸ General Assembly resolution 2625 (XXV) of 24 October 1970.

not exclusively, to those activities which caused or might cause physical or material loss or injury, leaving aside activities which could result in economic or financial loss or injury. That was because the title of the topic, if taken literally, might be regarded as covering, for example, loss or injury caused to industries in developed countries by rapid industrialization in developing countries or, conversely, loss or injury caused to developing countries by their reliance on the monopolistic or quasi-monopolistic production of certain articles by developed countries. If the topic was given such a broad scope, it could never be contained within reasonable bounds.

24. He had studied the Special Rapporteur's third report in the light of the foregoing considerations. The Special Rapporteur had virtually persuaded him that the topic was a viable one that would be relevant to the needs of the international community in the coming decade. It was very much in the field of the progressive development of international law. That suggested that the product of the Commission's work should be a set of guidelines to assist States in giving more positive content to the basic duty of co-operation. Happily that was what the Special Rapporteur seemed to have in mind.

25. With regard to the schematic outline, he had some reservations about the very broad scope of section 1. The question of attributability should be looked at in that context and in the context of the definition of the expression "territory or control". He tended to share Mr. Riphagen's view (1739th meeting) that the operation of ships and aircraft should be excluded from the scope of the topic since it was already regulated by regimes that were designed to limit operators' liability with a view to protecting industries whose functioning was essential to international communications. Consideration should be given to the possibility of limiting the meaning of the expression "loss or injury" to material or physical loss or injury.

26. The acceptability of the guidelines proposed in section 2 of the outline would depend on the general scope of the topic. They might be workable in relation to environmental damage, but they would not be workable in relation to a financial measure, such as the devaluation of a State's currency, whose effectiveness would require secrecy. He agreed with Mr. Calero Rodrigues (*ibid.*), that section 2 seemed to place too much emphasis on fact-finding machinery, which would be necessary in some contexts but not in others.

27. On the whole, he agreed with the content of section 3. If the activities committed in the territory of the acting State could be attributed to that State, it clearly had a duty to negotiate in good faith if loss or injury was suffered in another State. That duty should not necessarily depend on the prior invocation of a fact-finding procedure, since the negotiations themselves might be directed primarily towards an assessment of the extent of loss or injury suffered by the affected State.

28. He agreed with the doubts expressed by some members about the notion of the "shared expectations" of the parties in relation to the assessment of reparation. He would prefer a more objective kind of test, although he was not sure that it was possible to go as far as Mr. Riphagen had suggested (*ibid.*). Assessment of reparation might be related primarily to the common legislative standards normally observed by the States concerned, bearing in mind the duty of the affected State to mitigate any loss or injury that might have occurred.

29. The principles in section 5 were reasonably acceptable, with the exception of paragraph 4, which merely stated an evidentiary point. But he was not sure that all the matters listed in sections 6 and 7 were relevant; perhaps they were simply intended as a check-list. Some of those listed in section 6 could be relevant to a balancing of interests in cases where an activity in one State had adverse physical or environmental effects in another State, but they would not be relevant if the scope of the topic was so broad as to encompass the adverse consequences of financial or economic measures taken by one State and, although not wrongful, causing loss or injury to persons in another State.

30. Lastly, any saving clause inserted into the articles must be expressed in broad enough terms to cover what Mr. Riphagen had referred to in his third report on part 2 of the topic of State responsibility (A/CN.4/354 and Add.1 and 2) as existing subsystems, where regimes of liability might already have been worked out in detail and whose continued operation should be ensured.

31. Mr. OGISO said he had the impression that the Special Rapporteur himself shared the fairly general view stated in his third report (A/CN.4/360, para. 7), namely that the principle of "strict", "absolute" or "no-fault" liability was a product of conventional regimes such as the ones established in the Convention on International Liability for Damage Caused by Space Objects,⁹ the Convention on Civil Liability for Oil Pollution Damage¹⁰ and the recent Convention on the Law of the Sea,¹¹ and that it was not a principle of customary international law. Principle 21 of the Stockholm Declaration¹² was simply a kind of joint policy declaration by the States represented at the United Nations Conference on the Human Environment, not a statement of an existing principle of international law. Moreover, the *Trail Smelter* case¹³ and the *Corfu Channel* case¹⁴ were among the very small number of cases in which the principle of strict liability has been recognized. He therefore believed it would be premature to say that, on the basis of existing practice,

⁹ See 1739th meeting, footnote 16.

¹⁰ United Nations, *Juridical Yearbook, 1969* (Sales No. E.71.V.4), p. 174.

¹¹ See 1699th meeting, footnote 7.

¹² See 1735th meeting, footnote 3.

¹³ See 1739th meeting, footnote 7.

¹⁴ See footnote 7 above.

there were grounds for codifying the principle of strict liability. At the present stage, any general rule of strict liability could justifiably be criticized as being too abstract.

32. He had some difficulties in that respect with the scope of the topic as proposed in section 1, paragraph 1, of the schematic outline, and in particular with the definition of the term "activity" in paragraph 2 (b). That definition was too broad and too abstract, and could even apply to the economic, financial and monetary activities of Governments. It would be entirely impractical for such activities to be included in the scope of the topic. The Special Rapporteur and several members of the Commission had rightly stressed the need for the progressive development of international law, as envisaged in principle 22 of the Stockholm Declaration and in article 235 of the Convention on the Law of the Sea. However, it would be pointless to lay down principles that did not have good prospects of being accepted by the majority of the international community, and he did not think that the international community was ready to accept the principles of absolute or strict liability. At the present stage, therefore, the Commission should aim at proposing guidelines or a framework for the consideration, negotiation or arbitration of specific cases, and not a convention or principles of a legally binding nature. The scope of the guidelines should be more limited and more carefully defined than the scope of the topic as suggested in the schematic outline. They should in fact do no more than supplement or strengthen existing international legal regimes relating to the protection of the environment.

33. The Special Rapporteur had proposed the balancing of interests as a means of solving the problem of reparation under a regime of strict liability. It should be borne in mind, however, that although a balancing of interests could solve that problem in some cases, it could not be used in cases where claims were settled on an *ex gratia* basis, a device to which Governments resorted when they wanted to avoid legal or political difficulties or did not wish to explain the legal basis for their decision to settle a claim. The notion of shared expectations mentioned in section 4, para. 2, of the schematic outline was of great interest and warranted further consideration, but in the light of the international community's experience with strict liability regimes it was difficult to see how it would be interpreted in specific cases.

34. He would appreciate it if the Special Rapporteur could explain whether the question of exhaustion of local remedies came within the topic. For example, could it be said that, in the *Trail Smelter* case, the Canadian Government could have required the United States nationals who had suffered loss or injury to exhaust local remedies before the Canadian courts? If Japan and New Zealand concluded a fishing agreement and Japanese fishing vessels were prevented from fishing in New Zealand waters because of water pollution caused by New Zealand, would the New Zealand Government be entitled to say that the Japanese fishermen concerned

had to exhaust local remedies in the New Zealand courts before the matter could be taken up by the two Governments?

The meeting rose at 1 p.m.

1743rd MEETING

Friday, 9 July 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

SCHEMATIC OUTLINE² (continued)

1. Mr. BARBOZA congratulated the Special Rapporteur on his third report (A/CN.4/360), which showed a great effort of will to discharge an extremely difficult task. Where the delimitation of the topic was concerned, what came to mind first was liability for risk as it existed in internal law, where legislative provisions requiring some degree of care and foresight were usually enacted concerning activities that involved risks but were at the same time necessary or useful. In the event of an accident, the persons engaged in such activities were required to make reparation, even if they had exercised all the care and foresight required by the law.

2. This would have been the proper field for the topic of the Special Rapporteur, but it so happened that States had preferred to conclude treaties relating to specific activities, such as the launching of objects into space, oil transport and nuclear operations. The Special Rapporteur had in fact drawn up an exhaustive list of the conventions relating to liability for damage caused by such activities. There was no doubt that the method followed thus far in international law had advantages. It consisted in laying down rules concerning prevention that were adapted to each kind of activity, and prescribing compensation procedures for each case. It might therefore be thought that the States members of the international community would not be much inclined to conclude a convention laying down general rules on dangerous activities, and consequently, this field does not appear as a promising one for the Special Rapporteur.

3. Undoubtedly, the cases covered by part I, chapter V, of the draft articles on State responsibility³

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1735th meeting, para. 1.

³ *Yearbook ... 1980*, vol. II (Part Two), pp. 33 *et seq.*

belonged to the present topic. They related to acts of the State not held to be wrongful because of certain circumstances. The relevant articles of the draft did not exclude the possibility of compensation if damage was caused. But cases of that kind were rare and constituted a very small field of study for the topic assigned to the Special Rapporteur. He asked himself what was then left as a substantial field for this topic. It was precisely in the face of that situation, that the Special Rapporteur had made a great effort of imagination. In his view, activities could be carried out in the territory or under the control of a State and cause loss or injury to another State, exceeding a certain limit, which must be assessed in accordance with the balance of interests concept. Beyond that limit, the activities that caused the damage were wrongful. But below the aforementioned limit, there was a certain amount of harm which had somehow to be tolerated by the injured State. The injury was then caused by a lawful act. It is here where the Special Rapporteur had chosen to place his topic, in a crepuscular zone where the sun of lawful conduct has set, but the obscurity of wrongfulness has not yet descended. In that twilight zone, there were obligations that were not real obligations, like the obligation to provide information, and interests that, strictly speaking, were not rights. The result was that the topic did not appear to be a really legal one. Perhaps the Special Rapporteur took a rather broad view. He personally had serious misgivings about the possibilities of developing the Special Rapporteur's topic in such a field.

4. In his third report, the Special Rapporteur rightly stressed the importance of prevention. But the breach of any obligations laid down concerning prevention would lead the Commission into the area of wrongful conduct, which was foreign to the topic under study. So the Special Rapporteur imagines a regime of prevention without obligations, which although having the advantage of encouraging co-operation between States, seemed to be ineffective. It must be acknowledged, unfortunately, that the Special Rapporteur had not succeeded in steering between the two reefs of prevention and wrongfulness.

5. The schematic outline proposed by the Special Rapporteur was excellent as a method of work and would certainly serve as a model. After all that other members of the Commission had said about it, few comments were required. It should, however, be noted that section 2, paragraph 1, which specified the acting State's duty "to provide the affected State with all relevant and available information", formed the mainstay of the entire prevention system developed by the Special Rapporteur. That duty to provide information obliged the acting State, in particular, to give details of the losses or injuries it considered to be foreseeable and to propose remedial measures. If those measures did not satisfy the affected State, a fact-finding procedure might be undertaken, in conformity with section 2, paragraph 4.

6. Generally speaking, he endorsed those provisions, although they seemed open to practical objections. For instance, the usefulness of the procedure was entirely

relative, since it might cause delays in a situation where speed was essential. A State wishing to engage in a certain activity should not be liable to be hindered by the opposition of the affected State. Moreover, in general, the sole consequence of the acting State's failure to provide the information required was the procedural disadvantage specified in section 5, paragraph 4, according to which the affected State was allowed "a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury". That consequence was logical, but it constituted a procedural disadvantage which implied a sanction. There was thus a duty to inform, dereliction of which constituted wrongful conduct. In any case, the sanction provided for seemed insufficient. Ultimately, if the acting State did not take the measures required, no right of action arose, as was stated in section 2, paragraph 8. The obligation was thus minimal and non-fulfilment did not appear to give rise to a real sanction.

7. In the various cases referred to in section 3, paragraph 1, the States concerned had a duty "to enter into negotiations at the request of any one of them with a view to determining whether a regime is necessary and what form it should take". There again, nothing happened when a State would not co-operate. The wording of section 3, paragraph 4 was modelled on that of section 2, paragraph 8: failure to comply did not give rise to any right of action.

8. In his report (*ibid.*, para. 13), the Special Rapporteur had drawn broadly on the *Trail Smelter* case.⁴ That case was certainly of great interest, but it should be noted that a real regime of prevention had been imposed on the smelter by the court, and that it included duties of care. The reparation regime proposed by the Special Rapporteur rested instead on firmer foundations than the previous regime. The obligation to negotiate laid down in section 4, paragraph 1, derived from the obligation to make reparation. If the obligation to negotiate in good faith was not fulfilled, perhaps part 2 of the draft articles on State responsibility would become applicable.

9. Mr. McCaffrey said it was quite clear that the Special Rapporteur was making every effort to achieve the primary objective of "capturing" the topic under consideration, which had been described as a "rogue elephant" (A/CN.4/360, para. 46), and confining it within manageable bounds. That objective was all the more important in that it would be difficult for the Commission to draw up guidelines, let alone rules or procedural mechanisms, unless it knew precisely for what situations guidance was to be provided. Once he himself had overcome the obstacle of trying to define the situations which the topic was intended to cover, it had been much easier for him to approach the answer to many of the other questions that arose. In any event, he was in substantial agreement with the basic approach

⁴ See 1739th meeting, footnote 7.

adopted by the Special Rapporteur, whether they both understood the topic in precisely the same way or not.

10. Although the title was quite complex, it did offer some clues as to the meaning and nature of the topic. In his view, the nub of the topic was the fact that an "act" or, more accurately, an "activity", which was not prohibited by international law could produce injurious consequences for which there was nonetheless international liability. In other words, a State might be liable for the injurious consequences of its acts even if such acts were not prohibited by international law.

11. The key to the understanding of the topic lay in internal law. Although he would refer to the United States version of common law, he believed that its features had counterparts in other States and systems. The theories of liability for nuisance and negligence and of strict liability were convenient starting points for trying to understand the topic. All three pertained to activities which were not prohibited. In the cases of nuisance and negligence, it was unreasonable or careless conduct in carrying out an activity that gave rise to liability; in the case of strict liability, the activity in question was usually one that was socially desirable, but involved risks against which it was nearly impossible to guard without discontinuing the activity.

12. The *Trail Smelter* arbitration was one of the best known examples of a case which, in a domestic context, would involve liability for nuisance, and which was a classic illustration of the principle *sic utere tuo ut alienum non laedas*, and could be said to involve activities carried out in the right way but in the wrong place. Since most of the principles that applied to liability for nuisance were also applicable in the field of riparian rights, there seemed to be a close link between the topic under consideration and the topic of the non-navigational uses of international watercourses.

13. Liability for negligence would, for example, be entailed if a factory was operated so carelessly that it emitted unreasonable quantities of toxic substances. In connection with strict liability, the Special Rapporteur had aptly referred to the example of the incident which had occurred in the United States, in March 1979, at the Three Mile Island nuclear power plant. Strict liability would also come into play in situations involving the explosives industry and in other industrial situations where problems of proof would create intolerable burdens for the victims of defective products.

14. The problem at the international level was that, generally speaking, there was no well-developed system of rules that corresponded to the rules relating to liability for nuisance and negligence and strict liability, that existed in the municipal law of most countries. At best, the international rules relating to such forms of liability were in the embryonic stage of development, as the Special Rapporteur had rightly pointed out in connection with strict liability, in paragraph 20 of his third report. The need for some kind of substantive or procedural regime at the international level was underscored by the fact that it was by no means clear

that private remedies would always be available. That had, for example, been the case in the *Trail Smelter* arbitration, in which a private suit in Canada by the United States plaintiffs had been precluded by a "local action rule" requiring that actions to recover for injury to land must be brought at the *situs* of the land, namely, the State of Washington, which, at the time, had had no "long arm" statute. It had therefore been impossible for action to be brought in that State, and the only recourse for the injured parties had been to take up their claim with the United States Government.

15. Thus, in view of the need for international rules relating to liability, he agreed with the members who had said that in carrying out its work on the topic under consideration the Commission would be engaged primarily in progressive development of international law. With regard to the approach to such progressive development, he thought the Special Rapporteur was quite right in considering his task to be the elaboration of a procedural framework designed both to enable individual States to settle specific conflicts regarding the use of natural resources and to give international law freedom to develop within controlled parameters.

16. His own ideas on the scope of the topic were obviously defined to some extent by his view that it dealt largely, if not exclusively, with situations involving either conflicting uses of the natural environment or injurious consequences transmitted through the medium of the natural environment. It would therefore seem wise to limit the scope of the topic to transboundary environmental problems. He agreed with Mr. Riphagen (1739th meeting) and Sir Ian Sinclair (1742nd meeting) that the Commission should be very cautious about extending the scope of the topic beyond what the Special Rapporteur had referred to in his report as "dangers arising out of the physical use of the environment" (A/CN.4/360, para. 46). Such a limitation of scope seemed especially justified in the light of the fact that, as noted in the report (*ibid.*, para. 48), "the materials on which the Special Rapporteur must rely would largely be found in the area of the use of the physical environment". Clearly, rules relating to the harmful effects of, for example, drugs or economic, trade or financial measures would be difficult, if not impossible, to elaborate on the basis of materials relating to the use of the physical environment. He also endorsed the conclusion stated by the Special Rapporteur (*ibid.*, para. 49) that "it makes very good sense to proceed empirically, examining materials and demonstrating principles which appear to be consistently reflected in those materials".

17. The schematic outline should, in his view, contain a reference to principles such as those of non-discrimination and equal access embodied in the Nordic Convention on the Protection of the Environment⁵ and in the OECD Guiding Principles concerning the Interna-

⁵ Convention done at Stockholm on 19 February 1974, between Denmark, Finland, Norway and Sweden (*International Legal Materials* (Washington, D.C.), vol. XIII, No. 3 (May 1974), p. 591).

tional Economic Aspects of Environmental Policies.⁶ With regard to section 1, he shared Sir Ian Sinclair's reservations (1742nd meeting) concerning the potentially unlimited scope of the topic and, in particular, the problem of attributability. Empirical work would be of great value in dealing with those problems.

18. In section 1, paragraph 2, the term "acting State" appeared to refer only to an activity carried out by the State itself, not to a private activity carried out within the State. That term might therefore be replaced by the term "source State". In his view, it would be better for the term "activity" not to relate also to "a lack of activity to remove a natural danger". Reference might rather be made to other types of omission. A question that came to mind in connection with the definition of the term "loss or injury" was whether the words "property of a State" covered the air. Was air pollution covered only when it caused a demonstrable and legally recognizable loss to private persons, or was a mere deterioration of air quality sufficient? Such questions would undoubtedly be answered at a later stage. The definition of the expression "territory or control" raised questions, especially because of the words "substantial control", to which careful consideration would have to be given in order to determine whether they covered, for example, activities carried out under licence of the "acting" or "source" State. That problem was, to some extent, covered in section 6, paragraph 11.

19. Sections 2 and 3 contained a framework for a regime of prevention. In that connection, he fully agreed with the aim, which the Special Rapporteur had stated in paragraph 9 of his third report, of giving "pride of place" to prevention. He also agreed with Sir Ian Sinclair (*ibid.*), that acceptance of the rules contained in section 2, paragraph 8—which might, moreover, be either rules, principles or standards—would depend on the scope of the topic. Such rules would apply to environmental problems, but not to other types of problem, and failure to comply with them would not engage State liability or give rise to any right of action.

20. Section 2, paragraph 2, made him wonder what the effect of acquiescence by the affected State would be, and what would happen in a situation where the threat was within the knowledge of the State to be affected and it failed to inform the source State or to request that State to take action. Ample precedent for the duty to inform was to be found in the ECE Convention on Long-Range Transboundary Air Pollution,⁷ in the Nordic Convention on the Protection of the Environment, in title B of the OECD Guiding Principles and in internal United States legislation such as the Clean Air Act amendments and the Federal Water Pollution Con-

trol Act amendments.⁸ In section 2, paragraph 5, it would be useful to provide for some kind of time frame, perhaps by adding the words "within a reasonable time" to that paragraph.

21. With regard to section 3, he agreed with Mr. Calero Rodrigues (1739th meeting) that prior fact-finding should not be a condition for the duty to negotiate. Section 4 dealt with the situation in which no regime had actually been established, but loss or injury had occurred. Paragraphs 2 to 4 related to the rather controversial notion of "shared expectations", which would be quite useful if it was not taken too far. Although the idea of "shared expectations implied from common legislative standards ..." referred to in subparagraph 4 (b) would require further refinement, it seemed to represent an attempt to identify the standards, values or factors with which the States concerned were in agreement. It would thus be a useful way of determining the amount of reparation due. The only danger was that a State might have "expectations" imputed to it on the basis of its internal legislation which it would never have had in an international situation. "Shared expectations" might be a proper goal, but it would not be an acceptable criterion for the settlement of specific international disputes. What the Special Rapporteur seemed to have had in mind, however, was that the reparation made should not do great violence to the reasonable expectations of the source State or affected State; in that sense, the idea of "shared expectations" was a useful tool.

22. He agreed with the principle stated in section 5, paragraph 2, that "standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability". In that connection, he noted that paragraphs 24 and 25 of the third report (A/CN.4/360) proposed that the balance of interests test should be used to harmonize the interests of the States concerned; paragraph 24, in particular, stressed the "common interest" of those States. Although an activity might be of great importance to the economy of a border region, for example, the criterion of economic viability should not be taken too far. It was sometimes tempting to give undue emphasis to easily quantifiable factors, such as economic indicators, at the expense of other, more subtle factors, such as the despoliation of a pristine natural area. Economic viability was a factor listed in section 6, paragraph 7; but it was only one factor among many, and in the present context it should be borne in mind that some of the persons affected by an activity might also benefit from it. The affected State would therefore have to take economic viability into account in deciding whether it would be wise to stop the activity or to seek crippling damages. It might well be that additional prevention or reparation would make the activity unprofitable without appreciably enhancing the remedy.

⁶ Recommendation adopted by the OECD's Council on 26 May 1972 (*OECD and the Environment* (Paris, OECD, 1979), pp. 25 *et seq.*).

⁷ Convention signed at Geneva on 13 November 1979 (ECE/HLM.1/2, annex I).

⁸ United States Public Law 95-95 of 7 August 1977 and Public Law 95-217 of 27 December 1977, respectively (*United States Statutes at Large, 1977* (Washington, D.C., U.S. Government Printing Office, 1980), vol. 91).

Sections 6 and 7 would serve as useful points of departure and contained much grist for the Commission's mill in the coming years.

23. It was clear that there was ample justification for the topic under consideration; that was to say there was a need to develop means of accommodating conflicting interests in the use of natural resources. At the present stage, he agreed with those members of the Commission who had suggested that the Commission's objective should be a set of guidelines or a framework agreement. The Special Rapporteur's third report would give the Commission a firm base from which to pursue that objective.

24. Mr. KOROMA said that, although the Special Rapporteur had rightly acknowledged in his third report (A/CN.4/360, para. 9) that:

To establish independently enforceable rules of prevention would be to depart entirely from the cardinal principle that the present topic is not concerned with rules of prohibition,

there seemed to be general support in the Commission for the idea of establishing a preventive regime. But since the maxim *sic utere tuo ut alienum non laedas* was permissive, in that it allowed States to do what they liked so long as they caused no injury to other States, he feared that if the Commission attempted to construct a preventive regime as a framework for the topic under consideration, it would not only be laying itself open to the criticism that it was stifling creativity, but would also be negating the very idea embodied in the title of the topic, which referred specifically to "acts not prohibited by international law". In that connection, he stressed that internal law and international law were both concerned with acts, not with activities.

25. It would also be quite unrealistic to try to construct a regime relating to ultra-hazardous activities; such a regime would not come into play until loss or injury had occurred. Indeed, a State could not be told what kind of activities it could carry out in its own territory, and its international liability would be engaged only if its activities actually caused loss or injury to another State.

26. He suggested that, in future work on the topic, account should be taken of the principle of good neighbourliness, to which Mr. McCaffrey had referred indirectly, as well as of acquisitive rights, to which he himself had referred at the previous meeting, and of the duty of States to respect the territorial integrity and sovereignty of other States.

27. Mr. RAZAFINDRALAMBO said it was most important to define the place of the topic under study in relation to that of State responsibility. It might be asked whether it was not a particular aspect of State responsibility, where the wrongfulness of the State's conduct was excluded as an exception. Such a view would be normal for anyone tempted to establish a parallel with the regime of civil liability in the internal law of States. In his opinion, the fact that the special regime of strict or no-fault liability was at present established only by agreements, in no way detracted from the finding that

the basis of a State's international liability was the existence of an obligation to make reparation for loss or injury actually sustained as the result of activities not prohibited by international law. However, the effect of a breach of that primary rule was to bring into play the regime of secondary rules of State responsibility, which showed the relationship between the normal regime of responsibility and the special regime of liability with which the Commission was currently concerned. It was from that starting point that the Special Rapporteur developed his two main concerns: to give precedence to prevention over reparation, and to ensure a balance between freedom to act and the duty not to injure. It was on those two main themes that the Special Rapporteur intended to base strict liability.

28. In regard to prevention, the Special Rapporteur advocated the elaboration of a regime, the elements of which he had stated in detail in section 2 of his schematic outline. His efforts were commendable, but it seemed that the acting State's failure to comply with the requirement of prevention incumbent on it had a direct effect on the obligation to make reparation. For in the event of actual loss or injury, a whole procedure was provided for in sections 2 and 3, but only to establish the kinds and degrees of loss and injury. It was difficult to see the practical value and effectiveness of the provisions laying down prevention measures. It was true that under section 2, paragraph 2, the affected State could itself take the initiative of informing the acting State of the risks of loss or injury; but if the affected party was a developing country, such an initiative on its part might not carry much weight with an industrialized acting State. Conversely, as the Special Rapporteur had observed (A/CN.4/360, para. 23), developing States had only limited means of knowledge about industries established in their territory. Ultimately, all the precautions taken to ensure effective prevention might remain a dead letter.

29. The concept of balance of interests appeared to be warranted only in so far as the forces in play were equal. Who could claim that a powerful multinational corporation, established in an acting or affected State, was not in a position to dictate to that State, when it considered the corporation's activities to be of vital economic importance for its development? In such a situation, it would be difficult to readjust the balance of the rights and interests of the parties without interfering in the internal affairs of States.

30. Moreover, in seeking to establish the balance of interests, one might come up against considerable difficulties arising from the major differences existing in many spheres between advanced countries and developing countries. Those differences were not unlike the differences to be observed in the awards damages by the national courts of certain countries: the amount of compensation was proportionate to the position of the injured parties in the social hierarchy. The developing countries might also suffer the fate often reserved for persons of modest condition in internal law. It was therefore to be feared that the assessment of interests

might not be made in the same way for advanced countries as for poor countries. It was open to question whether the advanced countries were prepared to take account of cultural and moral injury, and of delay in economic development, which was undoubtedly an element of the future injury to which Mr. Evensen had alluded (1741st meeting). In that regard, certain statements in the report might be disquieting in so far as the actual principle of reparation was not proclaimed unequivocally. The conditional tense was used in section 5, paragraph 3 of the outline, in stating that "In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury".

31. The Special Rapporteur should nevertheless be congratulated on his schematic outline, which contained a precise and comprehensive statement of the principles and modalities of international liability in the field under study, and formed a catalogue of provisions for the future articles. Like Mr. Calero Rodrigues (1739th meeting), he wondered whether the purely descriptive and procedural elements in the schematic outline, appearing in sections 6 and 7, would not be better placed in an annex, a recommendation or a kind of code of conduct, leaving only the primary rules to form the elements of a convention like the international labour conventions, which were often accompanied by recommendations. The suggestion was similar to Mr. Reuter's idea of a framework agreement (1742nd meeting).

32. In view of the increase in activities likely to cause loss or injury through the use of insufficiently tested new techniques, he wondered whether, in solving the problems connected with full reparation for injury, the Commission should not, in certain cases, be guided by the concept of collective guarantee or insurance of the STABEX type,⁹ which, in the relations between the EEC member States and the ACP States, provided compensation for losses due to a fall in the prices of certain primary commodities, by payment of a special indemnity. In section 6, paragraph 16, of the outline the Special Rapporteur alluded to international assistance, but, strangely enough, he seemed to restrict the benefit of the provision to the acting State.

33. In the present state of the world, so long as the international community did not manage to establish a new international economic order, the developing countries would always be in a position of inferiority in relation to countries that were technologically and economically far more advanced. It would be essential to bear that in mind when preparing the draft.

34. The CHAIRMAN, speaking as a member of the Commission, said he wished to congratulate the Special Rapporteur on his tireless efforts to identify the bases, content and scope of the topic, from data that were cer-

tainly very unreliable. Transposing to international relations the aphorism that one man's freedom ended where another's began, he emphasized that an activity not prohibited by international law could not entail liability for its author if it did not cause injury to another or to other States. Liability thus derived not from the act which was not prohibited by international law, but from the consequences of activities carried out by States in the exercise of their rights, and only in so far as those activities were likely to cause injury to another State. Thus, the problem was to determine the modalities for reparation of the injury caused, or to prevent such injury.

35. In its report to the General Assembly on the work of its thirty-second session the Commission had stated that:

*two principles that should be involved in the construction of any regime, and in the ascertainment of liability when no regime applied, were a standard of care commensurate with the nature of the danger, and guarantees related to the occurrence of injury rather than to the quality of the act causing injury.*¹⁰

That statement appeared to be highly logical, but raised certain difficulties—for example, the problem of how to determine the degree of care and to impose on States a norm specifying that degree and its variations. And how was the relation between the degree of care and the nature of the danger to be determined when the nature and scope of that danger were not known in advance? It would be necessary to create a new kind of lawful act, the future commission of which could be foreseen.

36. He would not revert to the comments he had made on the topic in the Commission and in the Sixth Committee of the General Assembly. He wished to point out, however, that in his third report, the Special Rapporteur centred the topic on the environment. At best, his draft articles would duplicate the work in progress in other United Nations bodies, or the principles of the Stockholm Declaration¹¹ and the recent Convention on the Law of the Sea.¹² But to base the draft articles on those two instruments would be to disregard the fact that the former was no more than a statement of principles and the latter had not yet entered into force.

37. As Mr. Reuter had indicated at the previous meeting, the Commission had reached a crossroads and must now take concrete decisions. But in the absence of practice and doctrine it would be extremely difficult, as the debate had shown, to extract from the "twilight zones" the raw material for drawing up practical and effective rules to limit or control State activities not prohibited by international law. Moreover, what could be said about the harmful activities which the colonial powers could lawfully carry out in their colonies?

38. He therefore agreed with Mr. Reuter and Sir Ian Sinclair that the Commission should rather try to draw up a framework agreement consisting of a series of very general principles that would serve as guidelines for States drawing up bilateral or multilateral agreements

⁹ System of Stabilisation of Export Earnings, set up by the first Lomé Convention concluded between the ECE and the ACP States in February 1975, and expanded by the second Lomé Convention, concluded in October 1979 (see 1707th meeting, footnote 4).

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), p. 160, para. 137.

¹¹ See 1735th meeting, footnote 3.

¹² See 1699th meeting, footnote 7.

on liability for injurious consequences of acts not prohibited by international law.

39. Mr. THIAM said that as he had already had occasion to point out, he did not really understand how the subject differed from that of State responsibility. Indeed, it had not yet been shown that there was a firm dividing line between what was lawful and what was wrongful. An activity considered lawful was often wrongful because of the way it was carried out, and vice versa. Besides, assuming that a firm dividing line could be drawn, the treatment of the injurious consequences of a lawful act would be the same as the treatment of the injurious consequences of a wrongful act. For ultimately, whether an act was lawful or wrongful, as soon as it caused injury it entailed reparation. So what was the difference, as to the nature of the reparation, between the consequences of a wrongful act and the consequences of a lawful act? There was none: injury required reparation, whether it resulted from a lawful or a wrongful act.

40. He did not see the need to make the topic a separate one. Nevertheless, he appreciated the concern caused in a fast developing world by the progress of research and technology, and the desirability of studying the injurious consequences of activities regarded as lawful. He therefore accepted the Special Rapporteur's presentation of his subject substantially under two aspects: that of prevention and that of reparation. But did prevention really come within the framework of a topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law"? According to that title the Commission should concern itself with the injurious consequences of acts, not the prevention of acts. It should not study measures to prevent acts which in any case were permitted by international law, but should concentrate solely on the consequences those acts could entail. He was not unaware of the importance of the problem of prevention in the interests of humanity; but that problem could be dealt with by agreements, regional or international conventions, as the case might be, and in any event, it was not within the competence of the Commission, any more than the procedural mechanisms proposed by the Special Rapporteur.

