United Nations A/C.6/53/SR.16

General Assembly
Fifty-third session

Official Records

Distr.: General
18 November 1998

Original: English

Sixth Committee

Summary record of the 16th meeting
Held at Headquarters, New York, on Thursday, 29 October 1998, at 10 a.m.

Chairman: Ms. Flores Liera (Vice-Chairman) ..... (Mexico)
later: Mr. Enkhsaikhan (Chairman) ..... (Mongolia)

Contents

98-81997 (E)

In the absence of Mr. Enkhsaikhan (Mongolia), Ms. Flores Liera (Mexico), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

Agenda item 154: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/53/L.3)

1. **Mr. Herasymenko** (Ukraine), reintroducing draft resolution A/C.6/53/L.3 because his previous introduction, summarized in document A/C.6/53/SR.8, had not been mentioned in the *Journal of the United Nations*, No.1998/202, said that, while largely based on General Assembly resolution 52/162, the text took account of more recent developments such as the report of the Special Committee (A/53/33) and the Secretary-General's report (A/53/312). He hoped that the draft resolution, which was balanced and uncontroversial, would be adopted without a vote and expressed his willingness to engage in informal consultations on the proposal in paragraph 8 to establish a working group within the Sixth Committee.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*) (A/53/10 and Corr.1)

2. **Mr. Morshed** (Bangladesh) said that the draft articles on prevention of transboundary damage from hazardous activities contained in chapter IV of the Commission's report (A/53/10 and Corr.1) were remarkable, as was the speed with which the Special Rapporteur had accomplished his mandate. The emphasis on cooperation as the underlying principle of the regime of prevention was most welcome. The Commission's approach had been constructive and practical; he commended the institutionalization of notification and consultations, the identification of a balance of interests and the introduction of the idea of public consultation. The draft articles – the commentary to which was also admirable – constituted an elegant structure that could form the basis of codification.

3. Although the two-part approach adopted – the elaboration of a prevention regime separate from a liability regime – had proved a successful expedient, his delegation looked forward to the Commission's elaborating the basic principles of liability, thus removing some of the potential ambiguities to which the two-part approach might give rise.

4. The adoption of the principle of due diligence had certain implications. Due diligence had an objective element, traceable to the fact that hazardous activities carried, as it were, the seeds of their own physical consequences, which could be foreseen with a degree of certitude and precision. In that sense, "result" defined the duty of care, even though that might be an "obligation of conduct".

5. His delegation also believed that considerations governing liability were not identical with those governing the measure of damages. In the Bhopal case, the point at issue had been not the operator's liability but the measure of damages. Higher limits of tolerance in developing countries did not argue a higher threshold of liability, only a possibly lower measure of damages. If a State permitted hazardous activities in its territory, it must be presumed to be able to take care of the potential consequences thereof. That presumption applied irrespective of the level of development of the State concerned. His delegation was confident that the Commission would, upon second reading, further clarify and strengthen the law.

6. **Mr. Sepulveda** (Mexico) commended the new format of the Commission's report; its volume had been reduced without sacrificing the quality of its content. With regard to the prevention of transboundary damage from hazardous activities, he said that the draft articles, which had been prepared with admirable speed, constituted a full and balanced document which would make for the early adoption of that part of the topic and swift progress to the consideration of liability proper. Prevention was indeed a most important concept and the rules contained in the draft articles were most useful. The emphasis on prevention should not, however, lead to a deviation from the original objectives. It was unsatisfactory, in that context, that the question of liability had been excluded in dealing with prevention, as indicated in paragraph 31 of the report. If the principle was adopted that non-compliance with duties of prevention in the absence of any damage actually occurring would not give rise to any liability, the effect would be to limit the scope of the duties contained in the draft articles and to separate the duties of prevention from the consequences of non-compliance with rules on prevention. The two were, however, inextricably linked, as the Commission itself had noted in paragraph 2 of the general commentary to the draft articles. That need to link cause and effect led his delegation to urge once again that the topic of prevention should be included in that of liability, since it could not accept that non-compliance could fail to give rise to liability even if no damage actually occurred. There were a number of reasons for that view. First, there was a risk of weakening obligations of conduct. If prevention was better than cure, it was essential to establish rules governing the consequences of non-compliance, whether or not damage occurred. Otherwise, the commitment to observe obligations

of conduct would be diminished and so, consequently, would be the effectiveness of the draft articles.