41. For all those reasons, he thought it would be well to consider drawing up a model framework agreement, to which States could refer when they needed to prevent or regulate acts not prohibited by international law. In conclusion, he said that he had strong reservations on the topic—not concerning its interest, which was considerable, but concerning the advisability of making it a separate topic from that of State responsibility.

42. Mr. EL RASHEED MOHAMED AHMED commended the Special Rapporteur for the very valuable work he had done on a difficult topic; with skill and erudition, he had given it a comprehensible shape. The topic was a timely one and covered an area in which there was a generally agreed need for regulation. Examples had been given by members of the Commission

of the problems that nations faced and would continue to face as a result of technological developments. It was the fate of man that his tools, though useful, were at the same time harmful in some respects: factories could emit harmful fumes and nuclear energy entailed the danger of radiation.

43. Seen from the point of view of State responsibility, the topic involved a variety of conceptual difficulties, stemming from the fact that a State could not be held liable for activities carried out within its own territory. On the other hand, injury or harm should be avoided. The topic fell within the area of *de lege ferenda*, and there was no reason for the Commission not to carry out progressive development of international law if there was clear evidence of the existence of a framework of rules established by administrative action. Efforts were already being made to regulate the transfer of technology, as evidenced by the Programme of Action on the Establishment of a New International Economic Order, which called for a code of conduct to cover the commercial and economic aspects of the transfer of technology.¹³ That could indicate that the other side of the question, too, was ripe for treatment.

44. In his report (A/CN.4/360), the Special Rapporteur had described the topic as an undefined area; but while it undoubtedly held all sorts of surprises, he had no doubt that the Special Rapporteur was equal to the task. He noted that the Special Rapporteur had decided not to retain the notion of a duty of care (*ibid.*, para. 19) and had also dropped the use of the word "harm" in favour of the words "loss or injury" (*ibid.*, para. 34). In that connection, he pointed out that a cardinal rule of Islamic law was that no harm or injury was permissible. That principle applied at both the national and the international levels and was the basis of a whole body of case law similar to that of England. In the famous case of *Donaghue v. Stevenson*,¹⁴ Lord Atkin had said that the rule that you are to love your neighbour becomes, in law, "you must not injure your neighbour". The evolution of international law was, however, more or less predicated on the rules regulating the conduct of individuals; for Governments, which were composed of individuals, acted under certain restraints dictated by their mutual and national interests. Accordingly, injury must not be permitted to go without remedy or redress. The Special Rapporteur, conscious of the fact that he was dealing with the acts of States, had emphasized the notion of prevention of injury, rather than reparation or compensation for the damage that would otherwise result from a given act. In general, he agreed with that approach.

45. He commended the Special Rapporteur on his proposed schematic outline of the topic. The term "activity" was too general, however, and should be kept within specific limits. The term "control", as used in

¹³ General Assembly resolution 3202 (S-VI) of 1 March 1974, sect. IV.

¹⁴ United Kingdom, *The Law Reports, 1932, House of Lords, Judicial Committee of the Privy Council, 1932* (London), p. 562.

the expression “territory or control”, was difficult to define. Difficulties might arise in cases where the agency operating a plant or unit was owned by another State or State-owned corporation, or by a transnational company. In such cases, where did control lie? When injury resulted from the use of a plant, who was responsible? Was it the State that owned the plant, or the State in which the plant was operated?

46. The notion of “shared expectations” should also be clearly defined. The Special Rapporteur took the view that the occurrence of loss or injury was a question of fact depending on the circumstances of the case and warned that the notion was applicable only in the context of reparation. While the scope of the term “shared expectations” would be easy to determine where specific agreements existed between the States concerned, it would be difficult to infer from standard patterns of conduct normally observed. He supported Mr. Reuter’s suggestion (1742nd meeting) regarding the elaboration of a framework treaty. The schematic outline provided ample material for such a framework.

47. Mr. EVENSEN said he agreed with previous speakers that some modern technical activities, such as drilling for oil in marine areas, the operation of nuclear plants, the testing of nuclear devices and the operation of airlines, entailed dangers. But any attempt to preclude harmful consequences entirely would require total prohibition of the activities concerned. As applied to such activities, “prevention” and “prohibition” should be regarded as relative, rather than absolute terms. One possible approach would be to formulate the principle that States had an obligation to prevent injury or loss by establishing safety codes or codes of conduct. That was the situation emerging with regard to oil-drilling operations at sea, for which coastal States had an international obligation to establish and enforce reasonable safety codes precluding unnecessary loss or injury. The Special Rapporteur should adopt that approach in his future work on the topic.

48. Mr. LACLETA MUÑOZ said that the Commission should conclude the work it had undertaken, since it was required not only to codify international law but also to contribute to its progressive development. And the concept of strict liability was, precisely, a development in all sectors of law, internal as well as international: the international community must make every effort to ensure that the inevitable risks of acts not prohibited by international law were not always borne by the victims.

49. In addition to the polluting industrial processes already referred to, there were accidents that were absolutely unforeseeable. For instance, a few years ago an atomic bomb had become detached from a foreign aircraft which had received permission to fly over Spanish territory. It had never been possible to prove that there had been a wrongful act which had engaged the responsibility of the State in which the aircraft was registered. In law, there had been no obligation to make reparation for the injuries caused in a tourist area, but compensa-

tion had been paid *ex gratia*. On the basis of that example, the Commission could impose an obligation to make reparation on a State to which a wrongful act was attributed. But it should above all avoid seeking to identify the author of an act that was not wrongful; the principle of strict liability took on its full significance in that context, and it should be stated in the draft articles.

50. In the schematic outline proposed by the Special Rapporteur, section 7 was the heart of the topic, although paragraphs 2 and 3 of heading I did not come within the framework of the topic *a priori*. Nevertheless, those provisions could, and should, be included *a posteriori*. He thought the outline should begin with the provisions of section 7 and include rules regulating acts. Those rules could follow the model of the provision in section 7, heading II, paragraph 6, by completing it as follows:

“The test of the measure of compensation for loss or injury or the adoption of measures to prevent its continuation or repetition.”

He also thought that definitions should be given of an “act of the State” and of “attributability”, and that the possibility of extending the draft articles to cover acts of individuals within the territory or control of a State should be explored.

The meeting rose at 1 p.m.

1744th MEETING

Monday, 12 July 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

SCHEMATIC OUTLINE² (*concluded*)

1. Mr. QUENTIN-BAXTER (Special Rapporteur), summing up the discussion, said that the Commission’s debate had been very constructive and that he would carefully take account of all the comments made when he prepared his next report. At present, however, he would confine himself to a comparatively broad summary of the main conclusions reached, so that the Commission could proceed fairly quickly to the last substantive item on its agenda.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1735th meeting, para. 1.

2. He had noted that some thirteen members of the Commission thought he should proceed along the lines he had indicated in his third report (A/CN.4/360). One strong voice had said that there could be no doubt that the subject did indeed exist. A couple of other voices, however, while finding some merit in parts of the subject, believed that it could perhaps be more appropriately considered within the context of State responsibility. Four or five further voices, though displaying a measure of reticence, had not raised any special barrier to further consideration of the subject. Although at least twelve firm voices had spoken in favour of the ultimate obligation to make reparation, there had been a number of others which he had hesitated to count affirmatively, but which had certainly not reacted negatively. There had been some eleven firm voices in favour of rules to deal with the question of prevention, and some which had said that the rules he had set out in sections 2 and 3 of the schematic outline were not strong enough. A few had suggested that the question of prevention might interfere with the question of reparation. It seemed, on the basis of that assessment of the discussion, that the Commission, as a newly constituted and collegiate body, was capable of pursuing the goals, however distant and elusive they might seem.

3. He did not, however, wish to paper over the differences of emphasis that had been apparent throughout the discussion. If, as had been suggested, he did indeed have a tiger by the tail, it was probably only a paper tiger and, with a little assistance, it could be effectively dealt with. It was true that the Commission was perhaps entering areas where national interests might be sharply delineated and where different political notions and assessments might be hard to reconcile. When Mr. Kearney had presented the first report on the non-navigational uses of international watercourses,³ he had said that the Commission was embarking on a new aspect of its work; the same could be said of Mr. Sucharitkul's topic of jurisdictional immunities and Mr. Riphagen's subject of State responsibility. All three subjects presented a challenge. He did not, however, see his own subject as presenting difficulties of the same order, since its aim was not to force new situations upon the international community, but to increase the help which lawyers could give to policy-makers in dealing with acknowledged clashes of interest. It had been said that the rules which he was drafting were of a general procedural nature and he in no way disagreed. Their purpose was to ease the way to enable real differences of interest to be reconciled with the help of lawyers.

4. There was, however, a certain difference of direction within the Commission regarding the relative importance of prevention, using that word in the sense not of prohibition, but of insistence on safeguards in guaranteeing an activity—a certain pull between that kind of prevention and the desire for clear rules of reparation. There was also a certain pull between the

notion that the articles should be broad in scope and the notion that, even at that stage, they should be given a more confined direction.

5. The starting proposition was always that there was little point in rules of law that had no means of application to given situations. In the modern world, where resort to third party settlement was always the exception, particularly when policy interests were concerned, it was necessary to structure the procedures that Governments would use in dealing with one other. It was therefore also necessary to recognize from the outset that loss or injury of a transboundary nature could indeed arise without wrongfulness, and that such loss or injury had to be made good. It was idle to leave such issues to be settled simply in terms of a broad assertion that the action complained of was or was not wrongful. Almost inevitably the acting State was bound to take the view that, although it might have caused harm, it was acting lawfully, and the affected State was almost bound to take the view that the harm was caused wrongfully, if that was the only test articulated by the law. In their mutual contacts, however, States did not usually begin by accusing each other of breaking the law.

6. Reference had been made to the not infrequent preference of States for what might appear to be non-principled settlements, in which there was no admission of wrongfulness, but a certain willingness to make amends. A large part of the law on treatment of aliens was based on precedents of non-principled *ex gratia* payments. In the far more tenuous field covered by his own topic, practice was more limited, but the indications were there: often States would be prepared to settle their differences without reference to wrongfulness and, in the ordinary course of events, it might be virtually impossible to arrive at a satisfactory settlement by alleging wrongfulness. When a State had reason to believe that it was the victim of a wrongful act, it might, of course, base its case upon that act and request that the situation be rectified. But the more normal way of proceeding was for the affected State to inform the acting State that an accident had occurred and to request that the damage be repaired or, where appropriate, to request that the necessary precautions be taken to ensure that damage would not occur, or to secure a promise of payment if unavoidable damage did occur.

7. In connection with chapter V of part I of the draft on State responsibility,⁴ dealing with circumstances precluding wrongfulness, the Commission had discovered that there was some justification for the view that, even when wrongfulness was entirely precluded, payment should be made. There were two reasons for that view: the first was that liability could arise without wrongfulness in instances where it was accepted that the injury was the result of an activity such as the flying of military aircraft in bad weather, which involved a certain degree of risk; the second was that, when an acci-

³ Yearbook ... 1976, vol. I, pp. 268-269, 1406th meeting, paras 2-9.

⁴ Yearbook ... 1980, vol. II (Part Two), pp. 33 *et seq.*

dent caused heavy loss or injury, it was only right, unless there were factors that altered the equation, for the person who had taken the action, or the State in which it had been taken, to make good the loss, rather than the persons immediately affected by it.

8. As to the suggestion that the topic under consideration should be dealt with in the context of State responsibility, he reminded the Commission that a decision had been taken very deliberately and without any dissenting voice some years ago,⁵ and that Mr. Ago had repeatedly stated that the present topic was a separate one which he did not propose to examine in the context of State responsibility. In support of the Commission's decision it could be said that, if it was argued that it was immaterial whether the need to make reparation arose from a wrongful act or simply under the terms of a primary obligation, since the results were the same, it then became rather difficult to sustain the underlying thesis of the topic. Was there any point in the Commission's having spent so much time dealing with chapter V of part 1 of the draft on State responsibility if the same kind of obligation to make reparation arose irrespective of whether the act that caused the situation was wrongful? In point of fact, the rules which the Commission was now considering were governed by a far wider series of considerations. Wrongfulness would normally trigger its own consequence: a fairly clear obligation to make reparation. The situation had to be viewed as a whole in order to ascertain how the costs and benefits were distributed. It was necessary to consider the quality of the actions that gave rise to loss or injury and the quality of the responses made by the victim; only on a broad estimate of the balance between those factors was it possible to arrive at a conclusion. In that connection, he fully agreed that a State which suffered loss or injury had an obligation to mitigate the damage.

9. He had recently met an international expert on rice farming, who had said that he was keenly aware that each new rice paddy involved an increase in the risk of malaria and sometimes had clear transboundary implications. That was a good example of the kind of situation in which a beneficial activity could not be stopped simply because it involved an incidental risk of harm. It was not even possible to say, in any arbitrary manner, that the State which was increasing the number of its rice paddies must pay all the cost of ensuring that malaria did not cross its border. Nevertheless, the State whose people would be exposed to an increased risk of malaria certainly had a right to request the other State to co-operate in achieving the best possible balance between the need to provide enough food and the need to ensure freedom from disease. In that connection, he was conscious that he had rather underestimated the importance of broad community interests and the help to be obtained through international organizations in particular fields. All the support that could be obtained from the international community should be enlisted.

⁵ *Yearbook ... 1969*, vol. II, p. 233, document A/7610/Rev.1, chap. IV, paras. 83-84.

10. To take a somewhat different example, his own country, New Zealand, had some twenty-five or thirty years earlier been threatened by the oriental fruit fly; following negotiations with the United States Department of Agriculture, and with a contribution from New Zealand towards expenses, the necessary measures had been taken in Honolulu to ensure that the fly was not carried to New Zealand in aircraft. That was a small instance of the kind of situation in which co-operation between States might be covered by the draft articles. It was reasonable for a country so threatened to receive co-operation from the source of the problem; it was equally reasonable, in the particular circumstances, for the threatened country also to make a contribution to the cost of remedial action.

11. He felt bound to say that the draft articles would not provide for clear-cut and automatic rights of reparation. But neither would they weaken the protection that could be derived from the rules on wrongfulness; rather, they would introduce a degree of flexibility into those rules and provide for co-operation based on duties. He would, however, invite those who feared that the draft articles might place an enormous burden on the acting State to think again, particularly about the question of attribution. Attribution was the subjective element in State responsibility, which tied the unlawful act to the State that was its author. In his earlier reports, he had cited the "*Alabama*" arbitration⁶ and the *Corfu Channel* case⁷ as illustrations of the kind of obligations incurred by States. In both cases, the question at issue had been the State's knowledge of what happened in its territory and its corresponding duty as exclusive sovereign. It was the knowledge that imported the obligation. Mr. Ago would have said that, in such cases, the critical factor was not the secondary rule, but the extent of the primary obligation. He himself would postulate that it was a primary obligation in which the normal test of foreseeability was extended: States were required not only to have knowledge of what occurred within their territory or under their control, but also to provide safeguards against accidents which would not in themselves be wrongful, but which could be foreseen as a necessary or possible consequence of an activity over which they had control or which took place in their territory.

12. As he had said in his second report (A/CN.4/346 and Add.1 and 2), the extended test of foreseeability would take care of most of the topic, since there were very few situations that caused incidental damage or were likely to do so which could not be foreseen, even though the actual scale and nature of the damage could not necessarily be foreseen. He had even suggested that the question of responsibility for damage that could not be foreseen by the reasonable man—the case of pure accident—should be left aside for the time being. The Sixth Committee of the General Assembly had expressed some impatience at such a cautious approach; the Commission had been told that it should not shrink

⁶ See 1742nd meeting, footnote 6.

⁷ *I.C.J. Reports, 1949*, p. 4.

from situations in which causality should determine the outcome. One representative had suggested that the Commission should carry the duty of care as far as possible,⁸ but his own view was that it would probably be necessary to supplement that concept in the end.

13. Accordingly, the rules set out in his schematic outline did contain an element of causality inasmuch as, if all else failed and loss or injury occurred, the acting State should, in principle, be prepared to consider reparation. That element of causality did not, however, mean that there was any automatic duty of reparation, since there were too many situations in which such a duty would be totally unacceptable. The element of causality thus occupied a fairly small place in the rules, the emphasis being on the duty to avoid, minimize, or make provision in advance for, loss or injury. Only where there had been a lack of will to deal with a harmful situation would the question of applying the rules of section 4, governing reparation, arise.

14. In examining the liabilities that would be placed upon States by virtue of the rules, it had to be remembered that there was nothing in State practice to suggest that the burden would ultimately have to be borne by the State itself. The whole body of growing practice indicated that the State discharged its duty as territorial sovereign, redistributing the burden where it should fall within its own community. Everyone was acquainted with conventional regimes under which liability rested with the operator, there was a channelling of liability, the State might or not be a guarantor and there might be a limit of liability, but under which the State's responsibility was fairly redistributed in advance. That had an element of the internal law analogies which many members had rightly urged upon him, since in certain areas of the common law and, he understood, also of the civil law, the tendency was for the law of torts, or delicts, gradually to lose any penalty aspect and to become a sensible method of setting off future losses, redistributing costs and promoting social justice, with which the Commission was also concerned in the international sense.

15. The reason why such key terms as "activities" and "loss or injury" had been defined in general terms was that the rules were primarily concerned with promoting negotiation; it would serve no purpose arbitrarily to narrow the scope of the factors that might be relevant. But when it came to loss or injury that had actually occurred and to the rules in section 4, a more structured approach was essential.

16. While he agreed that the notion of "shared expectations" had not been adequately defined, he thought it was absolutely essential. For instance, the reservation to the ECE Convention on Long-range Transboundary Air Pollution, to the effect that that Convention did not contain a rule on State liability as to damage,⁹ could be

said to represent a "shared expectation" that would have to be honoured in any negotiations. In the *Trail Smelter* case,¹⁰ it was noteworthy that, at Canada's stipulation, the arbitral tribunal had been required to have regard to the jurisprudence of the United States Supreme Court in cases between States of the Union. That jurisprudence had been made applicable and had supplemented the meagre store of international precedent. Canada had thus found security in the expectation which it had shared with the United States and which the court had applied.

17. The intention of the saving clause in section 1, paragraph 3, of the schematic outline was, of course, that wherever regimes existed under which a balance of interest test was applied by agreement between the States concerned, the rules contained in the outline would not apply. It was also true that nothing would bring the rules into play except the occurrence of loss or injury.

18. A number of members had questioned whether developing countries were sufficiently well placed to take part in negotiations with more advanced States, either to establish a regime or to settle reparation for loss or injury. That was a difficult question to which he could not give any hard and fast answer; but it was reasonable to suggest that a convention with the necessary supporting material would be useful, since a State could rely on it as an indication of how similar matters had been settled in the past. A set of rules and principles would make for some degree of international solidarity, and international organizations could play their part in helping to maintain standards and to ensure that the interests of certain countries were not at odds with those of the international community as a whole.

19. On the question of scope, he agreed that the definition of the "affected State" could be spelt out and related to the definition of "territory or control". The latter definition merely followed the normal boundary line between matters that were regarded as territorial or quasi-territorial and matters that were at large. He had suggested that the topic should not include situations in which the origin of the harm and the victim of the harm were located in the same territory, with the sole exceptions of a ship in innocent passage and an aircraft in authorized overflight. In his view, those two exceptions fell notionally outside the territory and therefore within the scope of the draft articles, since there were two sovereignties, neither of which was subordinate. Fishing zones raised a similar problem. Applying the ordinary rules, he considered that fishing in the economic zone of a coastal State would involve a quasi-territorial situation and so would fall outside the scope of the rules: the passage of a ship of a foreign State through an economic zone would, however, have international transboundary implications. He was fully aware that ships and aircraft posed special problems and that in matters concerning their regulation the control of the coastal State was often much diminished. But there was

⁸ *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 45th meeting, para. 72* (United States of America).

⁹ Article 8 of the Convention, subpara. (f), footnote 1 (see 1743rd meeting, footnote 7).

¹⁰ See 1739th meeting, footnote 7.

nothing about them that added to the variety of matters which might arise within the limits of the draft articles and there was no respect in which he had felt entitled to depart from his standing instruction to develop principles of absolute generality.

20. Another question raised had concerned the physical use of the environment and the extent to which the draft articles would be applicable in other areas. In his view, it was abundantly clear that the rules would apply only within a framework in which they achieved real meaning. It was possible that in the economic field there were no inchoate norms that might permit a balance-of-interest test to be applied. Certainly, the practice on which his reports were based arose in the field of the physical use of the environment. The materials thus developed would not be easily translatable to other areas, but certain members of the General Assembly had requested that the Commission should not arbitrarily foreclose such use, since the rules might serve as examples for other developing fields of international law. It was possible that the point might be reached in economic affairs at which certain broad norms were evolved, and the same kind of rules that the Commission was now engaged in articulating would then be needed to make any balance-of-interest test work.

21. There were two choices in the matter of scope. Either the scope could be arbitrarily foreclosed before the materials were examined—a possibility already rejected by the General Assembly and the Commission—or the Commission could simply rely on the materials themselves. The Commission's work on the topic would henceforth be governed by the materials, which would be drawn almost entirely from what could broadly be termed the physical use of the human environment, although the Commission's attention would be drawn to anything else of interest that was discovered. The very nature of the practice on which the Commission had to rely would determine the immediate applicability of any rules adopted. Its duty to Governments, in his view, was simply to approach its work honestly, to assess the materials to see where they supported the rules, and to promote the idea of a law of co-operation.

22. Lastly, in reply to a question put by Mr. Malek, he drew an analogy with civil liberties within a country, where certain prohibitory rules were drawn up out of a sense of law and order at a given time and in a given society. Subject to those rules, individuals had freedom of action, provided they did not trample unduly on the freedom of others. He agreed that there would always be activities that could not be unlawful, even though they had a potential for harm; and in his view there would always be fresh applications for a set of rules of the kind being drafted. He trusted that, ultimately, there would be no grounds for asserting, at least in regard to the physical use of the environment, that the means for reconciling conflicting interests were non-existent.

23. Mr. USHAKOV said he was still convinced that the subject under consideration was entirely artificial. It was obvious that there was no obligation to make reparation for injury caused by acts not prohibited by international law—except, of course, if so agreed by the author of the act, in which case only a secondary obligation would arise. A comparison had been made with the Convention on the Law of the Sea, which contained a provision to the effect that States must not damage the marine environment,¹¹ but that was a primary rule, even though for the time being it was far too general and difficult to apply, and a breach of that rule would entail the responsibility of the State committing it. That, however, was the topic with which Mr. Riphagen was concerned.

24. To continue consideration of the topic would not enhance the Commission's prestige. Instead, it should inform the General Assembly that there was no general rule of customary international law on international liability for injurious consequences arising out of acts not prohibited by international law.

25. Mr. THIAM pointed out that, from the beginning, some members of the Commission, including himself, had asked Mr. Ago not to make too sharp a distinction between responsibility for wrongful acts and liability for acts not prohibited by international law; Mr. Ago had considered, however, that the subject was far too big to be dealt with in that way, though he had not said that there was a watertight division between the two kinds of responsibility.

26. In his third report (A/CN.4/360), the Special Rapporteur had tried to find new ground, because the position he had previously taken was difficult, and he had dealt mainly with prevention. He (Mr. Thiam) was not opposed to the study of preventive measures, but they had no connection with the topic as its title was worded. The Commission could, of course, draw up, perhaps in the form of a model convention, a code of conduct to be followed in order to prevent injurious consequences of acts not prohibited by international law. But then it would not be dealing with the topic as such, namely, injurious consequences, since it would only be concerned with the stage at which harmful consequences had not yet occurred. If it was to deal with liability for injury caused by acts that were not wrongful, it would have to determine the injurious consequences and, hence concern itself mainly with the question of reparation; and that, precisely, was Mr. Riphagen's subject. But if it wished to deal with prevention, it should adopt a different approach and, in any event, state its intention unambiguously.

27. Mr. DÍAZ GONZÁLEZ said that, despite his imaginative efforts, the Special Rapporteur had not been able to convince him that the topic under consideration was viable. As Mr. Ushakov had rightly said, the Commission should at least report the doubts expressed to the General Assembly.

¹¹ Art. 192 of the Convention (see 1699th meeting, footnote 7).

28. Sir Ian SINCLAIR said that he approached the topic as one on which the Commission need not necessarily consider itself bound to propose rules for adoption in an international convention. A new kind of approach should be worked out; perhaps the Commission could prepare guidelines for recommendation to the General Assembly covering prevention as well as reparation. The Chairman (1742nd meeting) had indicated a similar approach when he had spoken as a member of the Commission.
29. The topic was a difficult one in all conscience, and there might indeed be some disagreement as to the extent to which it could be separated from the law of State responsibility as such. He believed, however, that the Special Rapporteur would agree that the object was not to provide a complete set of cut and dried rules, but to propose guidelines that would operate both in the sphere of prevention and in that of reparation for loss or injury which had actually occurred.
30. Mr. KOROMA said that he would have agreed with Mr. Ushakov that the topic under consideration was artificial if it was concerned with activities. The law was concerned with acts, however, not with activities; whenever an accident occurred, there was a need for reparation. The Commission was attempting to work out guidelines for such liability and reparation, but they need not take the form of a convention or a strict regime.
31. Mr. SUCHARITKUL said that, as he had pointed out at the beginning of the debate (1735th meeting), the question of liability must cover not only remedial measures, but also prevention of injury. In connection with accidents that had occurred in the Malacca Strait to which he had referred earlier (*ibid.*), the riparian States, including Japan, had been active in devising preventive measures.
32. Mr. BARBOZA said that he too had had doubts from the outset about the viability of the topic under consideration. Like Mr. Thiam, he thought that, in terms of strict liability, the Special Rapporteur had not managed to assemble many elements, and the schematic outline submitted—although it had received unanimous praise—could only strengthen the doubts expressed. He thought the Commission should take a decision on the way in which it intended to deal with the topic and inform the General Assembly accordingly. It could either adopt the course indicated by Sir Ian Sinclair or prepare a kind of framework agreement, as Mr. Reuter had suggested (1742nd meeting).
33. Mr. McCAFFREY said that none of the remarks made at the meeting in progress were being made for the first time, nor did they contradict the Special Rapporteur's summing up. He associated himself with Sir Ian Sinclair's view that it would be premature to attempt to define the nature of the end-product of the topic under consideration. Although he himself had said (1743rd meeting) that the final product could take the form of guidelines, he agreed that it was too soon for the Commission to commit itself.
34. Mr. FRANCIS remarked that, having been closely associated with the work of the United Nations system since 1963, he was sensitive to the response of the General Assembly to action taken by the Commission. On the question whether guidelines or rules were to be prepared, he thought it would be premature to debate the ultimate outcome of the work. Any determination by the Commission as to how it would proceed should come after the Sixth Committee had had an opportunity to examine the Special Rapporteur's third report. In any event, he did not see how the work on which the Commission was now engaged could be avoided.
35. Mr. DÍAZ GONZÁLEZ said he had been convinced, both by the Special Rapporteur's presentation and by the general debate that had followed it, that the topic was not viable. It was quite clear that, after having examined three successive reports, the Commission still did not know what the topic included; and even the schematic outline submitted by the Special Rapporteur was based on a number of highly questionable and not very convincing concepts, such as that of "shared expectations", and lacked a reasoned foundation for liability.
36. As Mr. Barboza had said, the Commission should therefore inform the General Assembly of the progress of its work, so that the Assembly could take a decision. The Commission could perhaps consider adopting Mr. Reuter's suggestion and prepare a framework agreement containing general recommendations for States, which would conclude bilateral and multilateral agreements on that basis.
37. Mr. THIAM, referring to Mr. McCaffrey's remarks, observed that the arguments put forward by those who had doubts about the viability and substance of the topic were certainly not new. Some members of the Commission had expressed doubts when the first report had been considered, and he had himself done so at the previous session. The Commission had been exploring the subject for three years without making any progress, and it was high time to take a decision.
38. Mr. CALERO RODRIGUES said he shared the view that the Commission was not in a position to take a final decision on the difficult topic under study. Like Mr. Thiam, he considered the topic before the Commission to be that of liability for damage; but the Special Rapporteur had, from the very beginning, placed the emphasis on prevention. He himself had believed that it would be difficult to accommodate those two concepts; but in his third report the Special Rapporteur had submitted a plan by which that could perhaps be done.
39. Despite the doubts of many members concerning the topic, the schematic outline did represent progress, and if the Commission reported its results to the General Assembly they would show that it had found some grounds on which to proceed. It might later be found impossible to draft satisfactory provisions, either on prevention or even on reparation. In that case, as he

himself had said in the Sixth Committee,¹² the Commission should not hesitate to end consideration of the topic. At the present stage, however, in light of the progress made, it would be premature to say that the topic did not deserve further study. The Commission should indicate that it had doubts about the final result of its efforts, but should ask the Special Rapporteur to continue exploring the possibility of making a presentation to the General Assembly based on his schematic outline.

40. Mr. LACLETA MUÑOZ said he substantially endorsed the comments made by Mr. Calero Rodrigues. He reiterated his view that the subject-matter did exist, and the Commission should make a determined effort before concluding that it did not. The substance of the topic lay mainly in section 7 of the schematic outline; perhaps what was involved was not international liability arising out of lawful acts, but international liability arising out of lawful acts that caused harm. For his part, he considered that the Special Rapporteur should continue his efforts without prejudice, for the time being, to the form the draft would finally take—a convention or a code of conduct.

41. The CHAIRMAN, speaking as a member of the Commission, said that the views expressed by Mr. Calero Rodrigues were very close to his own. In his explorations, the Special Rapporteur had not come up with “dry holes”; he had really found something. Furthermore, the Sixth Committee itself seemed to be very interested in the work done so far. Nevertheless, it could legitimately be held that the Commission should not go any further because Governments would never agree to liability in any of the numerous areas explored. If that was the Commission’s opinion, it should be frankly expressed. In his opinion, Governments had already accepted and would accept more responsibilities, but the Commission did not seem to be dealing with a group of fixed primary rules concerning State liability for all sorts of activities. Nor did he think that draft articles should be prepared on a particular activity, which would be subjected to prohibitions in future years.

42. It could also be held that the Commission should go no further because its task was to prepare draft articles that could form conventions; if it was not sure of being able to elaborate such a draft on a certain subject, it should abandon the study of that subject. That was not his own opinion; he believed those views would lead the Commission to give up the study of several subjects. Moreover, if the General Assembly had shown some interest in the work on the subject under examination, that was precisely because it often produced texts which did not contain real legal rules, but only indications, directives or standards. Perhaps those members of the Commission who maintained that it was always necessary to draft articles that could serve as the basis for a convention would, unfortunately, no longer hold that opinion when the Commission prepared articles on responsibility for crimes.

43. The report under examination (A/CN.4/360) was extremely valuable and deserved more thorough discussion. Since he had not had time to examine it in detail, he intended to submit written comments to the Special Rapporteur.

44. Speaking as Chairman, he observed that the discussion had dealt mainly with three questions: the content of the Commission’s report to the General Assembly, the wording of the topic, and the instructions to be given to the Special Rapporteur. With regard to the content of the report, it was essential to give a faithful account of the opinions expressed in the Commission. The members did not really differ very widely in their views. The Commission was in the position of an oil prospecting company which had discovered a small deposit, but did not quite know what to do with it. Perhaps it was dealing with a non-marketable product and would say that it could not draft a convention, or guidelines, or even a framework agreement. He was not sure the Commission would solve the problem, but neither was he sure that it would not. It remained to be seen whether the Commission intended to convey its doubts to the General Assembly and inform it that in spite of disagreements the Commission believed that it was worth continuing the work, in the hope of arriving at a clearer position the following year. With regard to the wording of the topic, he agreed with Mr. Thiam that the situation should be put frankly to the General Assembly. Perhaps the present wording was awkward and should be slightly broadened. On the instructions to be given to the Special Rapporteur, he suggested that, faced with a subject needing fuller consideration, each member of the Commission should answer in writing the questions raised by the excellent schematic outline drawn up by the Special Rapporteur. On the basis of those answers, the Special Rapporteur should be able to pronounce on the direction the Commission’s work should take.

45. Mr. USHAKOV said he wished to emphasize that the Special Rapporteur was not responsible for the situation in which the Commission was placed and that, on the contrary, he should be commended for his meritorious efforts.

46. The CHAIRMAN said that Mr. Ushakov had expressed the unanimous feeling of the Commission. As a member he believed that the Commission should take a small risk: that of ending up with a result that did not satisfy it.

47. Mr. FRANCIS said that, according to his understanding, the Chairman had suggested that members should convey to the Special Rapporteur in writing their thoughts on how he should proceed. There was nothing wrong with that suggestion in principle, but he believed the content and range of the discussions had provided the Special Rapporteur with the necessary guidance. The Commission should not depart from its traditional practice; the Special Rapporteur should continue his work on the basis of his response to the debates, taking the General Assembly’s attitude into account.

¹² *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 43rd meeting, para. 34.*

48. The CHAIRMAN said that the members of the Commission were free not to submit written comments to the Special Rapporteur, but that it would be desirable for those who had not sufficiently expressed their views to do so.

49. Mr. DÍAZ GONZÁLEZ said he had nothing against the suggestion that written comments should be submitted to the Special Rapporteur, but pointed out that it was for the Commission, not the Special Rapporteur to make a decision on whether to continue the work. The Commission's report to the General Assembly must in no way allow the seriousness of the Commission to be called in question. It was absolutely essential to present the situation as it appeared from the debates. Several members of the Commission believed that its lucubrations could continue, but others thought they must be ended now that three reports had been examined. It was clear from the schematic outline that the subject did not have a solid foundation. Reverting to the example of the oil company, he said the Commission was most unlikely to find a large deposit. Hence it was important for the General Assembly to have a clear view of the situation, so that it could decide what the Commission was to do.

50. The CHAIRMAN noted that the report should indicate that some members of the Commission believed that further work on the topic could not lead to positive results.

51. Sir Ian SINCLAIR said it was clear that the report would have to indicate that views in the Commission were divided as to the future pursuit of the topic. In the Sixth Committee, he had expressed scepticism concerning the nature and value of the product which might emerge,¹³ but at the current session, after careful study of the Special Rapporteur's three reports, he had come to a conclusion similar to that of the Chairman. The topic did contain something worth pursuing, though it might not yield to the treatment the Commission usually applied to the drafting of articles for eventual incorporation in an international convention. The Commission had a duty, not only to itself, but also to the international community, not to be constrained by past practice into thinking that no other solution existed. He believed there would be injurious consequences for the Commission's reputation in the Sixth Committee and perhaps in the international community as a whole if it concluded at that stage that there was nothing in the present topic to which its work could make a useful contribution.

52. Mr. BARBOZA also believed that the Commission should confine itself to indicating that divergent opinions had been expressed on the viability of the topic, and that the report should faithfully reflect the position of each member. It was necessary to dispel the doubts expressed in the Commission. Sooner or later, members would have to reach agreement on what they intended to do. The Commission could not simply

restrict itself to drafting articles, without knowing whether it was to produce a work of codification or of progressive development of international law, or even prepare a practical guide for States.

53. Mr. KOROMA said he would like some clarification of Mr. Ni's reference (1739th meeting) to private law analogies in the elaboration of the topic under consideration. It was not clear to him whether that observation should be understood as meaning that there were no private law analogies or sources, as it were, on which the topic could be constructed.

54. In his opinion, the Commission should continue to explore the topic; if, at an appropriate stage, it concluded that the work should be discontinued, it could do so. For the moment, however, he believed that sufficient sources did exist, both in private law and in international conventions, to justify further exploration.

55. Mr. USHAKOV urged the need for making a decision. Perhaps the Commission could indicate that some members had doubts about the viability of the topic and that it would take a final decision on that question at its next session. Personally, in the light of his long experience of the Commission, he was convinced that the topic was not viable, but perhaps some new members had not yet fully grasped that point.

56. Mr. RIPHAGEN suggested that the Special Rapporteur should be asked to continue his work along the lines indicated in his third report. In his own view, there was no great difference between a convention, a framework convention and recommended practice. It was a question of degree, which could be decided at the last minute. But the Commission should point out that the topic, as worded by the General Assembly in terms of reparation for injurious consequences, was not one with which it could deal. The Commission could consider the topic only within the framework of a system of prevention and negotiating procedures.

57. The CHAIRMAN said that the Commission now had a complete picture of the situation and would no doubt be able to reproduce it faithfully in its report. It was because their hope factors were not the same that the members of the Commission had different positions.

The meeting rose at 6.05 p.m.

1745TH MEETING

Wednesday, 14 July 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Co-operation with other bodies (concluded)* [Agenda item 11]

¹³ *Ibid.*, 40th meeting, para. 9.

* Resumed from the 1726th meeting.

COMMUNICATION FROM THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN announced that a communication had been received from the Asian-African Legal Consultative Committee expressing the Committee's regret at having been unable to send a representative to the session as was customary, as well as its wish to maintain very close contact with the Commission and follow up the results of its work at an early date.

Organization of work (concluded)*

MEMBERSHIP OF THE PLANNING GROUP (concluded)*

2. The CHAIRMAN reminded the Commission that the Planning Group set up at the 1706th meeting consisted of Mr. Díaz González (Chairman), Mr. Castañeda, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam and Mr. Ushakov. All members of the Commission were cordially invited to join in the Group's work.

APPOINTMENT OF SPECIAL RAPPORTEURS (concluded)**

3. The CHAIRMAN invited the Commission to take a formal decision on two appointments which it had decided on privately.

4. He said that, if there were no objections, he would take it that the Commission approved the appointments of Mr. Evensen as Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses and of Mr. Thiam as Special Rapporteur on the topic of the draft Code of Offences against the Peace and Security of Mankind; the appointment of a Special Rapporteur on the latter topic would be in response to paragraphs 1 and 2 of General Assembly resolution 36/106.

It was so decided.

5. The CHAIRMAN said that neither the Special Rapporteur nor the Commission thought it necessary that a working group should be set up at present to study the first topic. However, the Special Rapporteur might make some recommendations on the subject later. In regard to the second topic, it was agreed that a working group should be set up straight away and meet as Mr. Thiam thought best. The group would consist of: Mr. Thiam (Chairman), Mr. Balanda, Mr. Boutros Ghali, Mr. Evensen, Mr. Francis, Mr. Illueca, Mr. Mahiou, Mr. Malek, Mr. Njenga, Mr. Ogiso, Mr. Pirezada, Mr. Riphagen and Mr. Yankov.

6. If there were no objections, he would take it that the Commission approved those arrangements.

It was so decided.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/347 and Add.1 and 2,¹ A/CN.4/359 and Add.1, A/CN.4/L.339, ILC(XXIV)/Conf. Room Doc. 4)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 14

7. The CHAIRMAN invited the Special Rapporteur to introduce his third report, which contained draft articles 1 to 14 (A/CN.4/359 and Add.1, paras. 19, 20, 42, 56, 79, 96, 103, 111, 114 and 128), which read as follows:

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags, as well as consular couriers and bags, couriers and bags of the special missions, permanent missions or delegations.

Article 2. Couriers and bags not within the scope of the present articles

1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.

Article 3. Use of Terms

1. For the purpose of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending State entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic missions, consular posts, special missions, permanent missions or delegations of the sending State, wherever situated;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea;

(4) "sending State" means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated;

* Resumed from the 1706th meeting.

** Resumed from the 1699th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

(5) "receiving State" means a State on whose territory:

(a) diplomatic missions, consular posts, special missions or permanent missions are situated; or

(b) a meeting of an organ of an international organization or an international conference is held;

(6) "transit State" means a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

(7) "diplomatic mission" means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(8) "consular post" means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(9) "special mission" means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter, for the purpose of dealing with it on specific questions or performing a special task in relation to it;

(10) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(11) "delegation" means the delegation sent by a State to participate on its behalf in the proceedings of either an organ of an international organization or an international conference;

(12) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag" may also apply to consular courier and consular courier *ad hoc*, to couriers and couriers *ad hoc* of special missions, permanent missions or delegations, as well as to the consular bag and the bags of special missions, permanent missions or delegations of the sending State.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in other international instruments or the internal law of any State.

Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags

The receiving State shall permit and protect on its territory free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts, special missions, permanent missions or delegations as well as between those missions, consular posts and delegations, wherever situated, as provided for in article 1.

Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State

1. Without prejudice to the facilities, privileges and immunities accorded to a diplomatic courier, it is the duty of the sending State and its diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

2. The diplomatic courier also has a duty, in the discharge of his functions, not to interfere in the internal affairs of the receiving State and the transit State.

3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations of 1961 or by other rules of international law or by any special agreements in force between the sending State and the receiving State or the transit State.

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

PART II

STATUS OF THE DIPLOMATIC COURIER, THE DIPLOMATIC COURIER *AD HOC* AND THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A SHIP CARRYING A DIPLOMATIC BAG

Article 7. Proof of status

The diplomatic courier shall be provided, in addition to his passport, with an official document indicating his status and the number of packages constituting the diplomatic bag as accompanied by him.

Article 8. Appointment of a diplomatic courier

Subject to the provisions of articles 9, 10 and 11, diplomatic couriers and diplomatic couriers *ad hoc* are freely appointed by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations, and are admitted to perform their functions on the territory of the receiving State or the transit State.

Article 9. Appointment of the same person by two or more States as a diplomatic courier

Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*.

Article 10. Nationality of the diplomatic courier

1. The diplomatic courier should, in principle, have the nationality of the sending State.

2. Diplomatic couriers may not be appointed from among the persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right under paragraph 2 with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9.

Article 11. Functions of the diplomatic courier

The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated.

Article 12. Commencement of the functions of the diplomatic courier

The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first.

Article 13. End of the function of the diplomatic courier

The function of a diplomatic courier comes to an end, *inter alia*, upon:

- (a) the completion of his task to deliver the diplomatic bag to its final destination;
- (b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;
- (c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;
- (d) the event of the death of the diplomatic courier.

Article 14 Persons declared non grata or not acceptable

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State.

8. Mr. YANKOV (Special Rapporteur), introducing his third report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/359 and Add.1), said it was a happy coincidence that he was presenting it on the very day commemorating the French Revolution of 1789, which had deeply influenced all aspects of social, political and cultural life as well as international relations and diplomatic law.

9. His third report had three main purposes: first, to ensure continuity in the consideration of the topic, bearing in mind the Commission's enlarged membership, secondly, to revise the texts of draft articles 1 to 6 in the light of the valuable suggestions made in the Commission and in the Sixth Committee of the General Assembly; and, thirdly, to examine the issues dealt with in chapter II of the report with a view to proposing further draft articles on the status of the diplomatic courier and his official functions.

10. Work on the topic had been greatly facilitated by the early consideration of the comprehensive list of issues set forth in the preliminary report² and by the Commission's subsequent examination and tentative approval of the structure of the draft, which consisted of four main parts. Part I (General provisions) dealt with the scope of the draft articles, definitions, and general principles of diplomatic law such as freedom of communication for all official purposes, the duty to respect international law and the laws and regulations of the receiving and transit States, and non-discrimination and reciprocity. Part II (Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag) would contain provisions on the status of the courier, his functions, rights and obligations and the facilities, privileges and immunities ac-

corded to him by the receiving and transit States. Part III would deal with the status of the diplomatic bag, including the bag not accompanied by a diplomatic courier. Finally, Part IV would contain other provisions including those relating to the obligations of transit and third States, the relationship of the draft articles to existing multilateral conventions in the field of diplomatic law, and final provisions.

11. Throughout his work on the topic, he had remained aware of its practical character and of the need to approach it empirically. However, it would be wrong because of that to exercise undue restraint in seeking solutions for certain issues which had not been settled adequately by existing rules of law and in attempting to elaborate new rules. As he understood it, the elaboration of a comprehensive set of rules on the status of the diplomatic courier and the diplomatic bag called for a close examination of State practice and an endeavour to meet the needs of the dynamic developments which had taken place in the field of diplomatic communications. He had been encouraged in that understanding by the comments and advice of members.

12. With regard to part I of the draft articles, article 1 continued to be comprehensive in its approach to the question of the scope of the draft. It did not use the global notions of "official courier" and "official bag" which he had suggested in his preliminary report³ but employed instead the wording of an assimilation formula based on the status of the diplomatic courier as defined in the 1961 Vienna Convention on Diplomatic Relations, with adjustments where appropriate. Such a formula had been discussed in his second report (A/CN.4/347 and Add.1 and 2, paras. 42-47), and the revised version of the article continued to exemplify it. The revision of article 1 was twofold. First, the reference to communications between the sending State and other States or international organizations had been deleted. Although there were exceptional cases where, because the sending State had no mission in the receiving State, a courier might deliver an official message from the former State to the latter or to an international organization directly, the Sixth Committee had regarded the provision for such cases in the draft articles as "an undue extension of the concept of diplomatic courier and diplomatic bag" (A/CN.4/L.339, para. 192) and a deviation from the traditional field of communications between States and their missions abroad or between those missions. The second change he had made in the original draft article 1 (A/CN.4/347 and Add.1 and 2, para. 49) was to combine the two paragraphs into one, thus making the text more concise.

13. Draft article 2 was unchanged and continued to provide that the draft articles should not apply to couriers and bags of international organizations; that had been the prevailing view. Some, however, had not agreed that couriers and bags used by international organizations and by certain other entities recognized as

² Reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 244, document A/CN.4/335, para. 60.

³ *Ibid.*, p. 245, para. 62.

subjects of international law, such as national liberation movements, should be excluded from the scope of the draft articles. While he appreciated that view, he thought it best that couriers and bags other than those used by States should be left aside for the time being, so that the Commission could concentrate its attention on the most common type of couriers and bags. It need not, however, lose sight of those used by international organizations, since paragraph 2 of the article safeguarded their legal status. If necessary the Commission could consider that point at a later stage of the work, when the relevant materials would be available.

14. Draft article 3 related to use of terms. A substantial part of the second report (*ibid.*, paras. 50-210) had been devoted to an examination of the various problems which they raised. There had been two broad criticisms, in the Commission and the Sixth Committee, of the article 3 he had originally proposed (*ibid.*, para. 211): first, that the definitions were unnecessarily detailed, and secondly, that the list of definitions was too long. He had given both criticisms very serious consideration and realized that they were indeed justified. The revised version of the article therefore omitted the references to the facilities, privileges and immunities accorded to diplomatic couriers and bags. That left a purely functional definition of couriers and bags. The other elements of the status of the diplomatic courier and bag would be considered in connection with the relevant substantive provisions of the draft.

15. The notion of an "official oral message" which he had included in the original definition of the term "diplomatic courier" (*ibid.*, para. 121) had been recognized by certain States and mentioned in the first report of the Working Group on the topic (see A/CN.4/359 and Add.1, para. 30). However, in view of the doubts expressed on the subject in the Sixth Committee, and in order to avoid possible confusion between a diplomatic courier and a diplomatic envoy, he had decided to delete the notion. In addition, he had deleted the words "and with whose consent" from the definition of the term "transit State", once again in order to meet criticism expressed in the Sixth Committee. Those words were not really necessary in a definition and could appear elsewhere in the draft.

16. In view of the observations on the length of his original list of definitions, the revised version of the article omitted definitions of terms that were either self-explanatory or whose meaning was well established in international law and State practice, as well as terms not yet used in the draft. The extent of the list could be reconsidered as and when the need arose or when the draft articles had been completed. The revised text of the draft article had twelve definitions. Paragraphs 2 and 3 of the draft contained safeguard provisions and were unchanged.

17. Draft articles 4, 5 and 6 laid down the three general principles of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags, duty to respect international law

and the laws and regulations of the receiving and the transit State, and non-discrimination and reciprocity with regard to the treatment of diplomatic couriers and diplomatic bags. The formulation of certain general principles of international diplomatic law had been suggested in his preliminary and second reports and had been generally endorsed in the discussions on the topic in the Commission and the Sixth Committee, on the ground that even their tentative enunciation might serve as a useful guide to the legal framework on which the rules on the status of the diplomatic courier and diplomatic bag were based.

18. The three principles should be considered as a balanced set of reciprocal rights and obligations of sending, receiving and transit States and, exceptionally, of third States. As he had pointed out in this third report (*ibid.*, para. 45), diplomatic law as a system of legal rules was based on sovereign equality of States and operated predominantly through reciprocity, since every State could be both a sending and a receiving State. The question of freedom of diplomatic communication and the reciprocity which it involved had been discussed quite extensively in his second and third reports. He simply wished to add that the two matters must be considered together and not in isolation one from the other. Paragraph 1 of draft article 4 had been revised to incorporate some minor editorial changes which brought the paragraph into line with the revised draft article 1. Draft article 5 had been redrafted to provide that it was the duty not only of the courier but also of the sending State itself to respect international law and the laws and regulations of the receiving and transit States.

19. Among the points raised during the debates in the Commission and in the Sixth Committee on the general principles embodied in draft articles 4 to 6 had been the question whether the inviolability of the diplomatic bag should be absolute, as provided for *inter alia* in article 27 of the 1961 Vienna Convention on Diplomatic Relations, or relative, as provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. He had been struck to discover, on examining some hundred bilateral treaties concluded since 1963, that even those States that had ratified the latter Convention preferred for the most part to incorporate in those treaties something similar to the rule on inviolability embodied in article 27 of the 1961 Convention, rather than the one laid down in article 35, paragraph 3, of the 1963 Convention. It seemed clear to him, therefore, that the trend was toward absolute inviolability. The matter should not be regarded as closed, however, and could perhaps be considered more appropriately in connection with the substantive provisions on the status of the bag.

20. Turning to part II of the draft, with particular reference to the proposed articles 7 to 14, he said that the third report discussed the status of the courier *stricto sensu*, in regard to matters such as proof of status, appointment of the courier, his nationality and functions, as well as *lato sensu*, in respect of the courier's rights and obligations, including his privileges and im-

munities. The main question with regard to proof of the courier's status was the requirement of an identifying document or credentials. The term "courier's passport" had always caused confusion. In some cases it was used solely in the sense of a travel document, but in many others, in that of a special or official document which indicated the status of the courier and the number of packages that constituted the diplomatic bag. He had examined the matter in detail, and on that basis he proposed, in draft article 7, that the courier should be required to carry a passport, like all other travellers—it could be a diplomatic, service or ordinary passport—and also an official document stating that the bearer was a diplomatic courier. That document might possibly indicate the destination of the bag and, as required under the four multilateral conventions on diplomatic law, the number of packages of which it consisted.

21. Draft article 8 dealt with an essential element in the legal status of the courier, namely, his appointment. That was an act of the competent authorities of the sending State or of its mission abroad, and was freely exercised at its discretion; it therefore fell within the internal jurisdiction of the sending State. The act of appointment defined the category of the courier—professional or *ad hoc*. The designation of a diplomatic courier *ad hoc* differed from the act of appointment of a professional courier. Although the appointment of a courier was primarily a matter of the internal law of the sending State, it might have international implications; for instance, where a courier was refused a visa on the ground that he was not acceptable. Draft article 8 had accordingly been worded to reflect both the internal-law nature of the act of appointment and the need to take the possible international implications into account.

22. Draft article 9 dealt with the appointment of the same person as a courier by two or more States. That practice had been introduced on grounds of economy by neighbouring States, States in the same region or States that enjoyed a special relationship, particularly where long journeys by the courier were involved. Draft article 9 had been designed to reflect the practice and was based on article 6 of the 1961 Vienna Convention and article 18 of the 1963 Vienna Convention. The modalities of such a joint appointment needed to be spelt out. The courier's passport should be issued by one of the States concerned; his official document might either be issued jointly or consist of separate documents issued by the individual sending States. A joint courier should in principle be a national of one of the States concerned.

23. Draft article 10 dealt with the related question of nationality. It was based on State practice, supported by article 35, paragraph 5, of the 1963 Vienna Convention. The nationality of diplomatic agents had been a problem which dated back to the latter part of the nineteenth century. It was now the general rule that admission to a country's diplomatic service was confined to persons of that country's nationality. He concluded that the same rule applied to professional couriers, on the

ground of the need to avoid a conflict of duties. When preparing the drafts of the diplomatic conventions, the Commission had not considered the question of the nationality of the courier. However, article 8 of the 1961 Convention had provided that members of the diplomatic staff of the mission should in principle be nationals of the sending State, but might exceptionally be nationals of the receiving State, although only with the consent of that State, which could be withdrawn at any time. Article 38 of that Convention had provided, in paragraph 1, that the latter kind of diplomatic agent "shall enjoy only immunity from jurisdiction and inviolability, in respect of official acts performed in the exercise of his functions". Subsequently article 35, paragraph 5, of the 1963 Vienna Convention had provided that, save with the consent of the receiving State, a consular courier should be neither a national of the receiving State nor, unless he was a national of the sending State, a permanent resident of the receiving State. That paved the way for the proposed article 10, which allowed for an exception to the general rule on practical grounds.

24. The last part of the third report concerned the scope, content and duration of the functions of the diplomatic courier, including the declaration of a diplomatic courier as *persona non grata*, or not acceptable. The significance of those matters in defining the status of the courier was obvious. The functions of the courier were instrumental to the exercise by the State of its right to freedom of official communication. As had been pointed out on many occasions, the right of a diplomatic mission to free and secure communication for official purposes was perhaps, in practical terms, the most important of all diplomatic privileges and immunities; without the right to send messages in code and without being able to rely on the inviolability of the diplomatic bag, a mission could not usefully perform its functions of observing, reporting and receiving confidential instructions. The main subject of legal protection was the mission's official correspondence—in other words, the contents of the bag. The courier was the person entrusted with the custody, transport and delivery of the bag; his legal status therefore derived from the status of the bag itself, which was a corollary to the principle of inviolability of the official correspondence of the mission. Modern diplomatic law and practice had adopted that functional need as an explanation and justification for diplomatic privileges and immunities.

25. The determination of the scope and content of the courier's functions also provided the legal criteria for the distinction between functions inherent in the status of the courier and necessary for the accomplishment of his official task, and activities extraneous to those functions. A generally agreed definition of the scope and content of the courier's functions could therefore play an important role in preventing abuse of the inviolability of the diplomatic bag and unjustified recourse to restrictions, including the right to declare a courier *persona non grata*, or not acceptable. It might also provide the legal foundation for the rights and obligations of the

courier, including the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag by the receiving or transit State.

26. Article 27 of the 1961 Vienna Convention on Diplomatic Relations provided some indication of the scope and content of the official functions of the courier, but did not specify all the important elements involved. Briefly, the courier's main function was his care of the bag, which involved its safe transportation, delivery and collection. That function had acquired considerable significance with the growing use of *ad hoc* couriers from both developing and developed countries, and also when the bag was entrusted to the pilot of an aircraft or the captain of a ship. The text proposed as draft article 11 attempted to indicate as concisely as possible the main functions of the diplomatic courier.

27. Draft article 12 dealt with the commencement of those functions, an important moment in regard to determining the beginning of the facilities, privileges and immunities accorded to the courier. From the point of view of the receiving or transit State, the courier's functions commenced at the moment when the courier entered its territory. However, in the case of a diplomatic courier *ad hoc* appointed by a mission to carry an outgoing diplomatic bag from the territory of the State where the mission was accredited, the function of the courier would probably not manifest its legal effect until the courier's exit from the territory of the receiving State.

28. In the Sixth Committee, there had been some discussion as to whether captains of commercial aircraft or ships should have privileges and immunities similar to those accorded to diplomatic couriers. In view of the functional approach that had been adopted to the question of the status of diplomatic couriers, he did not believe that would be justified. The captain of a ship was not supposed to carry the bag outside the ship; authorized mission personnel should have direct access to the ship for the purpose of taking possession of the bag. Parenthetically, he wished to point out that in the present draft articles the word "ship", used in the earlier portion of the recent Convention on the Law of the Sea,⁴ had been preferred to the word "vessel", which was used in parts XII, XIII and XIV of that text. Also, rules were needed about admission to ships and aircraft, and the Commission might help to formulate them. In many instances, national rules and regulations were either non-existent or took the form of a circular issued by the port authority for temporary use. The existence of positive international guidelines on the matter would help to overcome those drawbacks and enhance the proper functioning of diplomatic communications.

29. Reverting to the draft articles, he said that the four codification conventions in the field of diplomatic law adopted under the auspices of the United Nations contained no specific provisions on the end of the courier's functions. A comprehensive, though not exhaustive, set

of rules on that point was needed. Useful analogies could be made with the termination of the function of diplomatic agents, but not without great caution and a detailed scrutiny of the specific issues involved. Article 43 of the 1961 Vienna Convention might be of assistance in that connection. It singled out for specific mention two circumstances in which the function of a diplomatic agent ended: notification by the sending State to the receiving State that the function of the diplomatic agent had come to an end; and notification by the receiving State to the sending State that, a diplomatic agent of the sending State having been declared *persona non grata* or not acceptable and the sending State having failed to recall that agent, the receiving State refused to recognize the agent as a member of the mission. However, as the article itself made clear, those two conditions were not exhaustive, and in fact the Convention contained other provisions that referred implicitly to the termination of functions, for example, in the event of the death of the agent, the severance of diplomatic relations between the sending State and the receiving State, or the permanent or temporary recall of the mission.

30. On the basis of an examination of State practice and having regard to the analogies which could be drawn with the position of diplomatic agents, he suggested that two categories of factors might be considered for the termination of a courier's functions: first, acts of the sending and the receiving or the transit State, such as recall, dismissal or suspension of the courier, non-extension of his visa or declaration of the courier to be *persona non grata* or not acceptable; and secondly, events or facts such as the completion of the courier's function, namely, the delivery to final destination of the bag or bags entrusted to him, or the death of the courier. Article 13 was drafted accordingly.

31. The legal features of the institution of *persona non grata*, or not acceptable, deserved special consideration and were dealt with in paragraphs 124 to 127 of the third report. The rules were laid down in the four multilateral conventions, especially in the 1961 Convention on Diplomatic Relations. There should not be any confusion about the term "not acceptable", which in the Conventions was used both *ratione temporis* and *ratione personae*. In the former sense, it could involve a sequence of events; in the latter, it was usually applied to persons without diplomatic rank, the term *persona non grata* being reserved for persons having diplomatic rank. It was necessary to consider the applicability of the basic rules with regard to diplomatic couriers *ad hoc* as well as professional diplomatic couriers; in either case, the courier might or might not be a diplomatic agent. If he was not—for instance, when he was a member of the mission's technical staff or a member of such a person's family, as an *ad hoc* courier might be—the pertinent factor was his function and the commencement and duration of his functions were very important. All those elements were embodied in draft article 14.

⁴ See 1699th meeting, footnote 7.

32. In conclusion, he expressed his appreciation to the Codification Division for the work they had done in providing materials on the topic. He asked the Secretariat to continue assisting the Special Rapporteur in that respect in the following ways: by updating the collection of treaties and related materials in the field of diplomatic and consular relations in general and of official communications exercised through couriers and bags in particular; by seeking further information from Governments on national laws, regulations, other enactments, procedures, recommended practices, judicial decisions, arbitral awards and diplomatic correspondence in the field of diplomatic law, with particular respect to the treatment of couriers and bags; by preparing a preliminary analytical survey of State practice on the subject, including the *travaux préparatoires* of the four multilateral conventions on diplomatic law elaborated under United Nations auspices and the practice evidenced by bilateral and multilateral treaties and national laws, regulations and procedures, in accordance with the tentative list of issues and the structure of the draft articles proposed by the Special Rapporteur,⁵ and in accordance with the guidelines and draft articles which he intended to submit on part II of the topic, covering the status of the courier, and part III, dealing with the status of the bag; and by updating the information on the status of the above-mentioned four conventions, bearing in mind that, in order to enter into force, the 1969 Convention on Special Missions needed two ratifications, and the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character twelve or thirteen ratifications.

33. The CHAIRMAN thanked the Special Rapporteur for his third report and for the excellent statement he had made in presenting it. Mr. Yankov's broad culture went hand in hand with his constant concern to keep abreast of all aspects of the subject. His great experience was particularly useful in dealing with a topic that involved considerable practical problems. The draft articles would certainly be of great value if they brought to a somewhat uncertain area of the law elements which would promote the observance of the right of communication, which was fundamental for bringing unity to international society.

34. Speaking in his personal capacity, he thanked the Special Rapporteur for his kind reference to the commemoration of the French Revolution. As the Special Rapporteur had rightly indicated, the Revolution had had a significant effect on international law; that was particularly the case in regard to inland navigation and diplomatic privileges and immunities.

35. Mr. FRANCIS said that generally he had no contention with the principles embodied in the fourteen draft articles. In connection with article 3, on use of terms, he wished to stress the importance of the oral message; given the fact that some States made use of that as a means of communication, it might not over-

burden the article to add an extra term, "communication", the definition of which would include an oral message. He saw a contradiction between article 3, paragraph 3, which stated that the provisions of paragraphs 1 and 2 were without prejudice to the use of the terms in question in other international instruments, and article 3, subparagraphs (7) and (8), which defined "diplomatic mission" and "consular post" according to the 1961 and 1963 Vienna Conventions respectively. That could be corrected by defining "diplomatic mission" in subparagraph (7) in general terms that referred to its function, and by using in subparagraph (8) the definition of "consular post" which appeared in the 1963 Vienna Convention, but with the reference to the Convention itself relegated to a footnote.

36. Article 12 should indicate that a courier's functions commenced the moment the bag was entrusted to him, but that in regard to receiving and third States they commenced once he entered the jurisdiction of such a State. He wondered whether the stipulation that the courier should be "crossing the territory" of the transit or receiving State should not be replaced by a reference to jurisdiction. In a case where State A dispatched its bag from State B by State B's national airline, he was not sure that the airline had any responsibility for the bag until the bag left the jurisdiction of State B.

37. Finally, subparagraph (a) of draft article 13 did not cover the situation in which a courier had delivered one bag and was awaiting another. In the case in which a bag had been delivered and no other bag was expected, there should be a provision safeguarding the courier's privileges and immunities until he returned from the receiving State.

The meeting rose at 1 p.m.

1746th MEETING

Thursday, 15 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/347 and Add.1 and 2,¹ A/CN.4/359 and Add.1, A/CN.4/L.339, ILC(XXXIV)/Conf. Room. Doc. 4)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 14² (*continued*)

1. Mr. DÍAZ GONZÁLEZ said he fully agreed with the three principles that underlay the draft articles and

⁵ See footnote 2 above.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1745th meeting, para. 7.

had already been accepted by the Commission. Nevertheless he still had a few doubts about certain points. The Special Rapporteur's explanations (A/CN.4/359 and Add.1, para. 14) had not convinced him of the need to use the terms "official courier" and "official bag" rather than the terms "diplomatic courier" and "diplomatic bag". The contents had to be distinguished from the container: it was the bag, as a container, not its contents, that had a diplomatic character and justified a particular status. Official correspondence between two States that was not transmitted by bag and was thus not of a diplomatic character did not have the same characteristics as the diplomatic bag. Furthermore, the bag was used not only for official correspondence, but also for the private correspondence of members of a mission, particularly in countries which had censorship and in those where postal communications were difficult. The term "official courier" was also incorrect, because a courier was necessarily official but not always diplomatic. Finally, official status depended on the sending State, not on the agreement of the receiving State; an official of a ministry of foreign affairs travelling to another country in his official capacity need not necessarily be doing so in a diplomatic capacity. His official status derived from the fact that he was officially recognized by the Government that sent him.

2. Several of the articles called for minor drafting changes. The definition of the term "diplomatic courier *ad hoc*" (art. 3, subparagraph 1 (2)) as meaning "an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions", did not seem really necessary. A diplomatic courier was always a courier *ad hoc*, since his mission ended once he had performed the functions entrusted to him. The words "for a special occasion or occasions" added nothing to the definition, because a diplomatic courier *ad hoc* was always appointed for one or more special occasions. In the Spanish text of the definition of the term "transit State" (art. 3, subparagraph 1 (6)) the concluding words should be amended to read: "*que deben atravesar para llegar al Estado receptor*". In article 3, paragraph 1, subparagraphs (7) to (12) could be deleted, because the definitions they contained already appeared in multilateral conventions in force and formed part of the vocabulary of diplomatic law.

3. Referring to article 4, paragraph 2, he pointed out that the transit State could facilitate free communication through its territory without necessarily facilitating free passage. He therefore suggested that free passage should be referred to in that provision, which should be amended to read:

"The transit State shall facilitate free passage and free communication through its territory by the diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article".

4. At the end of article 5, paragraph 1, the words "and the transit State" should be replaced by the words "as well as those of the transit State". Similarly, at the end of paragraph 2 of that article the words "and the transit

State" should be amended to read "or in those of the transit State". Article 6 could be simplified. As the Special Rapporteur had indicated (1745th meeting), it was subject to the principle of reciprocity; paragraph 2 could therefore be amended to read: "However, the provisions of paragraph 1 shall be subject to the principle of reciprocity". Subparagraph 2 (a) could then be deleted, and the words "Discrimination shall not be regarded as taking place ..." could be added at the beginning of what was now subparagraph (b).

5. The Special Rapporteur was right in believing that there was a general trend towards recognition of the absolute nature of the principle of the inviolability of the diplomatic bag. It should be pointed out, however, that that principle was relative, in the sense that modern technical devices, such as certain types of X-rays, made it possible to inspect a bag without jeopardizing its inviolability.

6. In the Spanish text of article 7, it would be better to refer to the number of "*bultos*" or "*piezas*", rather than to the number of "*paquetes*" constituting the diplomatic bag, since the word "*paquetes*" did not apply, for example, to letters, which the bag might contain. The word "*bultos*" had, moreover, been used in several international conventions and agreements.

7. As the Special Rapporteur had pointed out (*ibid.*), the question of the appointment of a diplomatic courier did not come under international law; it was a prerogative of the sending State. Article 8, which related to that question, could be simplified. In the Spanish version, the word "*serán*" should be replaced by the word "*son*". The phrase beginning with the words "and are admitted ..." could be deleted, since the functions of the diplomatic courier were specified in other articles.

8. With regard to the nationality of the diplomatic courier (article 10), it was obvious that each State would follow its own laws and practice. Under the Constitution of Venezuela, no privileges or immunities could be granted to a Venezuelan national, so that a Venezuelan could not be a diplomatic courier of a foreign country. As the Special Rapporteur had pointed out (A/CN.4/359 and Add.1, para. 102), agreements concluded by States played an important part in the matter.

9. For the sake of accuracy, the words "to its destination", in article 11, should be replaced by the words "to its recipient", because a diplomatic courier who only delivered the diplomatic bag to its destination, without delivering it to its recipient, would not have performed his functions.

10. In article 12, the words "depending upon which of these events occurs first" did not appear to be necessary, since the functions of the diplomatic courier began as soon as he entered the territory of the receiving State or that of the transit State, no matter which he entered first. Lastly, in the Spanish text of article 13 and the commentary thereto, the word "*cesación*" should be replaced by the word "*cese*".

11. Mr. STAVROPOULOS, referring to draft article 13, suggested that subparagraph (d) should be deleted. In the event of the death of a diplomatic courier, it was sufficiently obvious that his functions came to an end.

12. Mr. Ni stressed the practical importance of the status of the diplomatic courier and the diplomatic bag. The four major multilateral conventions on diplomatic law, which were, without any doubt, the Commission's main contribution to the codification and progressive development of international law, contained some provisions on the status of the diplomatic courier and the diplomatic bag, but those provisions needed to be supplemented. It should be noted, however, that the frequent violations of diplomatic privileges and immunities were due not so much to a lack of relevant provisions as to the lack of political will to respect those privileges and immunities.

13. As to the relationship between the draft articles in preparation and the four existing conventions, he thought the Commission should only reaffirm the principles embodied in those conventions, without expanding them. The Special Rapporteur had already proposed a plan³ and shown concern to strike a balance between the interests of the receiving State, which the diplomatic bag should reach as rapidly as possible, and those of the sending State, which required safe, unhindered and rapid delivery of the bag.

14. The Commission should not only reaffirm the major principles enunciated in the multilateral conventions on diplomatic law, namely, freedom of communication for all official purposes, observance of the laws and regulations of the receiving State and the transit State, and non-discrimination; it should also take account of customary rules and would need to formulate concise articles covering specific situations without unnecessary repetitions.

15. In his second report (A/CN.4/347 and Add.1 and 2), the Special Rapporteur had proposed six draft articles which were to form part I of the draft, entitled "General provisions". In the report under consideration (A/CN.4/359 and Add.1), he had duly amended those articles, taking account of the comments made in the Commission and in the Sixth Committee of the General Assembly. Thus, in the new version of draft article 1, the Special Rapporteur had deleted the reference to direct communications between the sending State and the receiving State or international organization, and had explained why that amendment had been made (*ibid.*, paras. 17-18).

16. In the definition of the term "transit State" (art. 3, subpara. 1 (6)), the Special Rapporteur had eliminated the requirement of consent of the transit State to the passage of the diplomatic courier or diplomatic bag. The expression "third States" in article 6, subparagraph 2 (b), should either be defined or replaced by the words "other States", which would

mean States not parties to an agreement modifying the extent of facilities, privileges and immunities.

17. According to article 8, diplomatic couriers and diplomatic couriers *ad hoc* were "freely" appointed by the sending State; but since the sending State was bound by the provisions of articles 9, 10 and 11, it did not have absolute freedom. The words "are freely appointed" should therefore be replaced by the words "may be appointed".

18. In article 10, paragraph 1, the word "should", whose interpretation might cause practical difficulties, should be replaced by the word "shall". It should be noted that the principle stated in that provision was becoming increasingly established. For example, article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations provided that the consular courier must not be a national of the receiving State. It was therefore appropriate for draft article 10, paragraph 1, to state the rule that the diplomatic courier must, in principle, have the nationality of the sending State, even though the deletion of that provision could not affect the trend referred to by the Special Rapporteur in his third report (*ibid.*, para. 102). The wording of article 10, paragraph 3, which was divided into two subparagraphs, might be simplified through the use of the expression "*mutatis mutandis*".

19. The description of the functions of the diplomatic courier in article 11 contradicted the definition of the term "diplomatic courier" given in article 3, subparagraph 1 (1). According to article 11, the diplomatic courier took care of the diplomatic bag and delivered it to its destination, whereas article 3 provided that the diplomatic courier was entrusted with the custody, transportation and delivery of the diplomatic bag. That difference in wording could be explained by the fact that article 11 was a substantive provision, whereas article 3 was of an expository nature. It would, however, be advisable to harmonize the wording of those two provisions.

20. The text of article 12 required some clarification. Like Mr. Francis (1745th meeting), he believed that for the diplomatic courier himself, his functions commenced when he received the bag, whereas for the receiving State and the transit State, those functions commenced when the courier entered their territory.

21. He was not sure what the status of the bag was in the two cases covered by article 13 subparagraphs (c) and (d). He suggested that it should be made clear, in a provision to be added at the end of article 13, that in the cases referred to in subparagraphs (c) and (d) the end of the functions of the diplomatic courier did not affect the status of the diplomatic bag entrusted to him.

22. Article 14, paragraph 2, seemed unnecessary. According to that provision, the sending State would be obliged to send another diplomatic courier to the receiving State if a diplomatic courier was declared *persona non grata* or not acceptable by the receiving State prior to the commencement of his functions—but it was quite

³ *Yearbook ... 1980*, vol. II (Part One), p. 244, document A/CN.4/335, para. 60.

obvious that, in such a case, the sending State was free to send another diplomatic courier or not to do so.

23. Mr. RIPHAGEN, referring to the words "or with each other", in article 1, said that there had been objections to extending the scope of the article to include communications between diplomatic missions in different countries. In the case of his own country, communications never passed from one diplomatic mission direct to another, but always through the capital. Perhaps the Special Rapporteur could provide further information on the practice of States in that matter.

24. The definition of a "transit State" (art. 3, subpara. 1 (6)) applied equally to the case in which a courier picked up a bag at a diplomatic mission in the receiving State and brought it back to the sending State; perhaps some wording to that effect could be added to the definition. Paragraph 2 of article 3 stated that the provisions of paragraph 1 "may also apply to ...". He was not in favour of the use of the word "may", which was unclear, in legal texts; perhaps another word could be found.

25. The point he had raised in regard to article 1 was equally applicable to article 4, paragraph 1, which also appeared to extend special communications beyond the normal framework.

26. In article 5, paragraph 1, the reference to "the duty of the sending State ... to respect ... the laws and regulations of the receiving State and the transit State" was not appropriate. The courier had that duty, of course, but as applied to the sending State the wording was too strong. With regard to paragraph 2, he did not see how it would be possible for the diplomatic courier to interfere in the internal affairs of the receiving State and the transit State "in the discharge of his functions", which were simply to take care of the bag and deliver it.

27. In article 8, he agreed with Mr. Ni that the word "freely" should be deleted. The last phrase, "and are admitted to perform their functions on the territory of the receiving State or the transit State", was clearly belied by article 14, which provided for cases in which couriers were not admitted; he doubted whether that formulation was quite correct.

28. Article 9 contained nothing about the possible agreement or objection of the receiving State. He wondered whether the stipulation contained in article 6 of the Vienna Convention on Diplomatic Relations, "unless objection is offered by the receiving State", should not also appear in article 9. In article 10, he found paragraph 4 rather too strong, or at least not sufficiently clear. Although two or more States could not normally appoint a national of a third State as a diplomatic courier, paragraphs 2 and 3 would apply even in the case of a person appointed as a diplomatic courier by two or more States.

29. With regard to article 12, the point had already been made that it was not logical for the courier's functions to commence from the moment he was "crossing the territory of the transit or receiving State", though it

was true that the rights and obligations of the transit or receiving State did commence from that moment.

30. As to article 13, subparagraph (a), he agreed with Mr. Francis (1745th meeting), that the courier was still in function between the delivery of one bag and the issue of another. On subparagraph (d), he agreed with Mr. Stavropoulos that it was somewhat macabre to refer to the death of the courier.

31. In article 14, paragraph 2, the stipulation that the sending State "shall" send another diplomatic courier was too strong, since the sending State was free to do nothing at all or to use another means of communication.

32. Mr. CALERO RODRIGUES expressed his appreciation of the fact that, in redrafting the articles he had previously submitted, the Special Rapporteur had taken account of several observations made in the Commission and in the Sixth Committee. For instance, he had given up the idea (A/CN.4/359 and Add.1, para. 35) that the concept of the diplomatic courier and the diplomatic bag should apply to communications between different States, and was now limiting it to communications between organs of the same State. That was a realistic approach. The rejection of some other ideas was to be regretted, however. For example, it was unfortunate that the Special Rapporteur's suggestion⁴ regarding a general denomination for all couriers and bags had not been adopted. The terms "official courier" and "official bag" would have been a useful innovation. Again, the use of couriers and bags by international organizations would have to be assimilated to their regular use by States. That having been said, articles 1 to 6 as redrafted were in line with what was acceptable in an international convention. The Special Rapporteur had eliminated objections to substance and had also reduced the number of definitions. The Drafting Committee would decide whether all the definitions in the text as it stood were necessary.

33. With regard to the new articles 7 to 14, he agreed in principle with their contents, although some drafting changes were needed. Members had made useful suggestions, which he hoped the Drafting Committee would explore. The structure of the draft articles was generally sound, and the Special Rapporteur had been wise to rely on provisions in existing conventions. Although general objections to the topic had been made on the grounds that matters concerning diplomatic couriers and diplomatic bags were already regulated by other instruments, he agreed with the Special Rapporteur (1745th meeting) that there was some advantage in having a single instrument dealing with those matters. Such an instrument could also fill some gaps, such as the one mentioned by the Special Rapporteur in regard to the unaccompanied bag and the conditions under which it should be taken from the captain of a ship or aircraft. That point would be elaborated later.

⁴ *Ibid.*, p. 245, para. 62.

34. The end of the function of the diplomatic courier dealt with in article 13 was important only in regard to its consequences, such as the effect on privileges and immunities. Mr. Francis had raised an important point in that connection: if the courier had no bag to take back, his functions should not end until he had returned from the receiving State.

35. He agreed with Mr. Ni that article 14, paragraph 2 was unnecessary, since the sending State was not obliged to send another courier. He also shared Mr. Riphagen's views on the word "freely" in article 8 and the lack of clarity in article 10, paragraph 4.

36. Mr. OGISO, referring to the definitions of the "diplomatic courier" and "diplomatic bag" (art. 3, subparas. 1 (1) and (3)) remarked that there were references in other articles to the "consular courier" and "consular bag". If the Special Rapporteur wished to give the same treatment to the two types of bag, it should be made clear that the existing definitions covered both; if not, an additional definition could be needed in article 3.

37. As to articles 5 and 6, he was not familiar with the practice relating to diplomatic couriers and bags in the transit State, but even if there was not a firmly established practice, he believed the draft articles should stipulate that the transit State must give non-discriminatory treatment to diplomatic couriers and bags, irrespective of whether that State had diplomatic relations with the sending State.

38. A number of previous speakers had raised points concerning article 13. If he had understood the Special Rapporteur correctly regarding subparagraph (a), a regular courier's function ended when he returned home after delivering the bag, whereas the function of a courier *ad hoc* ended upon delivery of the bag. In his view, the function should end in both cases when the courier returned home after delivery. The courier would thus retain his facilities, privileges and immunities if he had to pass through transit States on the return journey. He agreed with the views expressed on article 13, subparagraph (d), concerning which Mr. Ni had raised an interesting point: the Special Rapporteur should find a way to make it clear that the status of the bag did not change even after the death of the courier during the exercise of his functions. The same applied to article 14, paragraph 1; the status of the bag should not change when the courier was declared *persona non grata* or not acceptable upon arrival at the frontier of the receiving State. He would appreciate information from the Special Rapporteur concerning such cases.

39. Mr. USHAKOV said that the draft articles proposed in the Special Rapporteur's excellent report (A/CN.4/359 and Add.1) were generally acceptable, subject to drafting changes. It was quite clear that the draft articles should not deal only with the diplomatic courier and diplomatic bag within the meaning of the 1961 Vienna Convention on Diplomatic Relations, but also with all other official couriers and bags, which had, unfortunately, been described in different terms in other

multilateral conventions. For example, article 28 of the 1969 Convention on Special Missions referred to the "bag of the special mission" and to the "courier of the special mission", whereas articles 27 and 57 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character referred to the "bag of the mission" and the "bag of the delegation", and to the "courier of the mission" and the "courier of the delegation" respectively.

40. Since the draft being prepared was to apply to all couriers and all diplomatic bags, which had the same status under the four conventions on diplomatic law, and the terms "diplomatic courier" and "diplomatic bag" were used in only one of those conventions, the Commission would either have to use new terms, such as "official courier" and "official bag", specifying that they covered all cases, or use the terms "diplomatic courier" and "diplomatic bag", giving them the same broad meaning. The wording which the Special Rapporteur had used so far was not satisfactory. Nothing in the definition of the term "diplomatic courier" (art. 3, subpara. 1 (1)) showed that that term meant all couriers, including those not described as "diplomatic" couriers in various international conventions. It did not seem possible to draft articles that applied only to diplomatic couriers within the meaning of the Vienna Convention on Diplomatic Relations and then provide that they also applied to other couriers. Besides, the Commission would still have to define those other couriers. Ultimately, it would be necessary to work out a comprehensive definition covering all types of courier. All the comments he had made concerning the definition of the term "diplomatic courier" also applied to the definition of the term "diplomatic bag".

41. Commenting more generally on the articles proposed by the Special Rapporteur, he said that article 12, as it stood, was not necessary. In his view, the functions of the diplomatic courier really began in the territory of the sending State, that was to say, when the bag was entrusted to the courier; the same was not true, however, of the facilities, privileges and immunities to which the diplomatic courier was entitled and from which he began to benefit only when he entered the territory of the receiving State or a transit State. Article 12 should therefore deal with the starting point of entitlement to facilities, privileges and immunities and, consequently, be placed elsewhere in the draft.

42. The end of the function of the diplomatic courier, dealt with in article 13, could, of course, take place in the cases provided for in subparagraphs (b), (c) and (d), but not in the case referred to in subparagraph (a), namely, upon completion of the task of delivering the diplomatic bag to its final destination, because the diplomatic courier might be entrusted with another bag to take back and, even if he was not, he must be able to continue to benefit from facilities, privileges and immunities until he had returned to the sending State. Article 13 might therefore be brought into line with article

43 of the Vienna Convention on Diplomatic Relations, and also be placed elsewhere in the draft.

43. Article 14 provided, in paragraph 1, that the receiving State might "at any time" notify the sending State that the diplomatic courier had been declared *persona non grata* or not acceptable. In his view, the diplomatic courier could be declared *persona non grata* or not acceptable prior to the commencement of his functions, but he certainly could not be so declared while he was carrying out the task entrusted to him, which he must be able to complete.

44. He thought that all the articles proposed by the Special Rapporteur could be referred to the Drafting Committee for consideration in the light of the discussion. He looked forward with great interest to the results of the work of Mr. Díaz González on relations between States and international organizations, which should also deal with the official couriers of international organizations.

45. Sir Ian SINCLAIR said that the topic seemed to him to lack glamour, since he had never been entirely convinced of the need to regulate specifically the problems relating to the diplomatic courier beyond what was contained in the four conventions on diplomatic law referred to by the Special Rapporteur. In his view, the topic should be kept within as narrow a framework as possible. The Commission should draft some articles to fill the few existing small gaps, but take care not to create another regime that would overlap with the existing regimes.

46. Referring to draft article 1, he echoed Mr. Riphagen's question as to whether the scope of the draft articles should include official communications of missions and delegations not only with the sending State, but also with each other. In his view, a little more should be known about the practice of States in that matter before any final decision was reached.

47. On draft article 2, he tended to share Mr. Calero Rodrigues' regret that couriers and bags used for official purposes by international organizations were excluded from the draft. While he understood the reasons, he feared that the Commission would be confronted at some later date with a request to take up the separate topic of couriers and bags used by international organizations, which could result in a further elaboration of the kind that the Chairman had had to undertake in regard to treaties concluded between States and international organizations or between two or more international organizations.

48. With regard to draft article 3, he considered, first, that the definition of a "diplomatic courier" (subpara. 1 (1)) should be extended to cover a person entrusted with the transportation of the bag not only to the diplomatic missions of the sending State, but also back from the receiving State. He therefore suggested that the words "or from" should be added after the word "to" in the third line of that paragraph. He shared Mr. Riphagen's concern at the way in which subparagraph 1

(2) was drafted, and agreed that it should be closely examined in the Drafting Committee. Furthermore, the terms "diplomatic mission", "consular post", "special mission" and "permanent mission", which were defined in subparagraphs (7), (8), (9) and (10) respectively, were apparently intended to convey exactly the same meaning as that given to them in conventions already adopted. He would therefore suggest, with a view to simplifying the draft, that those four terms should be grouped together in one paragraph reading:

"The terms 'diplomatic mission', 'consular post', 'special mission' and 'permanent mission' shall bear the meanings assigned to them in the ... and ... Conventions, respectively".

49. In draft article 5, paragraph 2, he agreed that the phrase "in the discharge of his functions" was perhaps unnecessary and could be deleted. Paragraph 3 did not seem to add anything to the draft, but he would welcome the Special Rapporteur's observations on that provision.

50. With regard to draft article 7, he appreciated that earlier conventions also referred simply to an "official document". He had himself served as an *ad hoc* diplomatic courier before the institution had been recognized; on that occasion he had been provided by the United Kingdom Government with an official document certifying his status as a diplomatic courier *ad hoc* and also, he believed, with a way-bill showing the number of packages he was carrying. So perhaps the Drafting Committee might wish to consider the addition, in draft article 7, of the words "or documents" after the words "official document". In principle, however, he would be content to rely on State practice.

51. He agreed that the word "freely", in draft article 8, might be unnecessary; he also agreed broadly with the comments made by other members on draft article 10.

52. With regard to draft article 12, he was inclined to agree with Mr. Ushakov in questioning the need for a draft article on the commencement of the functions of a diplomatic courier. Some thought should perhaps be given to whether it was really necessary to make specific provision for the commencement, given that in one sense the diplomatic courier's functions commenced when the bag was entrusted to him in the sending State, yet in another sense his functions began, for the purpose of international acknowledgement of his status, only when he crossed the frontier of the transit or the receiving State.

53. Draft article 13 was an interesting provision, but subparagraph (a) was ambiguous, since although it clearly applied to an *ad hoc* courier it was not certain how it would apply to a regular courier. He would suggest that the article be recast to reflect the distinction between a diplomatic courier *ad hoc*, whose function clearly came to an end when the bag was delivered to its final destination, and a regular diplomatic courier whose task might not be completed until he had collected another bag and returned with it to the sending

State. He also agreed with Mr. Stavropoulos that paragraph (d) could be deleted, since otherwise a peculiar *a contrario* interpretation might be possible in the case of a diplomatic courier who was totally incapacitated.

54. Lastly, he agreed that paragraph 2 of draft article 14 served no useful purpose and could be deleted. If retained, however, it should be made discretionary rather than obligatory.

55. Mr. THIAM said that at the thirty-sixth session of the General Assembly a number of delegations in the Sixth Committee had referred to the field of application of the draft articles under consideration and had raised two important questions. The Special Rapporteur (1745th meeting) had alluded to one of those questions, which concerned international organizations; the other, which was more sensitive, concerned national liberation movements (A/CN.4/L.339, para. 191) and, more particularly, their status under the Geneva Conventions on Humanitarian Law. He would like to know the Special Rapporteur's position on those two points.

56. Mr. LACLETA MUÑOZ observed that draft article 1 was now much better than the text originally proposed (A/CN.4/347 and Add.1, para. 49), because paragraphs 1 and 2 had been merged. He, too, was uncertain, however, to what extent it was the normal practice of State missions abroad to communicate among themselves by diplomatic courier and bag. Nevertheless, that possibility was provided for in the four major codification Conventions on diplomatic law, and he would have no express objection if the practice, although exceptional, were reflected in the draft articles.

57. With regard to article 2, it was a matter of concern to him that the draft articles under consideration would not apply to international organizations, though he understood why the Special Rapporteur had, for the time being, excluded organizations from the field of application of the draft. Few international organizations had their headquarters in his country, Spain, but he supposed that the largest of them must have the right to receive and send bags for their communications. He assumed that there were provisions to that effect in many of the headquarters agreements concluded between host States and international organizations, and it might be useful if the Special Rapporteur could examine them.

58. Article 3 raised many questions. It had already been simplified and it could be simplified much more, which would also make it possible to remove some of the difficulties, such as those raised by the definitions given in paragraph 1, subparagraphs (7) and (9), of the "diplomatic mission" and the "special mission". In his view, special missions were diplomatic missions, which they had, indeed, preceded in the history of diplomatic practice; there was thus no need to draw a distinction between those two types of mission. Moreover, he thought the word "diplomatic" could be used to describe any bag sent to a diplomatic mission, a special

mission, a permanent mission or a delegation—and perhaps also to a consular post, as was the case at least in Spanish practice. The suggestions made by Sir Ian Sinclair would make it possible to solve that problem of terminology.

59. He had some doubts about the distinction between a professional "diplomatic courier" and a "diplomatic courier *ad hoc*". He believed that a diplomatic courier was an official of the State permanently entrusted with the function of transporting diplomatic bags, but his function was permanent only as seen by the internal law of the State which had appointed him, not in regard to his activities outside that State. It was that quality of permanence that made the difference between a professional diplomatic courier and a diplomatic courier *ad hoc*, since their functions were exactly the same. With regard to the diplomatic courier *ad hoc*, the problem was not so much his status as whether he already benefited from facilities, privileges and immunities, as was often the case. Special attention should therefore be given to the status of the bag and to the case of the diplomatic courier *ad hoc* who did not already benefit from facilities, privileges and immunities, which he should do from the moment he received the bag until he delivered it to its destination. The case of the professional diplomatic courier and that of the diplomatic courier *ad hoc* should not, therefore, be dealt with together, as they were, for example, in article 12.

60. He had no comments to make on article 4. Like some other members of the Commission, he had doubts about article 5, particularly paragraphs 2 and 3. It was quite clear to him that there was no need to refer specifically in paragraph 3 to the use of the "temporary accommodation" by the diplomatic courier. The four codification conventions referred only to the premises of missions, and the general principle stated in paragraph 1 should therefore be sufficient.

61. He also had some doubts about article 8 (Appointment of a diplomatic courier) and article 10 (Nationality of the diplomatic courier). It seemed rather dangerous and excessive to refer to the nationality of the diplomatic courier and to the possibility that States might influence the appointment of a courier. The functions of a diplomatic courier abroad could be said to commence only from the moment he left the sending State or, in the case of the diplomatic courier *ad hoc*, from the moment his mission was entrusted to him. The Special Rapporteur should therefore place greater emphasis on the receiving State's right not to accept a particular diplomatic courier than on its right to object to the appointment of a diplomatic courier, at least in the case of a professional courier.

62. There was no doubt that the functions of the diplomatic courier, dealt with in article 11, consisted in taking care of the diplomatic bag and transporting it, in other words, accompanying it. It was the latter term that should be used in the draft articles. As to the question whether reference should be made to the "recipient" or to the "destination", he was in favour of the

term "destination", used by the Special Rapporteur, because in most cases, although the diplomatic bag was addressed to an ambassador or a head of mission, it was rarely delivered to him personally.

63. He considered paragraph 2 of article 14 unnecessary, mainly because it was very difficult to see how a diplomatic courier could be declared *persona non grata* prior to the commencement of his functions.

64. He believed that the draft articles would inevitably have to be based on provisions relating to professional diplomatic couriers and on specific provisions concerning diplomatic couriers *ad hoc* or any other persons who might transport a diplomatic bag.

The meeting rose at 1.05 p.m.

1747th MEETING

Friday, 16 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded) (A/CN.4/347 and Add.1 and 2,¹ A/CN.4/359 and Add.1, A/CN.4/L.339, ILC(XXXIV)/Conf. Room. Doc. 4)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (concluded)

ARTICLES 1 TO 14² (concluded)

1. Mr. McCAFFREY expressed particular appreciation of the summary of the Commission's work on the topic given by the Special Rapporteur in his third report (A/CN.4/359 and Add.1, paras. 3 *et seq.*), which had been of great value to him personally as a new member. He congratulated the Special Rapporteur on his heroic endeavour to breathe life into a subject which to himself was virtually inanimate. Like other members, he saw the advantage of having a single set of rules on the matter and of filling gaps in existing conventional law. However, he was not entirely convinced that the project was so pressing as to justify running any risk of setting up contradictions with existing conventional regimes. It was therefore necessary to proceed very cautiously indeed. That was particularly true in areas where the rules on the status of the diplomatic courier and the diplomatic bag were either very general or non-existent.

2. He noted that the Special Rapporteur had referred in paragraph 3 of his third report to the desirability of

elaborating such rules through codification and progressive development of international law and to the importance of elaborating rules on the status of the diplomatic courier *ad hoc* and the unaccompanied diplomatic bag. To the extent that the Commission was seeking to fill gaps or render existing rules more specific, it should take great care to investigate existing practice thoroughly and not to make unwarranted generalizations on the basis of bilateral regimes.

3. He approved the general structure of the draft articles that was set out in paragraph 10 of the third report. He noted however that the term "third State" was used in referring to the provisions of part IV of the draft. That term had an accepted meaning in treaty law, and it might therefore be best to replace it by a term such as "treaty State".

4. Turning to the draft articles, he said that the use of the words "or with each other" in article 1 implied a fairly broad scope for the draft. In his view, the Commission needed more information as to whether that was warranted.

5. With regard to draft article 2, he agreed with Mr. Calero Rodrigues (1746th meeting) that it seemed inappropriate to exclude international organizations from the draft articles. He believed the Commission should give some consideration to the extent to which the draft articles might apply to them.

6. As far as draft article 3 was concerned, he agreed with Sir Ian Sinclair's suggestion (*ibid.*, para. 48) that the word "to" in subparagraph 1 (1) should be replaced by the words "to or from". Subparagraph 1 (3) should perhaps include a reference to the diplomatic courier *ad hoc*. The definition of "receiving State" in subparagraph 1 (5) would be clearer if the words "and which is the destination of the diplomatic bag" were added at the end of the definition. He too thought that the definition of "transit State" in subparagraph 1 (6) should cover the passage of a diplomatic bag *en route* from the receiving State. He agreed with Sir Ian Sinclair's suggestion (*ibid.*) that subparagraphs 1 (7) to 1 (10) should be combined. In regard to paragraph 2, he shared Mr. Riphagen's view (1746th meeting) that the word "may" should be avoided; a phrase including the words "except as otherwise provided in the present articles" might perhaps be used at that point. He had spoken of the need for caution; the Commission should take particular care in deciding what couriers and bags the draft should cover, despite the trend of opinion which favoured an all-embracing formula of the kind referred to by the Special Rapporteur in paragraph 15 of his report.

7. For instance, in draft article 4, paragraph 1, the words "as well as between those missions" might be too broad for the scope of the draft. He agreed with Mr. Díaz González (*ibid.*) that passage as well as communication should be referred to in paragraph 2 of the article.

¹ Reproduced in *Yearbook ... 1980*, vol. II (Part One).

² For the text, see 1745th meeting, footnote 7.

8. Paragraph 1 of draft article 5 left the impression that the sending State must respect the internal law of the receiving State in matters unconnected with the diplomatic bag; obviously that was not the intention, but the point should be clarified. He shared the view that the expression “in the discharge of his functions” in paragraph 2 could be deleted and that paragraph 3 might be superfluous.

9. He suggested that the opening clause of draft article 6, paragraph 2, should be reworded to read: “However, no discrimination shall be considered to have occurred”. A more important point was that the expression “third States” in subparagraph 2 (b) of the article might usefully be replaced by the term “other States”.

10. Draft article 7 was similar in formulation to the opening part of article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations. That paragraph used the term “an official document” but did not speak of “passport” as well. He appreciated that the courier might need more than one document, but that point could perhaps be taken care of in the commentary and the wording of the 1961 Convention used for the text of the article.

11. In regard to draft article 8, he too had a problem with the word “freely”, and he shared Mr. Riphagen’s views (*ibid.*) on the words “and are admitted to perform their functions”.

12. Draft article 9 was a provision that was not in any of the four codification conventions adopted in the field of diplomatic law, so far as he knew; it should perhaps provide for an objection by the receiving State. The point did not seem to be covered by draft article 14, and he thought it bore scrutiny.

13. He shared the view that the word “should” in draft article 10, paragraph 1, ought to be altered to “shall”, although it was important not to depart too much from article 8 of the 1961 Vienna Convention, which dealt with the same subject. Paragraph 3 of draft article 10 might be made a little more specific by the insertion, in the opening clause, of the words “to consent” after the word “right”.

14. In connection with draft article 12, Mr. Ushakov (*ibid.*) had rightly drawn attention to the need to distinguish between the functions of the diplomatic courier and his privileges and immunities: his functions started when he received the diplomatic bag, whereas his privileges and immunities commenced when he entered the territory of the transit or receiving State. He shared the view that an article on the commencement of the functions of the diplomatic courier might not be necessary at all, but if the article was retained, the word “crossing” should be replaced by the word “entering”.

15. In regard to draft article 13, it had been remarked that the completion of the task of the diplomatic courier might not take place until his return to the sending State, even if another bag was not collected, and so his privileges and immunities would presumably apply until

his return. That point should perhaps be clarified. He shared the view that the article should distinguish between a diplomatic courier *ad hoc* and a regular diplomatic courier.

16. He too thought that draft article 14, paragraph 2, was unnecessary, but if it was retained, the word “shall” seemed too strong.

17. Mr. KOROMA said that in conventional law the topic had not received the consideration it now deserved, bearing in mind the increasingly dynamic nature of international relations, the inviolability and confidentiality of diplomatic messages, the need to elaborate rules on the status of the diplomatic courier *ad hoc*—an institution to which developing countries were resorting more and more—and the question of the unaccompanied bag. Moreover, it seemed to be the view of the Commission that such matters should be regulated in the interests of friendly relations and co-operation among States. The pragmatic approach to the topic adopted by the Special Rapporteur, based on international conventions and State practice, had enabled him to strike the right balance in the draft articles between the diplomatic interests of the sending State and the legitimate security interests of the receiving and transit States. In that connection, the sending State must respect international law as embodied in the internal law of the receiving and transit States.

18. With regard to the scope of the draft articles, the Special Rapporteur had suggested that they should apply to communications not only between the sending State and its missions abroad, but also between those missions themselves.³ It would be interesting to know what the position would be where a diplomatic bag was transmitted directly to the Minister for Foreign Affairs of one country while he was in another country.

19. In regard to draft article 3, the Special Rapporteur (1745th meeting) had stated that the captain of a ship or aircraft was not a courier within the meaning of the articles. If so, it would perhaps be best to substitute the word “conveyance” or “transmission” for the word “transportation” in subparagraph 1 (a). It would be helpful if the Special Rapporteur would consider the status and obligations of the captain of a ship or aircraft whenever he had custody of a diplomatic bag. Such persons were being increasingly used to convey or transmit a diplomatic bag, and it was only proper that their activities in that connection should be examined, if not regulated.

20. Draft article 4 concerned the safe and expeditious delivery of diplomatic messages and the inviolability of their confidential character, and should be reworded to bring out three ideas more clearly.

21. With regard to draft article 9, he wondered what its implications would be for the requirement that a courier must respect the laws of the receiving and transit

³ *Yearbook ... 1980*, vol. II (Part One), p. 241, document A/CN.4/335, para. 42.

States. For instance, what would the position be if the courier did not know the contents of the diplomatic bag? He was firmly convinced that the diplomatic bag should be completely inviolable and that the receiving and transit States should be under a duty to protect it from any interference. His concern was to prevent the status of the diplomatic bag from being abused, since that could have serious implications for international relations. If there were grounds for suspicion about the bag's contents, it should be returned to the sending State.

22. He would like to know the Special Rapporteur's views on the status of a courier during an armed conflict and whether he thought that point should be covered by the draft. The customary law of his own country, Sierra Leone, recognized the inviolability of a courier even during armed conflict.

23. The draft should certainly distinguish between the privileges and immunities of a professional courier and those of a courier *ad hoc*; the former should retain his privileges and immunities until he returned from whence he came and the latter until the bag had been delivered.

24. Mr. MAHIU congratulated the Special Rapporteur on the clarity, logic and precision of his third report (A/CN.4/359 and Add.1). The topic was of unquestionable importance, given the increasing number of exchanges of diplomatic couriers and bags. The Commission's concern should be to supplement and clarify the existing rules and perhaps harmonize them to some extent, thus helping to identify a number of common rules.

25. Referring to the draft articles, he said that in the final analysis the topic involved four types of relations: relations between the sending State and its various missions; relations between the missions themselves; direct relations between the sending State and the receiving State in cases where the former had no mission in the latter; and the relations between the sending State and international organizations. He noted from articles 1 and 2 that the two last-mentioned categories had been excluded from the scope of the draft. The explanations provided by the Special Rapporteur (1745th meeting) and the observations made by members of the Commission had tended to justify that exclusion. However, in the case of direct communications between the sending State and the receiving State, the conventions to which reference had been made, particularly the 1961 Vienna Convention on Diplomatic Relations, might not suffice to safeguard freedom of communication and the inviolability of the diplomatic courier and the diplomatic bag; if that was so, those conventions would perhaps need to be supplemented. It would be most helpful if the Special Rapporteur would provide some clarification of the matter. With regard to the exclusion from the scope of the draft of couriers and bags used for all official purposes by international organizations, he realized that the situation of international organizations differed from that of States, but he felt that the question would have to be settled sooner or later.

26. He shared the view of those members of the Commission who believed that draft article 3 could be simplified further. Where terms were to be defined in exactly the same way as they had been in an existing convention, it might be sufficient if, instead of repeating the definitions word for word, the article simply referred to the relevant conventions; where, however, a term was to be defined differently, the article might give the definition in full, even if the difference was only slight. Article 3 raised another problem, that of harmonization, not only of the terms defined in the draft articles with similar terms appearing in the reference conventions, but also of the terms used within the draft itself. Like Mr. Ni (1746th meeting), he considered that article 3, subparagraph 1 (a), for example, should be harmonized with article 11.

27. Articles 4 and 5 stated two fundamental principles, first, that of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags, and second, the duty to respect international law and the laws and regulations of the receiving and the transit States. The balance between those two articles should be strengthened by imposing on the receiving State the duty to permit and protect free communication, for all official purposes, by means of diplomatic couriers and diplomatic bags. As far as the French text of article 14 was concerned, the beginning of paragraph 1 should be amended to read: "*L'Etat de réception doit permettre et protéger, sur son territoire, ...*".

28. He shared the doubts expressed about the words at the end of draft article 8 "and are admitted to perform their functions on the territory of the receiving State or the transit State". It was debatable whether they were absolutely necessary, and he hoped the Special Rapporteur would clarify the point.

29. In regard to draft article 12, Mr. Ushakov (*ibid.*) had quite rightly drawn a distinction between the functions of the diplomatic courier and the privileges and immunities to which he was entitled. It was important that the draft should specify the privileges and immunities enjoyed by the diplomatic courier and the precise moment at which he could invoke them. In some circumstances, for example when he required a visa, the diplomatic courier should perhaps be accorded certain facilities even before entering the territory of the receiving or the transit State. The appointment of a diplomatic courier surely entailed an immediate duty on the part of the receiving or the transit State to facilitate the granting of his visa. That was one practical problem that must be dealt with.

30. Draft article 13 raised the question for him, like Mr. Francis (1745th meeting), of the exact situation of the diplomatic courier once the diplomatic bag had been delivered to its destination. It might be argued that, once that had been done, there was no longer any particular reason to accord the diplomatic courier privileges and immunities. On the other hand it could also be argued that, once the bag had been delivered to its

destination, the diplomatic courier required protection on the return journey to the sending State, in order to prevent freedom of communication by means of the diplomatic bag from being jeopardized. That was a situation which called for consideration and one in which Sir Ian Sinclair's observation (1746th meeting) regarding the distinction between professional and *ad hoc* diplomatic couriers took on full meaning. Sub-paragraph (d) of the article had initially seemed to him unnecessary, but on reflection he realized that it would have to be read in connection with other provisions on the status of the diplomatic courier and the diplomatic bag. The Special Rapporteur would presumably clarify that point in dealing with subsequent articles. For the time being, he would keep an open mind on whether the subparagraph was necessary or not.

31. Mr. STAVROPOULOS endorsed the observations made by Mr. Ni (*ibid.*) and Mr. Mahiou on article 13, subparagraph (d). Quite apart from the matter of the courier's function ending on his death, it was important to determine what would happen to the bag itself.

32. Mr. MALEK warmly congratulated the Special Rapporteur on the excellence and clarity of his third report. The revised draft article 1 was a great improvement on the original text (A/CN.4/347 and Add.1 and 2, para. 49), which to some extent had lacked cohesion because it had been divided into two paragraphs; it now assimilated the couriers and bags of consular posts, special and other missions and delegations with diplomatic couriers and bags in a single paragraph. But the form of the article should perhaps be changed to reflect more closely the title of the draft articles, namely, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The article might be drafted on the following lines:

"The present articles shall apply to diplomatic couriers and diplomatic bags, as well as to consular couriers and bags and to couriers and bags of special missions, permanent missions or delegations, when used in communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, and also in official communications of these missions and delegations with the sending State or with each other".

33. He associated himself with the general agreement reached at the preceding session of the Commission with regard to draft article 2, although he was not entirely convinced by the arguments advanced so far in support of the exclusion of international organizations from the scope of the articles. He shared the view expressed at the preceding session by a number of members of the Commission that draft article 2 should refer to "other subjects of international law" as well as to international organizations, in order to ensure that the interests of entities such as the Palestine Liberation Organization were safeguarded.⁴

⁴ *Yearbook ... 1981*, vol. 1, p. 259, 1691st meeting, para. 28 (Mr. Calle y Calle), and p. 275, 1693rd meeting (Mr. Tabibi).

34. The CHAIRMAN, speaking as a member of the Commission, joined with other speakers in congratulating the Special Rapporteur on the excellent quality of his work. He noted that the observations made by members of the Commission concerning the draft articles had mainly been of a drafting nature. That showed that the Commission had before it a set of articles which was already highly developed. He shared the view that the main purpose of the draft articles was to widen the ambit of the privileges and immunities of the diplomatic courier. However, given the decreasingly enthusiastic reception accorded to the four codification conventions on diplomatic law, he was not sure whether States would support that objective. Their comments and observations would to some extent determine the nature of the draft. If some Governments expressed reluctance to accept certain ideas, the draft must be very specific and not be confined, as some members of the Commission had recommended, to stating a number of rather vague general principles.

35. The title of the draft articles called for consideration of the status of both the diplomatic courier and the diplomatic bag, whether accompanied by a diplomatic courier or not. As yet, few of the draft articles referred to the unaccompanied diplomatic bag, and he assumed that the Special Rapporteur would propose some provisions on that subject later. The reference to "external marks" in article 3, subparagraph 1 (3), foreshadowed such rules, for if a diplomatic bag bore no external marks, it was not inviolable. While he was prepared to accept that the captain of a ship or aircraft should be regarded as a diplomatic courier, he was more inclined to think of a diplomatic bag dispatched through the captain of a ship or aircraft as being an unaccompanied diplomatic bag.

36. Numerous comments had been made about the protection of the diplomatic courier. The question most frequently raised was the source of that protection. Did it derive from the status enjoyed by the diplomatic courier independently of the bag, or from the bag itself? In the past, the protection of the diplomatic courier had been guaranteed by the status of the courier and not by that of the bag. Any rule that attributed the source of protection to the bag itself would raise problems. For example, what would become of the status of the courier once he had delivered the bag to its final destination?

37. Referring to article 8, some members of the Commission had questioned whether the words "and are admitted to perform their functions on the territory of the receiving State or the transit State" should be retained. His own question was, what authority would decide on that admission and what would the terms of admission be? The Special Rapporteur had explained (A/CN.4/359 and Add.1, para. 90) that there was not necessarily any approval procedure. In that case, when did the admission take place? If by virtue of his nationality or of the regulations governing the movement of persons between the sending and receiving States, the courier travelled freely, the receiving State would not be

informed of his movements in advance; when the courier declared that he was accompanying a diplomatic bag, the external marks would assume their full importance, since it was at that moment that his status would begin to apply. If on the other hand the courier required a visa, it could be argued that the functions of the diplomatic courier began in an incidental manner as soon as the visa was obtained. Certain other provisions of the draft, such as those relating to the nationality of the diplomatic courier, assumed considerable importance in relation to the question of the movement of the courier. Articles 13 and 14 should be recast in both substance and form after careful consideration of that point.

38. Mr. YANKOV (Special Rapporteur), summing up the discussion, said that he had been encouraged by the critical observations made by members, both on the subject in general and on individual draft articles. They would be very useful to him in his future work. With regard to general issues, there was an obvious need to fill existing gaps; the more he had studied State practice, and above all recent practice, the more justification he had found for doing so. One extremely important observation had been that the Commission should take care not to produce a set of rules that would be inconsistent with existing regimes or would create a different kind of regime. He assured members that one of his primary objectives had been to rest his codification on the sound basis of the four codification conventions on diplomatic law adopted under United Nations auspices, which, even though some of them were still not binding on States, none the less provided a framework of law. It was significant that an impressive number of States had ratified the 1961 and 1963 Vienna Conventions. He had also taken care not to make unjustified generalizations on the basis of bilateral treaties. All the sixty or so bilateral treaties he had examined confirmed the principles and rules embodied in those conventions, and some even employed their wording.

39. Mr. Ushakov (1746th meeting) had suggested that the articles should be based on a global notion of the courier and the bag. Such a notion had in fact been recommended in his preliminary report,⁵ but he had decided, in the light of the comments made in the Commission and the Sixth Committee, and for practical reasons, that it would be better to use terms that were widely recognized than to introduce notions that could create problems. The terms of draft article 1 and draft article 3, paragraph 2, might require improvement, however, in order to express more satisfactorily the assimilation formula suggested in his third report (A/CN.4/359 and Add.1, para. 14).

40. As he understood it, the notion of communication had two aspects, one relating to means of communication and the other to a network of communications. In regard to means, the notion was derived basically from article 27 of the Vienna Convention on Diplomatic

Relations and from State practice. It covered public postal, telephone, telex and radio services and, in addition, official correspondence and messages in code and cipher carried in a sealed pouch by a diplomatic courier. In the sense of a network of communications existing between the sending State and its missions abroad or between the missions themselves, the notion was reflected in the Commission's commentary to the draft article that had become article 35 of the Vienna Convention on Consular Relations. The relevant passages of the commentary were reproduced in his second report (A/CN.4/347 and Add.1, para. 8).

41. There was an abundance of State practice which showed that the network of communications was something permanent, particularly in consular functions. An example of the practice as embodied in a treaty was article 12 of the Consular Convention between the United States of America and the People's Republic of China, signed in Washington on 17 September 1980,⁶ which provided that a consulate should be entitled to exchange communications with its Government, with diplomatic missions of the sending State and with other consulates of the sending State wherever situated. That was an almost standard provision, as was evident from the sixty or so bilateral conventions dating back to 1950 which he had examined. He read out a list of the conventions in question for the information of members. Though his own experience as a former ambassador was limited, it seemed to him that inter-mission communication was quite extensive. The fact that Governments had deemed it necessary to provide for it in bilateral treaties was an indication that many countries practised it.

42. The issues raised by Mr. Reuter's remarks concerning the status of the diplomatic bag would be dealt with in part III of the draft. Turning to comments made on individual articles, he said that draft article 1 was basically an attempt to describe a uniform and comprehensive set of rules, based on the relevant provisions of the four codification conventions and State practice, that would apply to all couriers and bags. In reply to the point made by Mr. Ogiso (1746th meeting) in connection with article 3, he said that the codification conventions did not differentiate in treatment between consular couriers and other types of couriers. He read out the text of an objection raised by the United Kingdom at the United Nations Conference on Consular Relations to a proposal made by Japan which had turned on the treatment to be afforded to consular couriers; the objection, reproduced in his second report (A/CN.4/347 and Add.1, para. 83) had made it clear that acceptance of the proposal would have resulted in the existence of two categories of courier with different degrees of inviolability. The United Kingdom had found that unacceptable and the Conference had agreed. Moreover, some bilateral consular conventions stipulated explicitly that consular couriers had the same status as diplomatic

⁵ *Yearbook ... 1980*, vol. II (Part One), p. 245, document A/CN.4/335, para. 62.

⁶ *International Legal Materials* (Washington, D.C.), vol. XIX, No. 5 (September 1980), pp. 1119 et seq.

couriers. Mr. Malek had made an interesting proposal (para. 32 above) for redrafting article 1 in a way that would place greater emphasis on couriers and bags; he hoped the Drafting Committee would give it careful consideration.

43. In connection with article 2, it had been suggested that the draft articles should apply to couriers and bags of international organizations, or of other subjects of international law such as national liberation movements. He recalled that the preliminary report had made a recommendation along those lines.⁷ However, that had not appeared to be the general view of the Commission at its previous session, although opinions in favour of the articles doing so had been expressed both in the Commission itself⁸ and in the Sixth Committee. The door was of course open to that, and he hoped members would make their precise views on the subject known. Perhaps the Commission might consider placing a provision at the end of the draft articles which would serve the purpose.

44. Article 3 had been the subject of many comments. The suggestion that the words “to or from” should replace the word “to” in subparagraph 1 (1) was an interesting one. Proposals had been made to reduce the number of terms, for instance through a cumulative provision referring to the definitions employed in the codification conventions concerned. In that connection he wished to point out that the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, unlike the 1961 and 1963 Vienna Conventions, were not yet in force. In reply to the point raised by Mr. Koroma about the word “transportation”, he said that the use of that term followed previous practice in legal provisions on the subject. Referring to the comment by Mr. Díaz González (1746th meeting) concerning the use of the words “special occasion or occasions” in the definition of the term “diplomatic courier *ad hoc*”, he explained that his intention had been to spell out fully the meaning of the expression “*ad hoc*”; if the words were redundant, they could be removed by the Drafting Committee.

45. Mr. Riphagen (*ibid.*) had raised a valuable point in connection with article 3, paragraph 1 (6). It was true that the receiving State was not always the final destination of the bag. To meet the point, he suggested replacing the words “receiving State” by the words “their destination” or the word “to” by the words “from or to”. In connection with the comment by Mr. Mahiou about harmonization of terms, it might help if the drafting of paragraph 2 of article 3, which contained the important assimilation formula, was improved; for example, the words “may also apply” might be replaced by the words “shall also apply as appropriate”. That matter deserved further study. He agreed with the

observations by Mr. Ni (*ibid.*) and Mr. McCaffrey regarding the use of the term “third State”. The Commission might either define the term “third State” in article 3 or substitute the term “other States” for “third States” in article 6, subparagraph 2 (b).

46. In regard to article 4, he had already spoken about the notion of communication. He had decided to use the term “permit and protect” in paragraph 1 because it was a standard expression used in all the four codification conventions and it therefore ensured uniformity. Concerning Mr. Riphagen’s point (*ibid.*) about the duty of the sending State, the purpose of articles 4 and 5 was to strike a balance between the rights and the obligations of the sending and receiving States. The sending State might give its courier explicit instructions to respect the requirements of the receiving State. The expression “in the discharge of his functions” in draft article 5, paragraph 2, had been meant to refer to the period during which the courier was performing his functions; perhaps that wording should be reconsidered.

47. Article 6 had raised observations of a drafting nature, which could be considered by the Drafting Committee. Some members had raised objections to the use of the word “freely” in article 8; the wording of that article had been based on that of the four relevant codification conventions and he had not wished to depart from it. It had been suggested that the last clause of the article, “and are admitted to perform their functions on the territory of the receiving State or the transit State”, might be unnecessary. That clause concerned the main function of a courier, which was to act in the territory of another State; in any case, the *agrément* of the receiving or the transit State had to be given in cases where a visa was required. The clause warranted further consideration.

48. Articles 9, 10 and 14 concerning multiple appointment and nationality of a diplomatic courier and *persona non grata* were highly relevant to the status of the courier and had been modelled on relevant provisions of the four codification conventions. In reply to the point raised by Mr. McCaffrey concerning an objection by the receiving State to a multiple appointment, he said that he believed that consent was necessary. In connection with article 10, there had been a proposal to change “should” to “shall” in paragraph 1, but the word “should” was used in all the four codification conventions, providing the sending State with the option to appoint a non-national. He would reconsider paragraph 4, which was felt by Mr. Riphagen to be too strong or not sufficiently clear.

49. With regard to article 11, he agreed that its terminology should be harmonized with that used in article 3, paragraph 1 (1). As to replacing the word “destination” by the word “recipient”, he believed that “destination” was more appropriate. Mr. Ushakov (1746th meeting) had expressed doubts about the necessity of article 12, but the question of the duration of the courier’s functions was the basis of the duration

⁷ See footnote 5 above.

⁸ See footnote 4 above.

of his facilities, privileges and immunities, as explained in his third report (A/CN.4/359 and Add.1, paras. 111-113). The commencement of the courier's functions, as opposed to the moment of their acknowledgement by the receiving State, was a point that deserved careful consideration.

50. Article 13, subparagraph (a), was important for differentiating between the status of a courier *ad hoc* and a professional courier. According to international law, a courier *ad hoc* ceased to enjoy privileges and immunities upon the completion of his task. He would gladly delete subparagraph (d), to which some members had objected; however, the point it dealt with should come to the forefront in connection with the status of the bag, in part III. As members had pointed out, not only the courier's death but also his complete incapacitation and the situation envisaged by article 14, paragraph 2, were relevant to the status of the bag.

The meeting rose at 12.45 p.m.

1748th MEETING

Monday, 19 July 1982, at 3 p.m.

Chairman: Mr. Paul REUTER
later: Mr. Leonardo DÍAZ GONZÁLEZ

Draft report of the Commission on the work of its thirty-fourth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter II.

Mr. Díaz González, first Vice-Chairman, took the chair.

CHAPTER II. *Question of treaties concluded between States and international organizations or between two or more international organizations* (A/CN.4/L.344 and Add.1-6)

A. Introduction (A/CN.4/L.344)

Paragraphs 1-30

Paragraphs 1-30 were adopted.

Paragraphs 31-33

2. Sir Ian SINCLAIR, supported by Mr. McCAFREY, proposed the replacement, in the English text, of the word "consensus" in the first sentence of paragraph 31 and in the third sentence of paragraph 32 and of the word "consensualism" in the first sentence of paragraph 33, by the word "consensuality".

It was so decided.

Paragraphs 31 to 33, as amended, were adopted.

Paragraphs 34 to 44

Paragraphs 34 to 44 were adopted.

Section A, as amended, was adopted.

B. Recommendation of the Commission (A/CN.4/L.344)

Paragraph 45

Paragraph 45 was adopted.

Paragraph 46

3. Mr. ILLUECA said that he agreed with the recommendation in paragraph 46 that the General Assembly should convene a conference to give the draft articles the status of a convention. In that connection, he wished to express his admiration and gratitude to the Special Rapporteur and to thank the members of the Bureau and the staff of the Codification Division as well. The work done on the question of treaties concluded between States and international organizations or between two or more international organizations, the principal topic for consideration at the Commission's thirty-fourth session, represented a noteworthy contribution to international law. Unfortunately, recent events in Latin America, which were leading the countries of that region to adopt a new and radical orientation in their relations within the American continent and with the rest of the world, had prevented him from participating earlier in the work of the Commission. The second preambular paragraph of General Assembly resolution 1505 (XV) was surely an invitation to the Commission to pursue its task of codification and progressive development of international law without losing sight of world occurrences of great importance which might necessitate the adoption of new rules.

Paragraph 46 was adopted.

Paragraph 47

Paragraph 47 was adopted.

Paragraph 48

4. Sir Ian SINCLAIR said that, in view of the persuasive reasons given in paragraph 47 for recommending to the General Assembly that the draft articles should be given the form of a convention, the second sentence in paragraph 48, which might create the impression that the Commission was seeking to establish a *jurisprudence constante*, should be deleted.

It was so decided.

Paragraph 48, as amended, was adopted.

Paragraph 49

5. Mr. REUTER (Special Rapporteur), referring to the French version, proposed that in the third sentence the word "déciderait" should be replaced by the word "décide", which was more positive; it could be left to the Secretariat to make any necessary changes in the other language versions.

Paragraph 49, as amended, was adopted.

Paragraph 50

Paragraph 50 was adopted.

Section B, as amended, was adopted.

C. Draft articles on the law of treaties between States and international organizations or between international organizations
(A/CN.4/L.344/Add.1-5)

PART I (INTRODUCTION) (A/CN.4/L.344/Add.1)

Commentary to article 1 (Scope of the present articles)

6. Sir Ian SINCLAIR said that the last sentence of the commentary should be related more closely to the definition of the word “treaty” in article 2, subparagraph 1 (a). He therefore proposed the addition to that sentence of the phrase “as defined in article 2, subparagraph 1 (a),” after the words “a treaty”.

It was so decided.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Use of terms)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

7. Sir Ian SINCLAIR said that, while the phrase “if it is not by virtue of its purpose and terms of implementation placed under” in the second sentence of the paragraph might be a proper translation of the original French text, it was not clear in English. He suggested that it should be replaced by the words “if it is not expressly or by necessary implication made subject to”. However, if the corresponding passage in the French version, “*s'ils ne se trouvent pas placés par leur objet et leurs conditions d'exécution*”, had a special significance, it would be helpful to explain it in a footnote.

8. Mr. REUTER (Special Rapporteur) said he realized that even in the French text the phrase referred to by Sir Ian Sinclair was somewhat enigmatic. It should be read together with article 27. The reference to terms of implementation was to be explained by the fact that, when two United Nations Member States concluded an agreement that was wholly dependent on the implementation of a Security Council resolution, that agreement could be regarded as subject not only to general international law but also to the law of the United Nations. As to the reference to purpose, he would illustrate the point by the following example: an agreement concluded between two subsidiary organs of the United Nations for the purpose of governing technical assistance relations could likewise be considered, given its purpose, as being subject both to general international law and to the internal law of the United Nations. When the Commission had endeavoured to ascertain the legal nature of the agreements concluded by the subsidiary organs of the United Nations, it had received only vague information, which showed that practice in the matter was undecided.

He had referred to the problem at several points in the report.

9. That was why, taken in isolation, the expressions to which Sir Ian Sinclair had referred were not very clear. They might either be replaced by the wording which Sir Ian had suggested, or be retained and accompanied by a footnote referring to the relevant passages of the commentary to the draft.

10. Mr. KOROMA, referring to paragraph (3), and in particular to the last sentence, said he felt that the text might perhaps be improved in the light of the explanation given by the Special Rapporteur.

11. Mr. REUTER (Special Rapporteur) said the Secretariat would endeavour to improve the wording of paragraph (3), the object of which was to indicate that the Commission had not had to deal with the problem as such. The problem of determining the proper law of the contract was well known in private international law. More generally, a question that often arose was whether a conventional act was a treaty in international law—an agreement subject to both general international law and the law of a particular international organization—or a contract governed by the law of a given State. It was not, of course, for the draft to indicate criteria for deciding that. Such an indication would perhaps rebut to some extent the presumption expressed in paragraph 4 that the parties intended the agreement to be governed by general international law. Nevertheless it did seem that the conventional acts of subjects of general international law could be presumed normally to fall within the scope of general international law. However, it was by no means rare for States to conclude conventional acts that were simply contracts governed by a particular municipal law.

Paragraph (4) was approved in the light of those clarifications.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were approved.

Paragraph (9)

12. Mr. KOROMA asked for some enlightenment on the statement in the first sentence of paragraph (9) that “ratification amounts to the definitive confirmation of a willingness to be bound which has, in the first instance, been manifested without commitment.”

13. Mr. REUTER (Special Rapporteur) said that the willingness of a State to be bound by a treaty could be expressed provisionally by signature and then definitively by ratification. In its desire to afford international organizations the same possibility, but without using the word “ratification”, which was reserved for States, the Commission had undertaken an analysis of ratification. It had found that ratification by a State was, in short, a confirmation and had decided to use the expression “act of formal confirmation” for international organizations. But States as well as organizations could, by accession or acceptance, express in one single act their

willingness to be bound. The Commission might have noted that the expression “*acte de confirmation formelle*” had been used in article 3 of annex IX to the recent Convention on the Law of the Sea, but no final equivalent for that expression had yet been found for the English text of the Convention.

14. Sir Ian SINCLAIR said that, in the English text of paragraph (9), the first sentence was ambiguous, because it was not clear whether it was the willingness to be bound or the confirmation of that willingness, and thus ratification, which had “in the first instance, been manifested without commitment”. It might perhaps be best to delete the final clause of the sentence.

15. Mr. McCAFFREY approved Sir Ian Sinclair’s suggestion; another solution would be to add the word “willingness” after the word “which”.

16. Mr. THIAM pointed out that a treaty could come into effect without having been ratified. That being so, he proposed the deletion of the words “which has, in the first instance, been manifested without commitment”.

It was so decided.

Paragraph (9), as amended, was approved.

Paragraphs (10)-(16)

Paragraphs (10)-(16) were approved.

Paragraph (17)

17. Mr. KOROMA referred to the clause in the fourth sentence reading “or because the organization has committed itself by way of a unilateral declaration (assuming that to be possible)”. He suggested that examples of that possibility should be given in a footnote.

18. Mr. REUTER (Special Rapporteur) said that the examples given in paragraph 49 of chapter II might be referred to in such a footnote.

Paragraph (17) was approved, subject to the addition of a footnote to that effect.

Paragraphs (18)-(26)

Paragraphs (18)-(26) were approved.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (International agreements not within the scope of the present articles)

The commentary to article 3 was approved.

Commentary to article 4 (Non-retroactivity of the present articles)

The commentary to article 4 was approved.

Commentary to article 5 (Treaties constituting international organizations and treaties adopted within an international organization)

The commentary to article 5 was approved.

Part I, as amended, was adopted.

PART II (CONCLUSION AND ENTRY INTO FORCE OF TREATIES) (A/CN.4/L.344/Add.1)

SECTION 1 (Conclusion of treaties)

Commentary to article 6 (Capacity of international organizations to conclude treaties)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

19. Sir Ian SINCLAIR said that practice might play a part in connection with article 6, but only through the relevant rules of the organization. He therefore proposed that the beginning of the last sentence of the paragraph should be amended to read: “For these reasons, practice as such was not specifically mentioned in article 6”.

It was so decided.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

Paragraph (7) was approved.

Commentary to article 7 (Full powers and powers)

Paragraphs (1) to (12)

Paragraphs (1) to (12) were approved.

Paragraph 13

20. Mr. McCAFFREY said that paragraphs (10) to (13) discussed the reasons why the verb “to express” had been preferred to the verb “to communicate”. First a case was made for using the verb “to communicate”, then the problems involved in doing so were pointed out, and finally paragraph (13) dealt with the decision to use the verb “to express”. However, nowhere was it stated that, by using that term, the Commission did not mean to imply that a representative of an organization might simply declare a consent that did not emanate from the competent organ of a State or organization. He therefore proposed that a sentence should be added to that effect.

21. Mr. REUTER (Special Rapporteur) said that, if the contents of paragraph (14) did not suffice to dispel the doubt expressed by Mr. McCaffrey, paragraph (13) might be expanded by the addition of a sentence stating that: “In the text of the draft articles, the verb “to express” covers, as appropriate and without distinction, the case of a consent made public by the person that had established it legally and the case of a consent made public by a person other than the person or entity (the competent organ, whatever that might be) that had established it legally.”

It was so decided.

Paragraph (13), as amended, was approved.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8 (Subsequent confirmation of an act performed without authorization)

The commentary to article 8 was approved.

Commentary to article 9 (Adoption of the text)

The commentary to article 9 was approved.

Commentary to article 10 (Authentication of the text)

The commentary to article 10 was approved.

Commentary to article 11 (Means of expressing consent to be bound by a treaty)

The commentary to article 11 was approved.

Commentary to article 12 (Consent to be bound by a treaty expressed by signature)

The commentary to article 12 was approved.

Commentary to article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty)

The commentary to article 13 was approved.

Commentary to article 14 (Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval)

Paragraph (1)

22. Sir Ian SINCLAIR supported by Mr. McCAFFREY, proposed the deletion from the second sentence of the words “at least in the French version”, since the comment applied to all the versions.

It was so decided.

23. Mr. McCAFFREY further proposed that in the English version of that sentence the words “*un acte de confirmation formelle*” should be replaced by their equivalent in English.

It was so decided.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 15 (Consent to be bound by a treaty expressed by accession)

24. Mr. REUTER (Special Rapporteur) proposed that, in the French version, the first part of the penultimate sentence should be amended to read: “*Par ailleurs, le présent projet ne devrait pas viser une telle situation ...*”. That would make it quite clear that the

sentence contained the expression of the views of one member of the Commission.

It was so decided.

The commentary to article 15, as amended, was approved.

Commentary to article 16 (Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession)

The commentary to article 16 was approved.

Commentary to article 17 (Consent to be bound by part of a treaty and choice of differing provisions)

The commentary to article 17 was approved.

Commentary to article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)

25. Sir Ian SINCLAIR proposed that the last sentence of the commentary should be amended to read: “Consequently, the reference is to “a treaty” as defined in article 2, subparagraph 1 (a), but without distinguishing between the two types of treaties involved.”

It was so decided.

The commentary to article 18, as amended, was approved.

Section 1, as amended, was adopted.

SECTION 2 (Reservations)

Commentary to section 2

26. Mr. REUTER (Special Rapporteur) proposed that the title “Commentary” should be amended to read “General commentary to section 2”, since the commentary applied to the section as a whole.

It was so decided.

Paragraph (1)

27. Mr. REUTER (Special Rapporteur), referring to the second sentence, proposed the addition of the words “in first reading” after the word “discussions”. He further proposed that in the French version of footnote 24 the date “28 May 1951” be underlined, since it formed part of the title of the publication.

It was so decided.

28. Sir Ian SINCLAIR proposed that the third and fourth sentences in the English text should be connected by a semi-colon instead of being separated by a full stop, since it was exclusively in the Sixth Committee that the question had been touched upon in 1978 and 1979. He further proposed that, in the English text of the last sentence, the words “brought up” should be replaced by the words “brought out”.

It was so decided.

29. Mr. REUTER (Special Rapporteur) proposed that in the French text the colon after the third sentence should be replaced by a semi-colon.

It was so decided.

Paragraph (1), as amended, was approved.

Paragraph (2)

30. Mr. REUTER (Special Rapporteur), referring to the French text, proposed that, in the opening portion of the first sentence, the words “*quelles sont*” should be amended to read “*quelles étaient*”.

It was so decided.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (15)

Paragraphs (3) to (15) were approved.

The general commentary to section 2, as amended, was approved.

Commentary to article 19 (Formulation of reservations)

The commentary to article 19 was approved.

Commentary to article 20 (Acceptance of and objection to reservations)

31. Mr. REUTER (Special Rapporteur), referring to the French text, said that in footnote 44 the words “*de toute différence*” should be replaced by the words “*de toute référence*”.

It was so decided.

The commentary to article 20, as amended, was approved.

Commentary to articles 21 (Legal effects of reservations and of objections to reservations), *22* (Withdrawal of reservations and of objections to reservations) *and 23* (Procedure regarding reservations)

The commentary to articles 21, 22 and 23 was approved.

Section 2, as amended, was adopted.

SECTION 3 (Entry into force and provisional application of treaties)

Commentary to articles 24 (Entry into force) *and 25* (Provisional application)

The commentary to articles 24 and 25 was approved.

Section 3 was adopted.

Part II, as amended, was adopted.

PART III (Observance, application and interpretation of treaties) (A/CN.4/L.344/Add.1 and 2)

SECTION 1 (Observance of treaties)

Commentary to article 26 (Pacta sunt servanda)

The commentary to article 26 was approved.

Commentary to article 27 (Internal law of States, rules of international organizations and observance of treaties)

The commentary to article 27 was approved.

Section 1 was adopted.

SECTION 2 (Application of treaties)

Commentary to article 28 (Non-retroactivity of treaties)

The commentary to article 28 was approved.

Commentary to article 29 (Territorial scope of treaties)

The commentary to article 29 was approved.

Commentary to article 30 (Application of successive treaties relating to the same subject-matter)

The commentary to article 30 was approved.

Section 2 was adopted.

SECTION 3 (Interpretation of treaties)

General commentary to section 3

The general commentary to section 3 was approved.

Section 3 was adopted.

SECTION 4 (Treaties and third States or third organizations)

General commentary to section 4

The general commentary to section 4 was approved.

Commentary to article 34 (General rule regarding third States and third organizations)

32. Mr. McCAFFREY, referring to the English text, proposed that in the first sentence the word “*consensualism*” should be replaced by the word “*consensus-ality*”.

It was so decided.

The commentary to article 34, as amended, was approved.

Commentary to article 35 (Treaties providing for obligations for third States or third organizations)

The commentary to article 35 was approved.

Commentary to article 36 (Treaties providing for rights for third States or third organizations)

33. Mr. KOROMA said that he had doubts about the main proposition of the last sentence of paragraph 1 of article 36, namely: “*Its assent shall be presumed so long as the contrary is not indicated ...*”. He reserved the right to revert to the matter later.

The commentary to article 36 was approved.

Commentary to article 36 bis (Obligations and rights arising for States members of an international organization from a treaty to which it is a party)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

34. Mr. REUTER (Special Rapporteur), referring to the English text, said that the first sentence did not reflect his intent. What he had had in mind was the situation where there was, first, a relation between States members of an international organization deriving from its constituent instrument; secondly, a treaty between that organization and other States; and thirdly, certain relations between the States members of that organization and the parties to the treaty, including those parties to the treaty which were members of the

organization in question. The word “each” in the English text should therefore be deleted, since it was not necessarily each treaty that involved the organization and its member States.

35. Sir Ian SINCLAIR said that, in his view, the problem with the English version arose because the words “*d’une manière distincte*”, which could be related to the word “each”, had not been translated. He therefore suggested that in the English text the phrase “each involving an international organization” should be amended to read “each involving in a distinctive manner an international organization”.

It was so decided.

36. Mr. MAHIOU, also referring to the first sentence, asked whether it would not be best to replace the words “several treaties” by the words “two or more treaties”.

37. Mr. REUTER (Special Rapporteur) said that he preferred the existing wording; there would of course be at least two treaties—the original treaty and the constituent instrument of the organization—but, in some cases, there might also be a third treaty between the members of the international organization concerned and its partners which were parties to the original treaty.

38. Mr. USHAKOV, referring to the second sentence of paragraph 2, said that the expression “run by an international organization” did not seem particularly apt for a customs union.

39. Mr. REUTER (Special Rapporteur) suggested that, in order to meet that point, the expression in question should be amended to read “in the case where it takes the form of an international organization”.

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

40. Mr. CALERO RODRIGUES proposed that in the English text the words “from a number of” should be replaced by the words “from the following”.

It was so decided.

Paragraph (4), as amended, was approved.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were approved.

Paragraph (8)

41. Mr. McCAFFREY, supported by Sir Ian SINCLAIR, proposed that in the first sentence the word “third” should be deleted; read in conjunction with the last part of the concluding sentence of paragraph 7, it was confusing.

42. Mr. USHAKOV proposed that the words “third States” should be replaced by wording indicating that

the States concerned were not parties to the treaty in question.

43. Mr. SUCHARITKUL agreed with Mr. Ushakov and proposed that the same change should be made in the last line of paragraph (7).

44. The CHAIRMAN suggested that the Special Rapporteur should be invited to redraft the first sentence of paragraph (8) in the light of the comments made.

It was so decided.

45. Mr. MAHIOU pointed out that the fourth sentence of paragraph (8) should be amended in the same way as the second sentence of paragraph (2).

46. Mr. REUTER (Special Rapporteur) agreed. He suggested that the words “that manages a customs union” should be replaced by the words “that has been given its form by a customs union”.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) to (17)

Paragraphs (9) to (17) were approved.

The commentary to article 36 bis, as amended, was approved.

Commentary to article 37 (Revocation or modification of obligations or rights of third States or third organizations)

The commentary to article 37 was approved.

The meeting rose at 6 p.m.

1749th MEETING

Tuesday, 20 July 1982, at 10.05 a.m.

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ
later: Mr. Paul REUTER*

Draft report of the Commission on the work of its thirty-fourth session (continued)

CHAPTER II. Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/L.344 and Add.1-6)

C. Draft articles on the law of treaties between States and international organizations or between international organizations (continued) (A/CN.4/L.344 and Add.1-5)

1. The CHAIRMAN invited the members of the Commission to limit their observations to points of substance.

PART V (INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES) (A/CN.4/L.344/Add.4)

SECTION 4 (Procedure)

Commentary to article 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Mr. McCAFFREY suggested that the last sentence should be amended by replacing the words "to require the" by "to justify requiring the".

It was so decided.

Paragraph (3), as amended, was approved.

The commentary to article 67, as amended, was approved.

Commentary to article 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

The commentary to article 68 was approved.

Section 4, as amended, was adopted.

SECTION 5 (Consequences of the invalidity, termination or suspension of the operation of a treaty)

Commentary to article 69 (Consequences of the invalidity of a treaty)

The commentary to article 69 was approved.

Commentary to article 70 (Consequences of the termination of a treaty)

3. Sir Ian SINCLAIR said that he would like the Special Rapporteur to explain what was meant by the expression "a rule regarding conflict of laws over time" in the last sentence of the commentary.

4. Mr. McCAFFREY said that he believed the expression "conflict of laws", which represented a notion of private international law, was inappropriate. He would prefer it to be replaced by an expression such as "conflict of treaty obligations".

5. Mr. REUTER (Special Rapporteur) said that in continental-law countries with a predominantly Germanic culture, the expression used was "intertemporal law". In French law, the expression "conflict of laws" was removed from the pure context of private international law to refer to conflicts of laws which took place over time; the question was, which law applied, depending on the temporal circumstances, to a situation or to effects which took place over time. However, to solve the problem completely, he proposed that the entire last sentence should be deleted.

It was so decided.

The commentary to article 70, as amended, was approved.

Commentary to article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law)

6. Mr. McCAFFREY said that the expression "conflict of laws over time" in the third sentence raised the same problem as in the commentary to article 70. Furthermore, he did not quite see what interpretation was being referred to in the third sentence of the commentary.

7. Sir Ian SINCLAIR suggested that the second and third sentences should be deleted and that the beginning of the following sentence should be amended to read: "The Commission considered it inappropriate to make any changes to the text of article 71, not only ...".

8. Mr. REUTER (Special Rapporteur) said that he agreed to those suggestions, which made it clear that the question at issue was the interpretation of the three articles of the Vienna Convention on the Law of Treaties which dealt with peremptory norms.

The commentary to article 71, as amended, was approved.

Commentary to article 72 (Consequences of the suspension of the operation of a treaty)

The commentary to article 72 was approved.

Section 5, as amended, was adopted.

PART VI (MISCELLANEOUS PROVISIONS)

Commentary to article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

Paragraphs (1) to (12)

Paragraphs (1) to (12) were approved.

Paragraph (13)

9. Mr. McCAFFREY suggested that, in the English text, the words "to that treaty" in the first sentence should be replaced by the words "to such a treaty" and that the end of the sentence, beginning with the words "the implication being", should be deleted.

It was so decided.

Paragraph (13), as amended, was approved.

Paragraph (14)

Paragraph (14) was approved.

The commentary to article 73, as amended, was approved.

Commentary to article 74 (Diplomatic and consular relations and conclusion of treaties)

The commentary to article 74 was approved.

Commentary to article 75 (Case of an aggressor State)

The commentary to article 75 was approved.

Part VI, as amended, was adopted.

PART VII (DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION)

Commentary to article 76 (Depositaries of treaties)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2) and (3)

10. Sir Ian SINCLAIR proposed that the last sentence in paragraph 2 should become the first sentence in paragraph 3.

It was so decided.

11. Mr. McCAFFREY, referring to the English text, proposed that in the second sentence of paragraph (3), the word “need” should be inserted after the word “what”.

It was so decided.

Paragraphs (2) and (3), as amended, were approved.

The commentary to article 76, as amended, was approved.

Commentary to article 77 (Functions of depositaries)

The commentary to article 77 was approved.

Commentary to article 78 (Notifications and communications)

12. Mr. McCAFFREY proposed that it should be made clear, at the beginning of the first sentence, that the article 78 in question was article 78 of the Vienna Convention on the Law of Treaties.

It was so decided.

The commentary to article 78, as amended, was approved.

Commentary to article 79 (Correction of errors in texts or in certified copies of treaties)

The commentary to article 79 was approved.

Commentary to article 80 (Registration and publication of treaties)

The commentary to article 80 was approved.

Part VII, as amended, was adopted.

Mr. Reuter took the chair.

CHAPTER V. Jurisdictional immunities of States and their property (A/CN.4/L.345 and Add.1)

A. Introduction (A/CN.4/L.345)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

13. Mr. McCAFFREY proposed that in the last sentence the words “as various expressions of consent” should be replaced by an expression such as “on the various ways of expressing consent”.

It was so decided.

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 19

Paragraphs 12 to 19 were adopted.

Paragraph 20

14. Mr. McCAFFREY proposed that, in the English text, in the last sentence, the words “In civil-law jurisdiction” should be replaced by the words “In the civil law system”.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

15. Mr. McCAFFREY proposed that the words “it was to be hoped” in the penultimate sentence should be replaced by the words “it appeared”.

It was so decided.

16. Sir Ian SINCLAIR proposed that the words “He noted that” at the beginning of the same sentence should be deleted.

It was so decided.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 33

Paragraphs 24 to 33 were adopted.

Paragraph 34

17. Sir Ian SINCLAIR proposed that the words “of the above” in the second sentence should be replaced by the words “of the article”.

It was so decided.

Paragraph 34, as amended, was adopted.

Paragraph 35

18. Mr. McCAFFREY proposed that, in the English text, the words “pleadings on the merits” in the fifth sentence should be replaced by the words “steps concerning the merits”.

19. Mr. SUCHARITKUL (Special Rapporteur) said that he believed it would be just as well simply to delete the words “pleadings on”.

It was so decided.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 42

Paragraphs 36 to 42 were adopted.

Section A, as amended, was adopted.

CHAPTER III. State responsibility (A/CN.4/L.346)

A. Introduction

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

Section A was adopted.

B. Consideration of the topic at this session

Paragraphs 16 to 36

Paragraphs 16 to 36 were adopted.

Paragraph 37

20. Sir Ian SINCLAIR proposed that the words "of the commitment" should be deleted.

It was so decided.

Paragraph 37, as amended, was adopted.

Paragraphs 38 to 40

Paragraphs 38 to 40 were adopted.

Section B, as amended, was adopted.

Chapter III as a whole, as amended, was adopted.

**Jurisdictional immunities of States
and their property (continued)* (A/CN.4/L.342)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 1, ARTICLE 2, subpara. 1 (a), ARTICLES 7, 8 and 9

21. Mr. SUCHARITKUL (Chairman of the Drafting Committee), before introducing the draft articles on jurisdictional immunities of States and their property adopted by the Drafting Committee (A/CN.4/L.342), said that the Committee had held 23 meetings in all, during which it had adopted the texts of 55 draft articles and the annex, and reviewed 26 draft articles, on the law of treaties between States and international organizations or between international organizations. That had been the priority topic at the Commission's thirty-fourth session. The Committee had also held a preliminary discussion on the first few articles in part 2 of the draft articles on State responsibility for internationally wrongful acts. Finally, the Committee had adopted the texts of the draft articles on jurisdictional immunities which he would shortly introduce. The Committee's achievements at the present session compared favourably with those at preceding sessions; in that connection he wished to thank all the members of the Drafting Committee as well as the Special Rapporteurs concerned and those members of the Commission who had attended the Committee's meetings.

22. Unless the General Assembly requested the Commission to complete the second reading of part 1 of the draft articles on State responsibility for internationally wrongful acts, the Drafting Committee should be in a position, at the thirty-fifth session, to consider the three remaining draft articles on jurisdictional immunities of States and their property and the nine draft articles on State responsibility. To those should be added the 14 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which the Drafting Committee had not yet

begun. The Drafting Committee should then be able to consider such new articles as might be referred to it by the Commission in the course of its thirty-fifth session.

CONSIDERATION BY THE COMMISSION

ARTICLE 2¹ subpara. 1 (a) (Use of terms: "court")

23. Turning to the draft articles on jurisdictional immunities of States and their property, he said that the Committee proposed the following new text for article 2, subparagraph 1 (a):

"(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;"

24. Although article 2, on use of terms, would have to be considered towards the end of the preparation of the draft on first reading, the Drafting Committee had deemed it appropriate, in the light of the debate in the Commission, to adopt at the present stage a provisional definition of the term "court". The definition was intended to delimit the topic under consideration, namely, to show that the jurisdictional immunities referred to in the title of the topic were immunities from the jurisdiction of the courts of a State. The expressions "organ" and "judicial functions" had been found sufficiently flexible to encompass the varied characteristics that might be attributed to them under the internal law of States.

25. The CHAIRMAN, noting that there were no comments, suggested that the Commission might adopt article 2, subparagraph 1 (a), as proposed by the Drafting Committee.

Article 2, subparagraph 1 (a), was adopted.

ARTICLE 1² (Scope of the present articles)

26. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text and title for article 1:

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

The text of the article had been modified in the light of the definition of the word "court". The words "of the courts" had been added to qualify the word "jurisdiction" and the words "questions relating to" had been deleted.

27. Mr. USHAKOV said he noted that the Drafting Committee had decided to confine the scope of the draft to the immunity of one State from the jurisdiction of the courts of another State. He thought it was best for the time being to be specific, although he was not sure what the position would be with regard, for example, to prop-

¹ For the text, see *Yearbook ... 1981*, vol. II (Part Two), p. 153, footnote 655.

² For the text initially adopted by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), p. 141.

* Resumed from the 1730th meeting.

erty and execution falling more within the jurisdiction of the administrative authorities.

28. While he was able to accept draft article 1, he nevertheless regretted that draft article 6,³ which stated the principle of jurisdictional immunity of States, had to remain in abeyance. He found it a little difficult to understand the attitude of other members of the Commission in that respect. They seemed to be afraid that, once the principle was enunciated, exceptions to it would no longer be possible; that seemed somewhat strange, since exceptions often proved the rule. They even feared a provision to the effect that a State should enjoy immunity from the jurisdiction of the courts of another State “save as otherwise provided for in the articles”, since they felt that the exceptions provided for would not be exhaustive and that difficulties would ensue. Yet the principle existed, and it was recognized by all States; if it was not enunciated, the Commission would be failing in its task. He would therefore like an assurance that the Commission would try to state the principle; otherwise it would be pointless to talk of exceptions.

29. Sir Ian SINCLAIR said that the new text of draft article 1 proposed by the Drafting Committee did in a sense confine the scope of the topic, inasmuch as it would leave certain areas unregulated by the draft. Members would, however, probably agree that there seemed to be a dearth of reliable authority for settling the wider issue of the extent of immunity from the jurisdiction of administrative authorities, for instance, given the general principle that one State entity operating in the territory of another State was fundamentally obliged to comply with the laws of the latter. In the circumstances, he considered that the new draft article 1 was a very considerable improvement and should provide the foundation for the ensuing draft articles. Although there might be problems when it came to the chapters relating to property and execution, he did not think that they would be insurmountable.

30. Agreeing that draft article 6 raised a problem, he said that he had always taken the view that, even in its present wording, it did state a principle of immunity, to which there were exceptions. It could of course be argued that that in itself was a controversial way of presenting the topic. There was at least one school of thought according to which the whole doctrine of State immunity was an exception to an overriding principle, that of the jurisdiction of the territorial sovereign. In his view, however, the problem raised by Mr. Ushakov would solve itself as work on the draft articles proceeded. If draft article 6 were to be modified in such a way as to state that the principle of immunity applied “except as provided in the articles”, the Commission would immediately be confronted with the problem of the scope and range of the exceptions that would come later in the draft. Having participated in the elaboration of the European Convention on State Immunity,⁴ he

knew how difficult it was to draw up an exhaustive catalogue of cases of non-immunity. Some flexibility therefore had to be ensured in the later draft articles in order to enable the future instrument to operate in an effective manner, having regard to the way in which the jurisprudence of the courts developed.

31. Consequently, he did not think it would be possible to take a decision on draft article 6 at the present stage of work on the topic. In his opinion, the matter would sort itself out as work progressed, and should not, in the final analysis, prove a stumbling-block. At any rate, the Drafting Committee was proceeding on the basis that draft article 6 did state a principle and that exceptions to it would be provided for. That should bring some comfort to Mr. Ushakov.

32. Mr. YANKOV said he felt bound to agree with the reasoning of Mr. Ushakov, especially in regard to the link between the new article 1 and article 6 as provisionally adopted by the Drafting Committee. Even if the restrictive scope of article 1, which confined the application of the articles to the jurisdiction of the courts, was simply regarded at that stage as a working hypothesis, it was hardly a step forward, considering its implications for article 6. As Sir Ian Sinclair had observed, the fact that some areas would remain unregulated by the draft might unnecessarily restrict the general rule on State immunity and lead to results which conflicted with customary and conventional law and the ambit of State immunity as indicated by State practice at large. Enunciating a general rule by way of exceptions might shrink the legal notion of State immunity and its application. The issue deserved further consideration, since it was easier to repair consequences at the present state than later on. Flexibility and a pragmatic approach were to be recommended, but great caution should be exercised as well.

33. He suggested that the door should be left open for considering all the implications that article 6 might have for the articles following it. Even articles 7 to 9, if seen in terms of the restrictive approach resulting from article 1 as amended and article 6, might need further consideration by the Drafting Committee and the Commission. In view of that, he was not prepared to endorse articles 7 to 9 as they stood.

34. Mr. NI, referring to the proposed definition of “court” in article 2, subparagraph 1 (a), recalled that in the Drafting Committee Sir Ian had proposed the following formulation of that definition:

“ ‘court’ means any organ of a State, however named, entitled to exercise adjudicatory functions in civil, commercial or administrative matters”.

There had been considerable discussion in the Committee about the word “adjudicatory”, since in countries whose judicial system included procurators, they were considered as exercising judicial functions in the service of the courts although they never made decisions or gave judgements. The present formulation—“ ‘court’ means any organ of a State, however named, entitled to exercise judicial functions”—was appropriate because

³ *Ibid.*, p. 142.

⁴ See 1708th meeting, footnote 12.

the term "judicial functions" did not exclude the exercise of functions considered judicial but not adjudicatory.

35. He shared the concern expressed by Mr. Ushakov and Mr. Yankov regarding the present formulation of article 6, although he did not feel so strongly as Mr. Ushakov that the article formulated an exception. It did state a certain principle, but not very clearly; it gave the impression that whatever kind of State immunity was given would be governed by the articles to follow. During the debate in the Commission a number of formulations had been proposed, some of which were enumerated in paragraphs 27 and 28 of chapter V of the draft report (A/CN.4/L.345). It was obvious that the present one was not final. The Drafting Committee had even set up a working group to try to reword article 6, but the group had not had time to do that. Although he was not absolutely satisfied with the present formulation of that article, he took the view, like Sir Ian Sinclair, that it could be revised when the Commission had arrived at a definite formulation of the articles following it.

36. Mr. KOROMA recalled that in an earlier intervention (1712th meeting) he had tried, if anything, to extend the application of jurisdictional immunity, whereas article 1 and article 2, subparagraph 1 (a), took a restrictive approach. As to article 6, it stated a basic principle of international law and so was not subordinate to the other articles. He was prepared to accept the view of the Special Rapporteur that article 1 and article 2, subparagraph 1 (a), as presently formulated, should be accepted as a working hypothesis.

37. Mr. CALERO RODRIGUES said that he approved the articles submitted by the Drafting Committee, on the understanding that further consideration of article 6 was necessary. He agreed with the limitation of the scope of the articles now presented in article 1, which simply clarified the Special Rapporteur's position that the Commission should confine itself to dealing with the jurisdiction of the courts. Precisely because the Commission was not being too ambitious, article 6 should be clearer than it was at present. According to his understanding of that article, it stated the principle that immunity existed under general international law except as far as limitations to it were laid down in the draft articles. It had been impossible at the present session for the Drafting Committee to come to grips with the problem of article 6. However, it was his understanding that if the Commission was able to approve articles 1, 2, subparagraph 1 (a), 7, 8 and 9, it would come back to article 6 in the future in order to make the meaning of the article absolutely clear.

38. Mr. FRANCIS said that he wished to associate himself with the reservations expressed by Mr. Koroma concerning the limitation in scope of article 1.

39. The CHAIRMAN, speaking as a member of the Commission, said that he approved of the working method whereby the scope of the draft was limited from

the outset to jurisdictional immunity in judicial matters; that did not mean that there were not other forms of jurisdictional immunity or that the Commission could not examine them subsequently. The situation had been almost identical when the Commission had tackled the study of succession of States in respect of matters other than treaties; in order to make progress, it had had to study certain aspects of the question one by one.

40. The definition of the term "court" in article 2, subparagraph 1 (a), was quite acceptable to him. When dealing with an exceptionally difficult topic, it was important to show some flexibility.

41. He would not be able to gain a clear idea of article 6 and the following articles until the entire draft had been elaborated. It was not unusual that the early articles of a draft could only be evaluated in relation to the subsequent articles and that the latter sometimes obliged the Commission to revise the former. In the present case, it was evident that each article called the preceding articles into question. However, in order to progress, the Commission must have texts before it which, even if they were not perfectly satisfactory, enabled it gradually to obtain a comprehensive view of the issue, which might ultimately be acceptable as a compromise.

42. Mr. McCAFFREY said he wished to associate himself with the last remarks made by the Chairman in his capacity as a member of the Commission. It was essential for the Commission to approve the articles submitted by the Drafting Committee in order to provide a working basis for continued progress the following year. The Sixth Committee would certainly find it curious if the Commission failed to approve those articles provisionally. Their approval did not mean that they had to be perfect in the eyes of every member of the Commission.

43. Concerning article 1, he agreed with Mr. Calero Rodrigues that the empirical method followed by the Special Rapporteur had not revealed a State practice that was broad enough to expand the coverage of the present articles beyond what was provided for in the new article 1. It would certainly be highly inadvisable to purport to create principles of immunity which did not exist. He referred in that connection to the examples mentioned in the Commission and in the Drafting Committee, particularly in regard to administrative proceedings, to which all agreed that States were subject.

44. The definition of the term "court" in article 2, subparagraph 1 (a), was a pivotal accomplishment in that it enabled the Commission to avoid defining jurisdiction more specifically at that stage.

45. The draft articles submitted by the Drafting Committee were the product of long and hard labour; it would be regrettable to leave them pending for another year. He therefore endorsed the suggestion that they should be given provisional approval.

Article 1 was adopted.

ARTICLE 7⁵ (Modalities for giving effect to State immunity)

46. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that when part IV of the draft articles, concerning immunities of State property from measures of attachment and execution, was drafted, the Commission might wish to re-examine the scope of article 1. In order not to delay its work, the Drafting Committee had appointed a working group to consider article 6. He was grateful to Mr. Ni for having drawn attention to some of the draft proposals which the group had made. He wished to assure Mr. Yankov that article 6 as it stood would have to be changed, both because of the changes in article 1 and because article 6, paragraph 2, carried over into article 7. As Special Rapporteur, he had submitted the following alternative texts for the phrase “in accordance with the provisions of the present articles” in the two paragraphs of article 6: in paragraph 1, “to the extent of and subject to the limitations provided in the present articles”; and in paragraph 2, “except as otherwise provided in the present articles”.

47. Turning to article 7, he said that the Drafting Committee proposed the following title and text for the article:

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

48. The text of article 7 reproduced substantially that submitted by the Special Rapporteur to the Drafting Committee for the same article towards the end of the thirty-third session of the Commission.⁶ Paragraph 1 was based on alternative A, but with drafting changes made necessary by the introduction of the term “court”. Thus the rather long and detailed formulation in the original text (“refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities [or] and by disallowing the [conduct] continuance of legal proceedings”) had been replaced by the following more

concise phrase: “refraining from exercising jurisdiction in a proceeding before its courts”. The words “under article 6” remained in square brackets in order to highlight the existence of differing views on the contents of article 6 and the importance attached by some members to that article.

49. In paragraphs 2 and 3, the term “court” had been utilized where necessary and the text had been recast accordingly. In particular, the words in former paragraph 3, “against one of its organs, agencies or instrumentalities acting as a sovereign authority”, had been altered to read: “against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority”; that terminology, borrowed from part 1 of the draft articles on State responsibility for internationally wrongful acts, helped to ensure some uniformity among the drafts being elaborated by the Commission on different topics.

50. In the title of article 7, the words “Obligation to give” had been replaced by the words “Modalities for giving”, which reflected the contents of the article better. Finally, in paragraph 2 of the French text the words “*désigné comme une partie*” had been replaced by the words “*cité comme partie*”.

51. Mr. USHAKOV said that the Drafting Committee had worded article 7 on the basis that it would be able to finalize the text of article 6. As the words “under article 6” in paragraph 1 of the article indicated, article 7 did in fact depend on article 6, about which the Drafting Committee had been unable to reach agreement. If article 6 concerned immunity from the jurisdiction of the courts only, article 7, which dealt with how to give effect to that immunity, would definitely make sense. But at present article 6 was much wider in scope and encompassed all forms of immunity from the jurisdiction of the State.

52. Without article 6, the articles following it should be left in abeyance. He himself could not understand why some members of the Commission were reluctant to state a well-known principle of international customary and conventional law in article 6 and why that principle could not be stated until the exceptions to which it was subject had been enumerated. He was neither for nor against articles 7, 8 and 9. They simply seemed meaningless to him because they lacked the basis which article 6 should represent.

53. Sir Ian SINCLAIR said that he was not as pessimistic as Mr. Ushakov about the implications of article 6 for articles 7, 8 and 9. The new text of article 1 represented progress in that it delimited the scope of the draft articles. Accordingly, although there might be differing views in the Commission as to the precise formulation of article 6, the statement of principle it contained was bound to relate to immunity from jurisdiction in proceedings before the courts of another State. There was at least that measure of agreement regarding a revised formulation for article 6. The fact that the Commission, for reasons advanced earlier by

⁵ For the text submitted by the Special Rapporteur and the initial consideration thereof by the Commission at its present session, see 1714th meeting, paras. 6-41; 1715th meeting; and 1716th meeting, paras. 1-14.

⁶ See *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnote 668.

Mr. Ushakov and himself, had not yet been able to finalize the text of article 6 should in no way prevent it from provisionally adopting articles 7, 8 and 9. Only in that way would it be able to proceed with the elaboration of the draft articles and finally solve the problem posed by the uncertainty over the precise formulation of article 6.

54. Mr. McCAFFREY said that, in his understanding, Mr. Ushakov's difficulties with articles 7, 8 and 9 stemmed from the fact that, in the absence of a statement of the principle of State immunity, those articles had no foundation. However, as Sir Ian had pointed out, article 6 would state a principle which would be a solid foundation for articles 7, 8 and 9. The only question which arose whether article 6 would state the principle as one of general international law or as one elucidated from the articles under study. Since there was no disagreement on the actual purpose of article 6, it did not need to be in final form for the Commission to be able to adopt articles 7, 8 and 9 provisionally.

55. The CHAIRMAN, speaking as a member of the Commission, said that he could accept article 7 subject to certain reservations. In particular, the word "control" at the end of paragraph 3 was a common law term which had simply been reproduced in French. Although control was a clear concept in the restrictive practices legislation of most States that had adopted such legislation, as well as in certain international conventions, he would be unable to reach a final decision on article 7 until the Commission had indicated clearly what it meant by "control". The notion could be construed so broadly as to make immunity absolute in all cases.

56. Mr. KOROMA said that he was prepared to accept Sir Ian Sinclair's view that article 6 could, at least for the time being, be predicated on article 1. On that basis, article 7 could be accepted provisionally.

Article 7 was adopted subject to the reservations formulated by some members of the Commission.

The meeting rose at 1 p.m.

1750th MEETING

Wednesday, 21 July 1982, at 10.15 a.m.

Chairman: Mr. Paul REUTER

later: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.342)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

ARTICLE 8¹ (Express consent to the exercise of jurisdiction) *and*

ARTICLE 9² (Effect of participation in a proceeding before a court)

1. Mr. SUCHARITKUL (Chairman of the Drafting Committee), referring to the draft articles adopted by the Drafting Committee (A/CN.4/L.342), said that in the light of the Commission's debate at the previous session on the draft articles 8 and 9 submitted by the Special Rapporteur,³ the Drafting Committee had concluded that there was no need to include in the draft a general principle such as that of article 8 on "Consent of State". The Drafting Committee also concluded that the original text of article 9, dealing with the "Expression of consent" could conveniently be divided into two separate articles to cover, respectively, express consent to the exercise of jurisdiction and the act implying consent to such exercise or, as the more neutral title of article 9 as it now stood indicated, the "Effect of participation in a proceeding before a court".

2. The basic idea embodied in the former text of draft article 8 underlined the provisions of former article 9 and was maintained in the new wording of article 8 concerning "express consent". In view of the Drafting Committee's decision to split the text of the former article 9 in two, paragraph 1 of the article, which was essentially descriptive, became unnecessary. The present text of article 8 formulated, in one simplified and consolidated paragraph, the provisions found in paragraphs 2 and 3 of former article 9. The new single text did not make reference to the waiver of immunity, that being deemed to be one of the forms in which consent could be expressed. To emphasize the mandatory nature of the rule, the text was formulated in the negative rather than the affirmative used in the original, which had been criticized as being merely descriptive.

3. Accordingly, the Drafting Committee proposed the following title and text for article 8:

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

4. Mr. LACLETA MUÑOZ pointed out, in connection with the word "proceeding", that when a State could not invoke immunity from jurisdiction before a court of first instance in another State, it obviously could not do so before a court of second instance or ap-

¹ For the text submitted by the Special Rapporteur and the initial consideration thereof by the Commission at its present session, see 1716th meeting, paras. 15-47, and 1717th meeting, paras. 1-39.

² *Idem.*

³ See *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 669 and 670.

peal. Furthermore, although in legal texts prepared at the United Nations the word “matter” was apparently regularly translated into Spanish by ‘*cuestión*’, the latter word was too concrete in its meaning, and it might therefore be advisable to replace it by ‘*materia*’.

5. Sir Ian SINCLAIR supported the first point made by Mr. Lacleta Muñoz. In the legal system of a number of countries, including his own, the concept of waiver or voluntary submission to the jurisdiction of another State applied not only to the proceeding before the court but also in the context of an appeal. That fact should be made clear in the commentary.

Article 8 was adopted.

6. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 9 embodied in three paragraphs the provisions of paragraphs 4, 5 and 6 of the initial draft. The provisions of paragraph 7 of that draft had been deemed unnecessary, since they merely attempted to specify some of the rules embodied in the preceding paragraph by allowing the question of jurisdictional immunity to be raised at any stage of the proceedings. The practice of various courts was not always uniform; as Mr. Razafindralambo had pointed out (1728th meeting), that question was regarded as falling under ‘*ordre public*’ in the system based on Roman law. No corresponding provision appeared, therefore, in the text as it now stood. To maintain parallelism with article 8, the new article 9 had been drafted in the negative and did not include a reference to waiver of immunity. Further precision and clarity had been introduced by drafting changes made in the light of the use of the term “court”.

7. The Committee had also felt that a subparagraph (c) could be added to article 9, paragraph 2, covering a situation where a State would like to appear before the court of another State, not in order to submit to its jurisdiction on the merits of a case but either to make a statement or to give evidence. There had been a slight difference of opinion as to whether such an appearance was considered already to constitute submission to the jurisdiction; but nothing would prevent a State from invoking a claim of jurisdictional immunity at the same time. In any event, the Drafting Committee should be able to revert to article 9 at the following session.

8. An amendment proposed by Mr. Flitan (1716th meeting) to the effect that waiver of immunity of jurisdiction could not be held to imply waiver of immunity from measures of attachment or execution of the judgment had been regarded as useful, but not as part of article 9. Perhaps it could be included at the end of part II of the draft articles, as a separate provision, or in part IV.

9. He said that the Committee proposed the following title and text for article 9:

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or
(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or
(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

10. Mr. THIAM suggested that, in the French text, the expression ‘*d’aucune manière*’ in subparagraph 1 (b) should be replaced by ‘*de quelque façon que ce soit*’, and that the word ‘*action*’ in the first line of paragraph 3 should be changed to ‘*procédure*’.

It was so decided.

11. Sir Ian SINCLAIR observed that the problem raised by the formulation of article 9 was a difficult one, since jurisprudence differed according to the country concerned. He was not sure whether it would be solved by the addition of a subparagraph (c) to paragraph 2; as the Chairman of the Drafting Committee had pointed out, it would have to be considered again at the following session. To satisfy those concerned by the impact of subparagraph 1 (b), perhaps the Special Rapporteur could indicate in the commentary that if a State had taken a step relating to the merits in a proceeding before a foreign court, it preserved the right to claim immunity if the facts could not reasonably have been ascertained and if immunity was claimed as soon as practicable.

12. Mr. USHAKOV said it was because certain situations were not covered by paragraphs 1 and 2 of article 9 that the Drafting Committee was asking the Commission if it would be possible to revert to article 9 at the next session. He noted also that in article 9, paragraph 3, the word “considered” had been translated into French by ‘*réputé*’ and in article 7, paragraph 2 by ‘*considérée*’.

13. Mr. THIAM said that in his view only one term should be used in French and ‘*réputé*’ would be preferable.

14. The CHAIRMAN, speaking as a member of the Commission, said that he understood the misgivings of members of the Drafting Committee who were generally of the impression that the list in article 9, paragraph 2, should be amplified. In the circumstances, the Commission could either adopt the text proposed by the Drafting Committee without change or it could add the words ‘*inter alia*’ before subparagraph 2 (a). In the latter case, an explanation would have to be given in the commentary.

15. Mr. LACLETA MUÑOZ said that if the Spanish translation of the words “shall be considered” was to be standardized, it would be better to use ‘*se considerará*’.

Subject to its reconsideration by the Drafting Committee at the next session of the Commission, article 9, as amended, was adopted.

Mr. Díaz González, First Vice-Chairman, took the Chair.

Draft report of the Commission on the work of its thirty-fourth session (continued)

CHAPTER II. Question of treaties concluded between States and international organizations or between two or more international organizations (concluded) (A/CN.4/L.344 and Add.1-6)

C. Draft articles on the law of treaties between States and international organizations or between international organizations (concluded) (A/CN.4/L.344/Add.3 and 5)

PART III (OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES) (concluded) (A/CN.4/L.344/Add.3)

SECTION 4 (Treaties and third States or third organizations) (concluded)

Commentary to article 38 (Rules in a treaty becoming binding on third States or third organizations through international custom)

The commentary to article 38 was approved.

Section 4, as amended, was adopted.

Part III, as amended, was adopted.

PART IV (Amendment and modification of treaties) (A/CN.4/L.344/Add.3)

Commentary to article 39 (General rule regarding the amendment of treaties)

16. Sir Ian SINCLAIR proposed that the words "That principle" at the beginning of the third sentence be replaced by "The rule laid down in article 39 of the Vienna Convention".

It was so decided.

17. Mr. McCAFFREY proposed that the second part of the first sentence be changed to read "what the parties have decided to do, they may also undo".

It was so decided.

The commentary to article 39, as amended, was adopted.

General commentary to part IV

18. Mr. REUTER (Special Rapporteur) said that no commentary had been prepared to articles 40 and 41, which differed very little from the corresponding provisions of the Vienna Convention. In consultation with the Secretariat, a brief commentary covering the whole of part IV could be added before article 39, which required a separate commentary.

It was so decided.

Part IV, as amended, was adopted.

PART V (Invalidity, termination and suspension of the operation of treaties) (concluded) (A/CN.4/L.344/Add.3 and 5)

SECTION I (General provisions)

Commentary to articles 42 (Validity and continuance in force of treaties), 43 (Obligations imposed by international law independently of a treaty) and 44 (Separability of treaty provisions)

19. Mr. REUTER (Special Rapporteur) said that, contrary to what had been stated in error in the draft report, the commentary to articles 42, 43 and 44 did not apply to articles 40 and 41.

The commentary to articles 42, 43 and 44 was approved.

Commentary to article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

Paragraph (1)

20. Sir Ian SINCLAIR suggested that in the second sentence the words "to invoke unlawful coercion" should be replaced by "to invoke coercion of a representative or coercion by the threat or use of force" and that the word "two" in the third sentence should be changed to "three".

21. Mr. McCAFFREY asked what was the meaning of the part of the fifth sentence which read "based on the fear that the principle it established might operate to consolidate situations secured under cover of political domination".

22. Mr. REUTER (Special Rapporteur) said that Sir Ian Sinclair's suggestion was acceptable to him.

23. In answer to Mr. McCaffrey's question, he explained that when one partner was much stronger than the other, politically or economically, the second might feel inclined to remain silent in the event of some peremptory assertion on the part of the first. In the draft articles which had served as the basic text for the preparation of the Vienna Convention on the Law of Treaties, the Commission had included an article on amendment of a treaty by tacit acquiescence. The plenipotentiary conference which had adopted the Convention had not accepted that article, since it could have meant that agreements concluded by the superior authorities of a State would be modified by an attitude of silence on the part of a subordinate department in the same State, thus allowing a *de facto* situation to come about for the sake of peace. That was the situation he was alluding to in the part of the sentence to which Mr. McCaffrey had referred.

24. In the French text the word "*prescription*" in the final sentence of paragraph 1 appeared, by mistake, in the plural. In the English text, the word "*prescription*" was in the singular, but perhaps it did not have exactly the same connotation as in French.

25. The CHAIRMAN said that in the Spanish text the sentence in question was perfectly clear.

26. Mr. McCAFFREY said that in the light of the Special Rapporteur's explanation he had no objection to retaining the words in question; but perhaps they might read "based on the fear that the principle it established might operate to legitimize situations produced under cover of political domination", which would be clearer.

27. Sir Ian SINCLAIR thought that the word "prescription" should be left in the singular in the English text.

28. Mr. LACLETA MUÑOZ supported Mr. McCaffrey's suggestion but suggested that in order to make it clearer that the hypothesis was one to be rejected, the last part of the sentence in question should be worded: "that the principle it establishes might be used to legitimize situations produced under cover of political domination".

It was so decided.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (7)

Paragraphs (2) to (7) were approved.

The commentary to article 45, as amended, was approved.

Section 1, as amended, was adopted.

SECTION 2 (Invalidity of treaties)

Commentary to article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

29. In reply to a question by Mr. McCaffrey, Mr. REUTER (Special Rapporteur) said that the words "in respect of them" in the third sentence could be amplified for the sake of clarity to read: "in respect of the members of that organization".

30. Mr. MAHIU proposed the following modification in order to reflect the idea expressed in the last part of the sentence: "in respect of the members of that organization, which can thus invoke it against them".

It was so decided.

Paragraph (8), as amended, was approved.

Paragraph (9)

31. Mr. McCaffrey considered that the first sentence in footnote 11 was redundant. From the point of view of the drafting, the last sentence in paragraph (9) would be better placed in paragraph (10), since it raised a new point dealt with in that paragraph.

32. Sir Ian SINCLAIR associated himself with Mr. McCaffrey's second point. The problem of the redundancy in footnote 11 could be solved by changing the words "basic rules of the organization" to "substantive rules of the organization".

It was so decided.

Paragraph (9), as thus amended in the English text, was approved.

Paragraph (10)

Paragraph (10) was approved.

The commentary to article 46, as amended, was approved.

Commentary to article 47 (Specific restrictions on authority to express the consent of a State or an international organization)

The commentary to article 47 was approved.

Commentary to article 48 (Error)

The commentary to article 48 was approved.

Commentary to article 49 (Fraud)

The commentary to article 49 was approved.

Commentary to article 50 (Corruption of a representative of a State or of an international organization)

The commentary to article 50 was approved.

Commentary to article 51 (Coercion of a representative of a State or of an international organization)

The commentary to article 51 was approved.

Commentary to article 52 (Coercion by the threat or use of force)
Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

33. Sir Ian SINCLAIR, supported by Mr. McCaffrey, said that in the English text, the first sentence of paragraph (4) seemed to express a collective view of the Commission, which had not been the case. It should be brought more closely into line with the French text, as follows: "In the light of these numerous statements of position, the view can certainly be supported that the prohibition of coercion established by the principles of international law embodied in the Charter goes beyond armed force; this view has been expressed in the Commission."

It was so decided.

Paragraph (4), as amended in the English text, was approved.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were approved.

The commentary to article 52, as amended, was approved.

Commentary to article 53 (Treaties conflicting with a peremptory norm of general international law (jus cogens))

The commentary to article 53 was approved.

Section 2, as amended, was adopted.

SECTION 3 (Termination and suspension of the operation of treaties)

Commentary to article 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)

The commentary to article 54 was approved.

Commentary to article 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

The commentary to article 55 was approved.

Commentary to article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)

The commentary to article 56 was approved.

Commentary to article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)

The commentary to article 57 was approved.

Commentary to article 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)

The commentary to article 58 was approved.

Commentary to article 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

The commentary to article 59 was approved.

Commentary to article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach)

The commentary to article 60 was approved.

Commentary to article 61 (Supervening impossibility of performance)

Paragraph (1)

34. Mr. McCAFFREY proposed that the words "in first reading" should be added after the word "Commission" in the penultimate sentence of paragraph (1).

It was so decided.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

The commentary to article 61, as amended, was approved.

Commentary to article 62 (Fundamental change of circumstances)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

35. Sir Ian SINCLAIR suggested that the words in the second sentence of paragraph (2) "the result of an act" should be changed to read "the result of a wrongful act".

36. Mr. ILLUECA, supported by Mr. DÍAZ GONZÁLEZ and Mr. LACLETA MUÑOZ, said that the word "*hecho*" in the Spanish text should be replaced by "*acto*".

37. Mr. McCAFFREY said that he agreed with the amendment proposed by Sir Ian Sinclair, and further proposed that the words "under an act", also in the second sentence of paragraph (2), be amended to read "under such an act".

It was so decided.

Paragraph (2), as thus amended, was approved.

Paragraphs (3) to (13)

Paragraphs (3) to (13) were approved.

The commentary to article 62, as amended, was approved.

Commentary to article 63 (Severance of diplomatic or consular relations)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

38. Sir Ian SINCLAIR proposed that the end of the second sentence, "which was prepared by the Commis-

sion in the form of draft articles", should be deleted, that the word "these" in the third sentence should be deleted from the phrase "the severance of these relations", and that the word "charter" in the last sentence should be replaced by "constituent instrument".

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 63, as amended, was approved.

Commentary to article 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

39. Sir Ian SINCLAIR observed that, in the commentary to article 53, the Commission had not wanted to include international organizations in the international community of States. He therefore proposed that the paragraph should end with the words "as having that effect", and also that, in the English text, the sentence should be in the present tense.

It was so decided.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 64, as amended, was approved.

Section 3, as amended, was adopted.

SECTION 4 (Procedure) (*concluded*)

Commentary to article 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph (1)

40. Sir Ian SINCLAIR proposed that the end of the last sentence of paragraph (1) should read "for recourse to third parties, that is to say, the International Court of Justice, arbitration, or a conciliation commission."

It was so decided.

Paragraph (1), as amended, was approved.

Paragraph (2)

41. Sir Ian SINCLAIR, supported by Mr. McCAFFREY, said that the word "confrontation" in the second sentence of the English text was perhaps a little stronger than intended. The word "balance" or "proceeding" might be more appropriate.

42. Mr. REUTER (Special Rapporteur) said that the word "*confrontation*" in French, was quite correct, since it implied a face-to-face encounter for the purposes of comparison. It was not to be confused with the word "*affrontement*", which had a bellicose connotation. The expression in question gave an accurate idea of the machinery provided for under article 65.

43. Mr. ILLUECA said that in Spanish it was the word “*confrontación*” that had a bellicose connotation. It would be better to use the word “*controversia*”, which appeared in article 65, or “*enfrentamiento*”.

44. Mr. REUTER (Special Rapporteur) suggested the word “dialogue” or “procedure”.

45. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission decided to delete the word “confrontation” and to replace it by one of the words proposed.

It was so decided.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

46. Sir Ian SINCLAIR said that the first two sentences of the paragraph did not give a very clear explanation of the system instituted under article 65.

47. Mr. LACLETA MUÑOZ likewise considered that paragraph (3) was not drafted in an entirely satisfactory manner. In his view, it could be deleted, since its sole purpose was to paraphrase article 65.

Paragraph (3) was deleted.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

48. Mr. RIPHAGEN said that the “right” referred to in the final sentence was apparently the right to raise an objection. Such a right could not, however, be lost as a result of the application of article 45, subparagraph 1 (b) and subparagraph 2 (b), since those provisions dealt with loss of the right to invoke a ground of invalidity.

49. Mr. REUTER (Special Rapporteur) proposed that the final sentence of the paragraph be deleted.

It was so decided.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 65, as amended, was approved.

Commentary to article 66 (Procedures for arbitration and conciliation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

50. Sir Ian SINCLAIR proposed the deletion of the words “however, imperfect”, in the fourth sentence.

It was so decided.

Paragraph (3), as thus amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

The commentary to article 66, as amended, was approved.

Section 4, as amended, was adopted.

Part V, as amended, was adopted.

ANNEX (Arbitration and conciliation procedures established in application of article 66)

Commentary to the annex

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

51. Sir Ian SINCLAIR proposed that the second sentence be amended to read:

“The only innovation vis-à-vis the 1969 text is part II, while part I merely makes the provisions drawn up in 1969 for the establishment of a conciliation commission applicable equally to the establishment of an arbitral tribunal.”

It was so decided.

Paragraph (3) as amended, was approved.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were approved.

The commentary to the annex, as amended, was approved.

Chapter II, section C, as amended, was adopted.

Mr. Reuter resumed the Chair.

D. Resolution adopted by the Commission (A/CN.4/L.344/Add.6)

52. Mr. DÍAZ GONZÁLEZ said that document A/CN.4/L.344/Add.6 contained the text of paragraph 51 of the report, which formed a new section to be added to chapter II. That section incorporated a resolution expressing the Commission’s appreciation to the Special Rapporteur, Mr. Reuter, for his contribution to the work on the draft articles on the law of treaties between States and international organizations or between international organizations.

The resolution was adopted by acclamation.

Paragraph 51 was adopted.

Section D of chapter II was adopted.

Chapter II of the draft report, as amended, was adopted.

CHAPTER V. (Jurisdictional immunities of States and their property (continued) A/CN.4/L.345 and Add.1)

B. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.345/Add.1)

PART I. Introduction

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

53. Sir Ian SINCLAIR proposed the deletion of the word “drafting” before the word “changes”.

It was so decided.

54. Mr. LACLETA MUÑOZ proposed the deletion of the words "new and enlarged" before the word "Commission".

It was so decided.

Paragraph (1), as thus amended, was approved.

Paragraphs (2) and (3)

55. Sir Ian SINCLAIR proposed that the order of paragraphs (2) and (3) be reversed, since in his view the phrase "of the courts" was the decisive element in the new text and the deletion of "questions relating to" was simply consequential.

It was so decided.

56. Sir Ian SINCLAIR further proposed that the new paragraph (3) (former paragraph (2)) be reworded along the following lines: "The phrase 'questions relating to' which appeared in the text as provisionally adopted had now been dropped. The phrase had been necessary at the time when the scope of the draft articles remained uncertain and the Commission had not yet determined whether the draft articles should extend to immunity from jurisdiction generally or should be confined, subject to the clarification indicated in article 2, to immunity from jurisdiction of the courts of another State."

57. Mr. USHAKOV said that Sir Ian Sinclair's proposed text gave the impression that the Commission had taken a final decision in the matter, when it might in fact arrive at another decision at a later date.

58. Mr. KOROMA said it was his understanding that the Special Rapporteur had in fact accepted the need to increase the scope of the draft articles. On that basis he would be prepared to accept Sir Ian Sinclair's proposed text provisionally, so as to allow the work of the Commission to proceed.

59. The CHAIRMAN suggested, in the light of the comments made, that the Commission should adopt the new paragraph (2) on the understanding that the Special Rapporteur would insert a phrase to take account of the provisional and methodological nature of the topic.

It was so decided.

60. The CHAIRMAN further suggested that the Commission should adopt the new paragraph (3) (former para. (2)) as amended by Sir Ian Sinclair's proposal, on the understanding that the final form of wording would be agreed between Sir Ian and the Secretariat.

It was so decided.

The new paragraphs (2) and (3), as amended, were approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

61. Sir Ian SINCLAIR said that, in his view, the final sentence of paragraph (2) did not reflect accurately the

discussions that had taken place in plenary meeting and in the Drafting Committee. He therefore proposed that it should be amended to read: "Covered under the definition are organs performing pre-judicial or post-judicial functions in a particular legal system."

62. Mr. LACLETA MUÑOZ supported that proposal.

63. Mr. USHAKOV said that, given the diversity of legal systems, he would prefer it if the last sentence were simply deleted.

64. Mr. KOROMA considered that, if the scope of application of the draft articles was to be enlarged, it would be better to retain the paragraph as drafted.

65. Mr. DÍAZ GONZÁLEZ said he appreciated the soundness of Sir Ian Sinclair's proposal, but in a spirit of compromise he would suggest that the last sentence of the paragraph be deleted.

66. Mr. McCAFFREY supported Sir Ian Sinclair's proposal but wondered whether it would not be advisable also to amplify and clarify the commentary by referring to the Parquet as an example of the organs referred to.

67. Mr. NI thought it would be preferable to delete the final sentence of the paragraph, failing which he would propose that it be amended to read: "Covered under the definition are organs performing pre-adjudicatory or post-adjudicatory functions."

68. Mr. YANKOV favoured the deletion of the final sentence of the paragraph, since the first sentence was sufficiently clear. Unlike Mr. McCaffrey, he did not think that examples should be given at the present stage.

69. Mr. RIPHAGEN noted that the paragraph did not correspond entirely to the text of article 2, which spoke only of "judicial fonctions". He therefore proposed that it should simply be deleted, particularly since the new paragraph (2) of the commentary to article 1 adopted by the Commission was sufficiently explicit.

70. Mr. THIAM likewise felt that the paragraph added nothing and could be deleted, as Mr. Riphagen had proposed.

71. Mr. EL RASHEED MOHAMED AHMED said he was in favour of deleting the final sentence, as proposed by Mr. Díaz González, and would suggest that the words "or similar functions", at the end of the first sentence, be replaced by "or related functions".

72. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Riphagen's proposal that the whole paragraph should be deleted. In his view, it was apparent from the new paragraph (2) of the commentary to article 1, which it had just adopted, that the Commission did indeed hope to provide a more general definition in international terms, and not to refer to the definition under any given legal system.

73. Mr. SUCHARITKUL (Special Rapporteur) saw no objection to Mr. El Rasheed Mohamed Ahmed's

proposal, which would also meet Mr. Koroma's point. However, as it would perhaps be premature to broaden the definition, it might be preferable to delete the whole of paragraph (2).

74. Mr. KOROMA thought, like Mr. Díaz González, that it would suffice simply to delete the final sentence of the paragraph.

75. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to delete paragraph (2) of the commentary to article 2, in the light of the comments made.

It was so decided.

Paragraph (3) (new paragraph (2))

Paragraph (3) was approved.

The commentary to article 2, as amended, was approved.

Part I, as amended, was adopted.

The meeting rose at 1 p.m.

1751st MEETING

Thursday, 22 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Draft report of the Commission on the work of its thirty-fourth session (*continued*)

CHAPTER V. *Jurisdictional immunities of States and their property* (concluded) (A/CN.4/L.345 and Add.1)

B. Draft article on jurisdictional immunities of States and their property (concluded) (A/CN.4/L.345/Add.1)

PART II (GENERAL PRINCIPLES)

1. Mr. SUCHARITKUL (Special Rapporteur) said that the commentaries to draft articles 7, 8 and 9 were of necessity long because they related to articles which the Commission had provisionally adopted on first reading, at its present session. Those commentaries were to some extent a restatement of the Special Rapporteur's previous reports.

2. An additional paragraph should be added to the commentary to article 8, reading:

“(12). Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.”

Commentary to article 7 (Modalities for giving effect to State immunity)

Paragraphs (1) and (2)

3. Sir Ian SINCLAIR, speaking on a point of order, said that at its present session the Commission had made no change in article 6 (State immunity), which was to be reconsidered and reworded at a later session. It was therefore pointless to reproduce, in the body of the Commission's report, the text of that article and paragraphs (1) and (2) of the commentary to article 7, both of which related to article 6.

4. Mr. McCAFFREY said that he agreed with Sir Ian, particularly since paragraph (1) of the commentary did not altogether reflect the current state of the Commission's work on article 6.

5. Mr. LACLETA MUÑOZ said that, while he shared the views of Sir Ian Sinclair and Mr. McCaffrey, he considered that the Commission, instead of deleting article 6 and paragraphs (1) and (2) of the commentary to article 7, should state in the report that article 6 had not been the subject of detailed consideration and that some members had reservations about it and about paragraphs (1) and (2) of the commentary to article 7. His own reservations related to the conception of the two paragraphs of article 6 and to the meaning of the term “*hacer efectivo*”.

6. Mr. USHAKOV said once more that he had reservations regarding the title of Part II, “General principles”. Only article 6—whose title he also found unsatisfactory—seemed to lay down general principles, and not articles 7, 8 and 9.

7. Mr. DÍAZ GONZÁLEZ said that he endorsed the reservations expressed by Mr. Lacleta Muñoz, in regard in particular to article 6, paragraph 2, and paragraphs (1) and (2) of the commentary to article 7, which both related to article 6.

8. Mr. YANKOV said that, although he had reservations about certain concepts underlying article 6, it would complicate matters if the text of the article was not included in the report. He therefore proposed that it should be reproduced, if not in the body of the report, then at least in a footnote, and that it should be followed by a few brief explanations.

9. Mr. CALERO RODRIGUES supported the suggestion of Mr. Lacleta Muñoz and Mr. Yankov that the Commission should summarize the discussions on article 6 in a footnote, with an indication that it had been provisionally found acceptable as a basis for article 7 and the following articles.

10. Sir Ian SINCLAIR said he could agree to the Commission reproducing the text of article 6 in its report, on the understanding that the existing footnote 2 would be amplified so as to reflect the discussions that had taken place at the present session, and would make it clear that the Commission was still considering article 6 and would continue to seek a more satisfactory form of wording.

11. Mr. NI endorsed the comments of Mr. Laclea Muñoz, Mr. Díaz González and Mr. Calero Rodrigues. It would suffice to mention members' views and suggestions on article 6 in a footnote.

12. Mr. SUCHARITKUL (Special Rapporteur) said he agreed that paragraphs (1) and (2) of the commentary to article 7, which had been taken from an earlier report, no longer reflected the state of work and that they might therefore be deleted. On the other hand, paragraphs 24, 27 and 28 of section A (Introduction) of chapter V, adopted by the Commission at its 1749th meeting, provided an adequate record of the discussions at plenary meetings. So far as the document under consideration was concerned, the Commission might therefore adopt the suggestions of Mr. Yankov and Sir Ian Sinclair. In other words, the title "*Article 6. State immunity*" would appear in the body of the report, while the text of article 6, together with a summary of paragraphs (1) and (2) of the commentary to article 7 and a reference to the summary of the discussions appearing in section A of chapter V, would be given in a footnote.

It was so decided.

Paragraph (3)

13. Mr. McCAFFREY said that, since paragraph (3) would become the first paragraph in the commentary to article 7, it would be advisable to specify, at any rate in the English text, that the obligation in question was an obligation to give effect to State immunity. He therefore suggested the addition of the words "to give effect to State immunity" after the words "the content of the obligation".

14. To dispel the impression which the commentary might give that article 7 stated the obligation to give effect to State immunity irrespective of any exception to the rule of State immunity, he proposed that the following sentence be added between the fourth and fifth sentences:

"Of course, the obligation to give effect to State immunity stated in article 7 applies only to those situations in which the State claiming immunity is entitled thereto, that is, where it has not consented to the exercise of jurisdiction over it as provided in Part II and the case does not fall within one of the exceptions in Part III."

A new paragraph could then start with the next sentence.

15. Sir Ian SINCLAIR proposed that, to simplify the second sentence of the paragraph, it should be amended to read:

"The rule of State immunity is turned the other way round and is viewed from the standpoint of the State giving or granting jurisdictional immunity."

16. He supported Mr. McCaffrey's proposals, which improved the text significantly.

17. Mr. ILLUECA supported Sir Ian Sinclair's proposed amendment to the second sentence of the paragraph.

18. Mr. CALERO RODRIGUES said that he supported Mr. McCaffrey's proposal but thought that the proposed sentence was a little too long; the first proposal would no doubt suffice.

19. Mr. LACLETA MUÑOZ said that he doubted the need for the words "the rule of State immunity is turned the other way round" in the second sentence. There was only one rule, and it could be perceived either from the standpoint of the State giving or granting jurisdictional immunity or from the standpoint of the State benefiting from that immunity. Accordingly, the sentence might be amended to read "The rule of State immunity is perceived from another standpoint, namely, that of the State ...". The sentence that followed could then be deleted.

20. He supported Mr. McCaffrey's proposal for the inclusion of a new sentence in the paragraph.

21. Mr. SUCHARITKUL (Special Rapporteur) said that all the proposals made were acceptable.

22. With regard to drafting amendments, it would be best if members submitted them to the Special Rapporteur or the Secretariat instead of formulating them at the present stage.

With that reservation, paragraph (3), as amended, was approved.

Paragraph (4)

23. Sir Ian SINCLAIR proposed the addition at the end of the paragraph of the following sentence:

"It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility of a State's internal law with general international law on the *extent* of jurisdiction."

the word "extent" should be underlined.

It was so decided.

24. Mr. McCAFFREY proposed that the words "unwilling to submit to its jurisdiction" at the end of the first sentence should be replaced by the words "that is entitled to immunity and is unwilling to submit to the jurisdiction of the former". He further proposed that the first sentence of footnote 7 should be amended to read: "While this obligation to refrain from exercising jurisdiction against a foreign State may be regarded as a general rule it is not unqualified."

25. Mr. SUCHARITKUL (Special Rapporteur), referring to Mr. McCaffrey's second proposal, said that the obligation to give effect to immunity obviously applied only in cases where a State was entitled to immunity. To spell that out on each and every occasion would make the text unduly heavy.

26. Mr. USHAKOV, agreeing with the Special Rapporteur, said that if it was really necessary to state on each occasion that there were exceptions to the rule of immunity, he could see no reason why the Commission was considering the subject.

27. The CHAIRMAN suggested that the definitive wording of the first sentences of paragraph (4) and of footnote 7 should be agreed jointly between the Special Rapporteur and Mr. McCaffrey.

It was so decided.

Paragraph (4), as amended, was approved in the light of that decision.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

28. Mr. McCAFFREY said that the sense in which the word “implead” was used caused him difficulty, and he proposed that it should be replaced by the word “implicated” and that the paragraph should be reworded to read:

“A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if a State agrees to become a party to the proceeding.”

29. Sir Ian SINCLAIR said that the paragraph created considerable difficulty in regard to the common law system. He therefore favoured Mr. McCaffrey’s proposal.

30. Mr. CALERO RODRIGUES said that the word “implead” caused difficulty not only in the common law system but in other systems of law as well. Moreover, it was not properly rendered into French by the expression “*mettre en cause*”. He therefore considered that the word “implead” should be avoided, and Mr. McCaffrey’s proposal went a long way towards solving the problem.

31. Mr. MAHIOU said that the intention of the paragraph was to say that the immunity of a State was at issue (*mise en cause*) if the State appeared before the court against its will, but not at issue if it agreed to submit to the jurisdiction. In his view, that should be spelt out to avoid ambiguity.

32. Mr. THIAM said that he fully agreed with Mr. Mahiou. In actual fact, he wondered whether the paragraph was necessary and whether it would not be best to delete it.

33. Mr. LACLETA MUÑOZ agreed with the comments which had just been made. He said that the difficulty in conveying the meaning of the word “implead” in Spanish was illustrated by the fact that it had been translated in two places by the word “*implicado*” and in a third place by the word “*emplazamiento*”. What was

at issue was not the State itself but the immunity of the State. He therefore favoured the adoption of Mr. Mahiou’s suggestion, or alternatively, the deletion of the paragraph.

34. Mr. SUCHARITKUL (Special Rapporteur) explained that he had used the word “implead” somewhat in the sense given it by Lord Atkin in *The “Cristina”* case¹ to mean that a foreign sovereign could not be impleaded “against his will”. One solution to the problem might be to add those three words to the paragraph.

35. Mr. KOROMA said that, in his view, the word “impleaded” was acceptable in the first sentence of the paragraph but not in the second.

36. Mr. CALERO RODRIGUES said he would not like to see the paragraph deleted simply because the Commission was unable to agree on the wording.

37. Mr. THIAM said that he could accept most of the paragraph but not the third sentence, which was quite incorrect and should be deleted.

38. The CHAIRMAN suggested that the Special Rapporteur should be invited to consult with Mr. McCaffrey and Mr. Mahiou with a view to arriving at a text that was acceptable in all working languages.

It was so decided.

Paragraph (7) was approved on that understanding.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were approved.

Paragraph (10)

39. Mr. McCAFFREY proposed that the first sentence should be amended to read: “A foreign sovereign or a head of State of a foreign State, often considered as a principal organ of a State, is also entitled to immunity to the same extent as the State itself on the ground that the crown, the reigning monarch, the sovereign head of State or indeed a head of State may be assimilated to the central government.”

40. The CHAIRMAN suggested that the Special Rapporteur should be invited to agree the wording of the first sentence in consultation with Mr. McCaffrey.

It was so decided.

Paragraph (10) was approved on that understanding.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were approved.

Paragraph (13)

41. Mr. NI proposed the deletion, in the English text, of the words “elements of” in the first sentence. The same proposal applied to the first sentence of paragraph (15).

It was so decided.

¹ *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London, 1942), case No. 86, p. 250.

42. Mr. LACLETA MUÑOZ, referring to the first sentence, proposed that the words “*elementos de autoridad gubernamental*” should be replaced by the words “*prerrogativas del poder público*” in the Spanish text and that a corresponding change should be made, if necessary, in the French text. He further proposed that the words “proceedings may be brought” should be replaced by the words “proceedings are brought”.

It was so decided.

Paragraph (13), as amended, was approved.

Paragraph (14)

43. Sir Ian SINCLAIR said he had some difficulty with the words “it should be permissive, and to some extent obligatory” in the second sentence. In his view, it might be permissible for States to exercise jurisdiction over political subdivisions, but he did not think there was any rule of law to that effect.

44. Mr. McCAFFREY said that Sir Ian’s point might perhaps be met if the second sentence were reworded to read:

“Despite the rarity of such cases, it would appear logical that when a political subdivision of a State acts in one of these activities it should enjoy immunity to the same extent as the central government would in similar circumstances.”

That wording also had the advantage of dispensing with the expression “withhold jurisdiction”, which seemed somewhat strange to him.

45. He further proposed that the word “impleads” in the penultimate sentence should be replaced by the word “implicates”.

46. Mr. SUCHARITKUL (Special Rapporteur) proposed the deletion of the second sentence of the paragraph. The paragraph would still contain the footnotes 22 and 23 which referred to the kind of case he had had in mind. He accepted Mr. McCaffrey’s second proposal.

Paragraph (14), as amended, was approved.

Paragraph (15)

47. Following a point raised by Mr. Thiam, Mr. SUCHARITKUL (Special Rapporteur) proposed that, in the French text, the word “*mécanismes*” should be replaced by the word “*institutions*”.

It was so decided.

Paragraph (15), as amended, was approved.

Paragraph (16)

48. Sir Ian SINCLAIR, referring to the last sentence, proposed that in the English text the word “legislative” should be replaced by the word “legislature” and that the words “in their sovereign capacity” should be replaced by the words “in respect of their public or official acts”.

It was so decided.

Paragraph (16), as amended, was approved.

Paragraph (17)

Paragraph (17) was approved.

Paragraph (18)

49. Mr. McCAFFREY, referring to the first sentence, proposed that the words “in this study” should be omitted and that the word “applies” should be replaced by the words “may apply”. Also, he had some difficulty in accepting the word “particularly” in the last sentence; he did not think that the phrase which it introduced really added anything to what was stated at the beginning of the sentence. He therefore proposed that the phrase should be deleted.

50. Mr. SUCHARITKUL (Special Rapporteur) said that the phrase was important since the representatives which it referred to enjoyed two kinds of immunity: *ratione personae* and *ratione materiae*.

51. Mr. LACLETA MUÑOZ said there was justification for deleting the word “particularly”, since the immunity of the State came into play when certain persons began to act in the exercise of their functions.

52. The CHAIRMAN suggested that the Special Rapporteur should be invited to consult with Mr. McCaffrey with a view to agreeing on the definitive text of the paragraph.

It was so decided.

Paragraph (18) was approved on that understanding.

Paragraphs (19) to (23)

Paragraphs (19) to (23) were approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8 (Express consent to the exercise of jurisdiction)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

53. Mr. McCAFFREY suggested that the words “*inter alia*” should be added after the word “qualified” in the last sentence of paragraph (3).

It was so decided.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

Paragraph (8)

54. Mr. McCAFFREY, referring to the fourth sentence, said that, in order to dispel the impression that consent must be expressed in writing or by a statement, the words “including the means provided in article 9” should be added at the end of the sentence.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

Paragraph (11)

55. Sir Ian SINCLAIR, referring to the third sentence, said that according to the jurisprudence of his country, once the courts of the State concerned had concluded that their jurisdiction was valid, there was no basis on which they could refrain from exercising it. He therefore proposed that the phrase “subject, of course, to any rule deriving from the internal law of the State concerned” should be added at the end of the sentence.

It was so decided.

56. Mr. RIPHAGEN proposed that the phrase “for reasons it is not obliged to disclose” should be deleted from the sentence. In all countries, whatever the system was, judges were obliged to give the reasons for their decisions.

It was so decided.

57. Mr. McCAFFREY suggested that, on second reading, paragraphs (9) to (11) should be arranged to indicate that they related specifically to subparagraphs (a) to (c) of article 8.

It was so decided.

Paragraph (11), as amended, was approved.

The commentary to article 8, as amended, was approved.

Commentary to article 9 (Effect of participation in a proceeding before a court)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

Paragraph (7)

58. Mr. McCAFFREY, referring to the third sentence, said that in the Drafting Committee Mr. Ushakov, among others, had pointed out that there might be positive participation in a proceeding but it might not have the force of consent. He therefore proposed that the sentence should be amended to read:

“Any positive action by way of participation in the merits of a proceeding by a State on its own initiative and not under compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded against its will.”

It was so decided.

Paragraph (7), as amended, was approved.

Paragraph (8)

59. Mr. McCAFFREY, supported by Mr. RIPHAGEN, said that in his view it was not clear that an appearance by a State *amicus curiae* would constitute a waiver of immunity or a consent to the exercise of jurisdiction. The words in the second sentence, “as *amicus curiae* or otherwise in the interest of justice”, should therefore be deleted.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

The commentary to article 9, as amended, was approved.

Part II, as amended, was adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.343)

Chapter I of the draft report was adopted.

CHAPTER VI. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (ACN.4/L.348)

60. Mr. McCAFFREY said that he reserved the right to speak on chapter VI of the report later, since it had not been circulated on time and he had been unable to study it fully.

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 11

Paragraphs 8 to 11 were adopted.

Paragraph 12

61. Mr. RIPHAGEN proposed that the word “valuable” should be deleted, since it was not seemly for the Commission to describe the comments of its own members as valuable.

It was so decided.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 17

Paragraphs 13 to 17 were adopted.

Paragraph 18

62. Mr. THIAM, supported by Mr. MAHIU, pointed out that the paragraph should begin with the words “several members thought” instead of “one member thought”.

It was so decided.

63. Sir Ian SINCLAIR proposed that the words “the communication concerning the national liberation movements” should be replaced by the words “the communications of national liberation movements”.

It was so decided.

Paragraph 18, as amended, was adopted.

Paragraph 19

64. In response to a request for information from Sir Ian Sinclair, Mr. YANKOV (Special Rapporteur) said that during the discussions the question had been raised of the case of a delegation which participated in the work of an international conference although diplomatic relations did not exist between the sending State and the host State. It was even possible to envisage the case of a special mission sent to a State with which the

sending State did not have diplomatic relations. In view of such possibilities, it would be advisable to replace the words "diplomatic delegations" by the words "official delegations or special missions".

It was so decided.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Organization of work (concluded)*

65. The CHAIRMAN, noting that the only documents available in all working languages were those containing chapter VII of the draft report, "Other decisions and conclusions of the Commission" (A/CN.4/L.349 and Add.1 and 2), asked whether members would be prepared to consider documents that had not been circulated in all the working languages.

66. Mr. DÍAZ GONZÁLEZ said he would find it very difficult, as would Mr. McCaffrey, to take part in a discussion on documents that had not been issued in his working language. If the documents that still had to be considered could not be circulated in Spanish until the following day, it would be necessary either to envisage convening an extraordinary session to consider them or to defer their consideration until the following session.

67. Mr. LACLETA MUÑOZ said that, while he agreed with Mr. Díaz González, he would be prepared to participate in a discussion on texts worded in English. In that event, it should be clearly understood that the Spanish-speaking members of the Commission would not be bound by any texts that were adopted.

68. Mr. DÍAZ GONZÁLEZ said that in that case the summary record of the meeting should make it clear that those members had been unable to take part in the discussion.

69. Mr. QUENTIN-BAXTER, speaking as Special Rapporteur for the topic which was agenda item 4 (International liability for injurious consequences arising out of acts not prohibited by international law), said he regretted that the part of the report dealing with that topic had not been circulated to members on time. He had deliberately given his duties as a member of the Drafting Committee priority over his duties as Special Rapporteur. He had however endeavoured to include in the documents drafted first—which it should be possible to circulate in all working languages before the next meeting—the most controversial questions and those which called for decisions of principle.

70. Mr. ROMANOV (Secretary of the Commission) informed the Commission that, at the present session, the Secretariat had noted a certain deterioration in performance on the part of the services responsible for ensuring that documents were circulated on time. In at least one case—that of addenda 3 and 5 to document A/CN.4/L.344—the translations had been distributed

before the original. That was an unacceptable and inexcusable procedure. Reluctantly, the Secretariat had raised the matter in the Planning Group and the Enlarged Bureau, and it was to be hoped that at the next session the Commission would find time to consider it.

71. The CHAIRMAN said that it would be most regrettable if the consideration of certain parts of the draft report had to be postponed until the following year. In principle, each member should have at least half a day to study documents in his working language; in the present case, however, it would undoubtedly be best to apply that principle flexibly so as not to detract from the spirit of friendly co-operation which should characterize the meetings of the Commission.

The meeting rose at 1.05 p.m.

1752nd MEETING

Friday, 23 July 1982, at 9.30 a.m.

Chairman: Mr. Paul REUTER

Statement by Mr. Cottafavi, Director-General of the United Nations Office at Geneva

1. Mr. COTTAFAVI (Director-General of the United Nations Office at Geneva) underlined the importance of the session of the International Law Commission that was drawing to a close. When the session had begun, the consequences of the enlargement of the Commission had been uncertain. Even though all the outgoing members who had stood for election by the General Assembly had been re-elected, the majority of the Commission was composed of members who had been elected for the first time. The conclusion, after twelve weeks' work, was that the decision to expand the Commission had been beneficial; it had done much to enhance the Commission's vitality while ensuring continuity in its work.

2. The Commission's particularly heavy agenda had been dominated by the second reading of the draft articles on the law of treaties between States and international organizations or between international organizations. In that connection, he warmly congratulated Mr. Reuter, who had distinguished himself both as Special Rapporteur and as Chairman of the session. On behalf of the Secretary-General of the United Nations, he thanked all members of the Commission and wished Mr. Flitan a speedy recovery.

3. The closure of the Commission's session was an important moment in the life of the United Nations Office at Geneva. The Commission, which had chosen Geneva as its seat, occupied a special place at the Palais des Nations, to which the nature of its work, the earnestness of its deliberations and the high competence of its

*Resumed from the 1745th meeting.

members gave added lustre. By his presence, he wished to attest to the very special interest which the Office accorded to the privilege of welcoming the Commission.

4. The CHAIRMAN, speaking on behalf of all the members of the Commission, thanked Mr. Cottafavi for attending the meeting and for his kind words. The Commission's connection with the United Nations was very close, not only because it was a subsidiary organ of the General Assembly but also because the United Nations system was well known to all its members, either because they took part in the work of the Sixth Committee of the General Assembly or of the United Nations Conference on the Law of the Sea or because they taught the law of the United Nations. In the performance of their task, the members of the Commission were wholly and exclusively at the service of the United Nations.

Draft report of the Commission on the work of its thirty-fourth session (concluded)

CHAPTER VI. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded) (A/CN.4/L.348)

B. Consideration of the topic at the present session (concluded)

Paragraphs 22 and 23

Paragraphs 22 and 23 were adopted.

Paragraph 24

5. Sir Ian SINCLAIR, referring to the English text, proposed that the words "back from" in the first sentence should be replaced by the words "from those missions back to".

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

6. Mr. YANKOV (Special Rapporteur) said that the word "diplomatic", which appeared by mistake in the first sentence, should be replaced by the word "official".

Paragraph 26, as corrected, was adopted.

Paragraphs 27 to 42

Paragraphs 27 to 42 were adopted.

Paragraph 43

7. Sir Ian SINCLAIR proposed that the last sentence should be expanded by adding, after the words "the captain or the master", the words "had full authority inside the aircraft or ship and".

It was so decided.

Paragraph 43, as amended, was adopted.

Paragraphs 44 and 45

Paragraphs 44 and 45 were adopted.

Paragraph 46

8. Sir Ian SINCLAIR proposed the deletion of the last sentence because a separate article had in fact been devoted to the commencement of the functions of the diplomatic courier.

It was so decided.

Paragraph 46, as amended, was adopted.

Paragraph 47

Paragraph 47 was adopted.

Paragraph 48

9. Sir Ian SINCLAIR proposed that, with a view to reflecting the discussions more accurately, the following sentence should be added after the first sentence: "Several members suggested the deletion of paragraph 2; others thought that, if it were to be maintained, it should at least be made facultative rather than obligatory."

It was so decided.

Paragraph 48, as amended, was adopted.

Paragraphs 49 to 51

Paragraphs 49 to 51 were adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER IV. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.347 and Add.1)

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 5

10. Sir Ian SINCLAIR, referring to the last sentence, said that the question of surveying the boundaries of the topic and its relationship with the topic of State responsibility was in fact a practical one and was not "more theoretical" than the question of the actual content of the topic. He therefore proposed the deletion of the words "more theoretical". He further proposed that the word "boundaries" should be replaced by the word "scope".

It was so decided.

Paragraph 5, as amended, was adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

11. Mr. DÍAZ GONZÁLEZ, referring to the last sentence, pointed out that the Commission had made suggestions, rather than given "instructions", to the Special Rapporteur regarding the development of principles of unlimited generality.

12. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, although the Commission had not reached any formal decision to that effect, it had always been clear, during the two years for which the topic had been under discussion, that it should be examined in its entirety. The Commission had in fact expected that the Special Rapporteur would continue to study the topic without introducing any limitations, but would confine himself almost entirely to the environmental field.

13. The CHAIRMAN proposed that the words "the Special Rapporteur was under instruction" should be replaced by "the Special Rapporteur's guidelines were".

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

14. Mr. McCaffrey said he wondered whether the second and third sentences might not give the impression that a situation such as the one envisaged could give rise to liability even in the absence of any agreements. Also, the United States nuclear ship *Savannah* was the only specific example given in the report. He therefore considered that the third sentence should be redrafted to read:

"This might, for example, be the case where one country agrees to assume responsibility for the safe operation of a ship as a condition of the ship's entry into a foreign port."

15. Furthermore, in the fourth sentence, the word "control" should be replaced by the word "regulate", since it was not a question of "control" in the sense of the expression "territory or control", with which paragraph 10 was concerned.

16. Lastly, he wondered whether the fourth sentence, and in particular in the last part of that sentence, really reflected the idea the Commission wished to convey. The host country might lack the technology and scientific skills adequately to regulate an industry of foreign origin irrespective of the extent to which it operated for the benefit of its foreign owners. The main point was that the host country lacked such technology and scientific skills. Accordingly, the words "that continues to operate for the benefit of its foreign owners" might be deleted.

17. Mr. QUENTIN-BAXTER (Special Rapporteur) said that he fully approved Mr. McCaffrey's first two proposals and accepted them. However, out of respect for the position taken by some members of the Commission, he could not simply delete the last part of the fourth sentence of the paragraph. It was true that when the host country lacked the technology and scientific skills adequately to regulate an industry of another country it might have to seek the latter's assistance irrespective of whether the benefits of that industry were exported. At the same time, there was more likely to be

an aid agreement if the country which exported the industry was still in a significantly dominant position.

18. Mr. SUCHARITKUL said that he was among those who, in the Commission and in the Sixth Committee, had made the observation reflected in the clause in question. That clause was quite correct. Of course, a developing country which accepted a foreign industry in its territory ran certain risks, but what really mattered was that it might not have the necessary means to regulate that industry and might not fully appreciate the risks it was running. At the present session the discussion had gone still further, since mention had been made of a division of responsibility between the host State, which should be deemed to assume some degree of responsibility, and the State that exported the industry.

19. The CHAIRMAN suggested that the Special Rapporteur should make any necessary changes in the third and fourth sentences of paragraph 10 in consultation with Mr. McCaffrey and Mr. Sucharitkul.

Paragraph 10 was adopted on that understanding.

Paragraph 11

20. Sir Ian SINCLAIR said that, in the light of the numerous suggestions made during the session with a view to formulating guidelines rather than general primary rules, and in order to make it clear that paragraph 11 dealt with past history, all the verbs in the paragraph might be expressed in the past tense.

21. Mr. LACLETA MUÑOZ said that the word "*responsabilidad*", as used in paragraph 11 of the Spanish version, was incompatible with the definition of the word given in paragraph 5.

22. Mr. QUENTIN-BAXTER (Special Rapporteur) said that he accepted Sir Ian Sinclair's idea of putting the paragraph into the past tense. Replying to Mr. Lacleta Muñoz's point, he suggested that the words "for wrongfulness" should be added after the word "responsibility" in all the language versions.

It was so decided.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

23. Mr. FRANCIS suggested that the word "would" in the last sentence should be replaced by the word "could".

It was so decided.

24. Mr. QUENTIN-BAXTER (Special Rapporteur) pointed out that the word "reflected" in the penultimate line of the English text should read "neglected".

It was so decided.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

25. Mr. RIPHAGEN asked for an explanation of the expression “shared expectation” in the last sentence of paragraph 16.

26. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, after discussing the matter with Mr. Riphagen, he believed the problem could be solved by adding the following sentence at the end of the paragraph: “Accordingly, no claim could be based upon the provisions of the treaty.”

Paragraph 16, as amended, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

Paragraph 19

27. Mr. USHAKOV observed that the second sentence in paragraph 19 did not take account of his position, which was that the duty of care did not exist in contemporary international law.

28. Mr. QUENTIN-BAXTER (Special Rapporteur) said that a broad range of opinions had been expressed on the subject of the duty of care, both in the Commission and in the Sixth Committee, and he had attempted to summarize them.

29. The CHAIRMAN suggested that Mr. Ushakov’s position should be recorded in a footnote 10 *bis*, to be added after the word “Commission” in the second sentence of the paragraph.

It was so decided.

Paragraph 19 was adopted.

Paragraphs 20 to 26

Paragraphs 20 to 26 were adopted.

Paragraph 27

30. Sir Ian SINCLAIR recalled that he had raised a question concerning the attributability to the State of activities carried out by private persons and having injurious transboundary consequences. Since that question was not reflected in the draft report, he proposed that the following sentence should be added at the end of paragraph 27: “Several members did, however, raise questions about how far activities carried out by private persons and having injurious transboundary consequences could be attributed to the acting State.”

31. Mr. THIAM said that the first sentence in paragraph 27 did not adequately reflect the discussion in the Commission, which had adopted a proposal by Mr. Ushakov to the effect that the Commission would explore the subject again the following year before taking a final decision. That did not correspond to the statement “there was a substantial majority in favour of proceeding with the topic...”.

32. Mr. DÍAZ GONZÁLEZ agreed with Mr. Thiam. To begin with, it was inaccurate to use the term “substantial majority” when not all the members of the Commission had been present at the discussion. In any event, the majority seemed to have expressed support for Mr. Ushakov’s proposal to continue studying the subject, but to do so in an exploratory way.

33. Mr. McCAFFREY approved the amendment proposed by Sir Ian Sinclair. Concerning the first sentence of paragraph 27, the Special Rapporteur, in summing up the discussion, had given figures of the number of members who had expressed support for proceeding with the topic. It certainly appeared that a majority of the members had not questioned the viability of doing so. The number of members actually present at discussions should not affect the validity of decisions.

34. Mr. SUCHARITKUL said that he agreed with Mr. McCaffrey; whatever the size and nature of the majority, several members of the Commission had expressed the view that the obligation to provide reparation should be laid down. A practice of States in favour of providing reparation might even be regarded as emerging. The fact that many States made reparation *ex gratia* was of little importance so long as the practice of making effective reparation continued to grow. As to the question of attributability, he supported the idea of the extraterritorial application of the strict requirements of law, in other words, the strict observance of the duty of care to prevent injurious consequences to human beings.

35. Mr. USHAKOV pointed out that the Commission had unanimously decided to postpone until the following session a decision on whether to proceed with the study of the topic. With regard to the third sentence of the paragraph, he said that in the French text the words “*Les membres de la Commission*” did not reflect his position. He found the last sentence strange, since a majority could not decide whether or not an obligation existed under international law.

36. Mr. FRANCIS proposed that the word “substantial” in the first sentence should be deleted. However, there was no doubt that the Commission as a whole had favoured the main thrust of the Special Rapporteur’s report. In that connection, it was not correct to say that the Commission had decided to postpone a decision on the topic until the following year. The General Assembly would ultimately decide whether or not the topic was viable.

37. Mr. CALERO RODRIGUES said that he believed the Special Rapporteur had reflected the view of the majority of the Commission fairly accurately. However, since the decision to look into the topic further had not been clear-cut, perhaps the paragraph should be amended in the following way: in the first sentence, the words “there was a substantial majority” would be replaced by the words “most of the members who spoke were ...”; in the third sentence, the words “from several members” would be added after the word “support”; and in the last sentence the words “there was

also a declared majority in favour of” would be replaced by the words “many speakers favoured”.

38. Mr. QUENTIN-BAXTER (Special Rapporteur) pointed out that the Special Rapporteur had a duty to reflect not only the minority view but also that of the majority. The majority view was dealt with in paragraph 27 only, whereas the subsequent paragraphs dealt with the views of those members who had expressed opposition to the topic. Concerning attendance of Commission members at discussions, he did not think that the word “majority” as used in paragraph 27 could be interpreted as meaning an absolute majority of the Commission. He had been careful, in paragraph 26, to state that “Almost all members present at any stage of the Commission’s discussion of the topic intervened in the debate.” On the matter of figures, 20 members had taken part in the discussion, 15 of whom had expressed willingness to see the study of the topic continued; 12 of the 20 speakers had said specifically that they supported the prevention measures and 8 had said they would like to see those measures strengthened. The reference to the “majority” in the last sentence related only to those members who had said specifically that formal obligation to make reparation should be laid down; 12 members had expressed that view.

39. Following a discussion in which Mr. USHAKOV, Mr. QUENTIN-BAXTER (Special Rapporteur), Mr. FRANCIS, Mr. DÍAZ GONZÁLEZ, Mr. CALERO RODRIGUES and Mr. YANKOV took part, the CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to amend the paragraph in the following manner: first, the opening clause would be reworded to read: “As in other years, most of the members who spoke were in favour ...”; the first part of the third sentence would be amended to read: “There was particularly strong support from many members for the retention ...”; and the last sentence would read: “There was also a majority in favour of establishing ...”.

It was so decided.

Paragraph 27, as amended, was adopted.

Paragraph 28

40. Mr. USHAKOV noted that he was the member referred to in the second sentence of the paragraph. He proposed that the words “in customary law” in that sentence should be replaced by the words “in general international law” and that the rest of the sentence should be deleted.

It was so decided.

Paragraph 28, as amended, was adopted.

Paragraph 29

41. Mr. THIAM said that quantitative expressions such as the words “half a dozen members”, which appeared in the penultimate sentence, should be avoided.

He proposed that the words “some members” should be used in that sentence instead.

It was so decided.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

42. Mr. YANKOV said that, in the light of the decision taken in regard to article 29, he proposed that the words “five or six Commission members” at the beginning of the last sentence should be replaced by the words “some Commission members”.

It was so decided.

Paragraph 31, as amended, was adopted.

Paragraph 32

43. Mr. QUENTIN-BAXTER (Special Rapporteur) said that the word “any” in the penultimate sentence should be deleted.

It was so decided.

44. Sir Ian SINCLAIR said that in his view the clause which ended the last sentence of the paragraph was far too categorical. He proposed that it should be amended to read: “though such rules might have precedential value”.

45. Mr. McCAFFREY said he agreed with that proposal but would suggest that the words “precedential value” should be replaced by the words “analogical value”.

46. Mr. QUENTIN-BAXTER (Special Rapporteur) said that he could accept Sir Ian Sinclair’s proposal but not Mr. McCaffrey’s, owing to the implications which the rules based upon State practice in the field of the physical environment had for the field of economic law.

47. Mr. FRANCIS agreed with the Special Rapporteur. He proposed that the clause should be amended to read “though such rules would have some precedential value”.

48. Sir Ian SINCLAIR pointed out that such a statement would depend on the nature of the rules. In his view, the statement should be as flexible as possible.

49. Mr. LACLETA MUÑOZ said that in the Spanish text the clause did not reflect the Special Rapporteur’s intent. It should read: “*a una esfera tan diferente como la del derecho económico ...*”.

50. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to adopt the amendment to paragraph 32 proposed by Sir Ian Sinclair.

It was so decided.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

51. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, in the second sentence of the English text, the word “the” between the words “a number of” and the word “Commission” should be deleted and the semicolon after the word “reparation” should be replaced by a full stop.

It was so decided.

Paragraph 34 was adopted, subject to those drafting changes in the English version.

Paragraph 35

52. Mr. DÍAZ GONZÁLEZ said that, as the Commission had not reached agreement on the content of the draft article, he did not fully understand what procedural rules, principles, etc. the last sentence referred to. In his view, the sentence should be deleted altogether, since it was far too categorical in its terms.

53. Mr. QUENTIN-BAXTER (Special Rapporteur) said he did not think that the last sentence was categorical. In any event members of the Commission, including Mr. Razafindralambo and Mr. Jagota, had made statements to that effect.

54. Mr. FRANCIS said that he was in favour of retaining the sentence.

55. Following a discussion in which Mr. McCAF-FREY, Mr. KOROMA, Mr. USHAKOV, Mr. ILLUECA and Mr. THIAM took part, the CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to amend the last sentence of the paragraph to read: “The developing countries would derive great benefit from the body of references, information and options which would be available to them and which they would find in the work of the Commission.”

It was so decided.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 43

Paragraphs 36 to 43 were adopted.

Paragraph 44

56. Mr. QUENTIN-BAXTER (Special Rapporteur) said that the words “court proceedings” in the second sentence should be replaced by the words “licensing proceedings”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 53

Paragraphs 45 to 53 were adopted.

Section B, as amended, was adopted.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VII. Other decisions and conclusions of the Commission (A/CN.4/L.349 and Add.1 and 2)

A. The law of the non-navigational uses of international water-courses (A/CN.4/L.349)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

E. Date and place of the thirty-fifth session (A/CN.4/L.349)

Paragraph 3

57. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to hold its next session at the United Nations Office at Geneva from Tuesday, 3 May 1983, to Friday, 22 July 1983.

It was so decided.

Paragraph 3 was adopted.

Section E was adopted.

F. Representation at the thirty-seventh session of the General Assembly (A/CN.4/L.349)

Paragraph 4

Paragraph 4 was adopted.

Section F was adopted.

G. International Law Seminar (A/CN.4/L.349)

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

58. Mr. JACOVIDES said that he had drawn the attention of the Secretariat to the correct title of the lecture he had given, which was not as stated in paragraph 8.

Paragraph 8 was adopted subject to correction.

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted.

Section G, as amended, was adopted.

B. Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.349/Add.1)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

59. Mr. USHAKOV said he did not understand why the last sentence of paragraph 4 should state that the Commission would endeavour to present a preliminary report to the General Assembly “if possible”, at its thirty-eighth session, bearing in mind the General Assembly’s formal request to that effect.

60. Mr. MAHIU said the Planning Group had considered that it might be difficult to submit a preliminary report to the General Assembly at its thirty-eighth session, since the topic would not come before the Commission until the latter’s thirty-fifth session. The Special Rapporteur would not be in a position until then to draw up a report, which would be based on the discussion which took place in the Commission.

61. Mr. THIAM (Special Rapporteur) said that, as he understood the position, the Special Rapporteur would first draw up an introductory report and then, on the basis of the discussion in the Commission, prepare another report for submission to the General Assembly on the scope of the topic. He could scarcely submit directly to the General Assembly a report that had not been approved by the Commission.

62. The CHAIRMAN suggested that, in the light of those comments, the last sentence of paragraph 4 should be replaced by wording to the effect that the Commission would submit to the General Assembly at its thirty-eighth session the initial conclusions arising out of the discussion which it would hold at its thirty-fifth session on the basis of a preliminary report by the Special Rapporteur.

It was so decided.

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Section B, as amended, was adopted.

C. Programme and methods of work of the Commission (A/CN.4/L.349/Add.1)

Paragraphs 6 to 20 were adopted.

Section C was adopted.

D. Co-operation with other bodies (A/CN.4/L.349/Add.2)

Paragraphs 1 to 7 were adopted.

Section D was adopted.

Chapter VII of the draft report, as amended, was adopted.

ANNEX. *Comments and observations of Governments and principal international organizations on articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-second session (A/CN.4/L.350)*

The annex to the draft report was adopted.

63. The CHAIRMAN put to the vote the draft report of the Commission on the work of its thirty-fourth session as a whole.

The draft report as a whole, as amended, was adopted.

Closure of the session

64. Mr. USHAKOV said that the major achievement of the session had been the adoption of 81 articles and an annex on the topic of treaties between States and international organizations or between international organizations—an achievement that was particularly significant at a time when the importance of international organizations and of the treaties they concluded was growing. Mr. Reuter was therefore to be congratulated for two reasons: first as Special Rapporteur

for that topic, and then as Chairman, for he had presided over the Commission with skill and a sense of discipline which it was to be hoped other chairmen would emulate.

65. A tribute was likewise due to the other members of the Bureau and to the Secretariat. He expressed his best wishes to Mr. Flitan for his recovery.

66. Mr. QUENTIN-BAXTER, speaking on behalf of himself and Mr. Evensen, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Riphagen, Sir Ian Sinclair and Mr. Stavropoulos, expressed their best wishes to Mr. Flitan for his recovery. The Chairman's benevolence had elicited responsiveness from the members of the Commission. He also expressed their gratitude to the Secretariat.

67. Mr. SUCHARITKUL said that it had been a memorable experience to work under the chairmanship of Mr. Reuter, whose sense of duty and discipline was coupled with kindness and compassion. The enlargement of the Commission was bound to prove beneficial to the development of international law.

68. Mr. NI said that he had learned a great deal from a most instructive session. He expressed his gratitude to the Chairman, whose able leadership and sense of duty and discipline had set an example for all, and to all the other members of the Commission. He thanked the Secretariat for its assistance.

69. Mr. THIAM, speaking on behalf of the African members of the Commission, said it was his pleasure to thank Mr. Reuter, who as Chairman had guided the Commission through some turbulent patches during the session; his concern for the problems of the third world had fitted him eminently to preside over the work of the enlarged Commission. In addition, as Special Rapporteur, Mr. Reuter had made a noteworthy contribution to international law and as a member of the Commission he had given its members the benefit of his culture and experience. He thanked the other members of the Bureau and the Secretariat. He wished Mr. Flitan a speedy recovery.

70. Mr. ILLUECA, speaking on behalf of the Latin American members of the Commission, spoke of the wisdom with which the Chairman had conducted the business of the Commission. Mr. Reuter was respected throughout Latin America for his outstanding contribution to contemporary international law. His image had been further enhanced by the task he had accomplished as Special Rapporteur on the topic of treaties between States and international organizations or between international organizations. He thanked all the members of the Bureau and the Secretariat.

71. The CHAIRMAN thanked all the members of the Commission for their kind words. Time did not allow him to address a word of thanks to each of them in-

dividually as he would wish. He would, however, make one exception in expressing the Commission's thanks to the interpreters, précis-writers and translators.

72. For the benefit of future chairmen, he wished to say that his task had been both pleasant and easy because it had been made so by all the members. The

manner in which the Commission was flourishing augured well for the future.

73. He declared the thirty-fourth session of the International Law Commission closed.

The meeting rose at 1.20 p.m.

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