7. Another effect would be to separate questions that should be considered together. In determining the consequences of non-compliance, consideration should also be given to the effect when damage occurred. If the approach proposed by the Commission were adopted, would it then be possible to say that non-compliance constituted an aggravating factor if damage actually occurred? Whatever the reply to that question, his delegation believed that the liability aspects should be considered together when the second part of the topic was studied.

8. Separation also had the effect of determining the consequences of liability at a time when the Commission was meant to be dealing solely with prevention and thus distorted the decision taken at the forty-ninth session that the issues of prevention and liability should be dealt with separately.

9. His delegation would, in principle, like to see the draft text become a convention, since that was the only way of providing a solid enough basis for rules on hazardous activities. A model law or a framework convention would not carry the same weight. With regard to the dispute settlement procedure, his delegation believed that the nature of the topic was such as to make the inclusion of binding mechanisms absolutely essential. A fact-finding commission was an acceptable first step, but ultimately a complainant should be able to have recourse to the courts.

10. The precautionary principle had not been clearly incorporated in the draft articles. Since the point at issue was activities involving a risk of causing significant transboundary harm, the principle ought to be to be reflected in the text. The Commission had been right not to spell out specific hazardous activities in draft article 1, given the difficulty of making an exhaustive list and the speed of technological advance. His delegation queried, however, the decision to omit ultrahazardous activities. It was true that they were the subject of special regulation, but nonetheless the question should be reconsidered at the same time as the liability regime. Not all existing treaties on the matter provided for the liability of the State of origin.

11. With regard to the threshold of harm, although any wording involved a value judgement, the inclusion of activities involving the risk of causing "significant harm" provided some element of certainty; as the Commission had stated in its commentary to article 2, it signified something more than "detectable" but need not be at the level of "serious" or "substantial". "Significant" was the most appropriate term.

12. Article 3 was one of the cornerstones of the prevention regime. The importance of the obligation contained in that article was perhaps such that greater weight should be given to the obligation of due diligence. If the nature and scope of due diligence were determined precisely, the essence of the obligations imposed under the draft article could be defined.

13. His delegation attached particular importance to draft article 4, with its insistence on cooperation and good faith. Both principles were fundamental, but where they proved inadequate it was right that liability should be attributed to whoever caused the harm.

14. The time-frames mentioned in article 10, paragraph 2, and article 13, paragraph 2, were too vague. It would be preferable to lay down specific time limits – not to exceed six months – for States to provide notification.

15. He commended the Commission's approach on article 12, especially the fact that the factors involved in an equitable balance of interests had not been put in any particular order of priority, or included in an exhaustive list. There was, however, an unnecessary repetition, which could lead to confusion: harm to the environment, mentioned in draft article 12, subparagraph (c), was already covered by draft article 12, subparagraph (a).

16. It had been an extremely sensible decision to include the provisions of draft article 16, which would substantially reduce the possibility of disputes between States and facilitate the implementation of the draft articles.

17. With regard to diplomatic protection, he said that, although different opinions could exist on some aspects of the topic, the existing customary law should be adequate to guide the Commission's work. He recalled that for diplomatic protection to be invoked a national of the State making the claim had to have suffered harm. There also had to be evidence that such harm had occurred, that it was contrary to international law, that it was attributable to the country against which the claim was made and that there was a link of cause and effect between the harm caused and the attribution of harm. His delegation considered that the following points should be borne in mind, in addition to those listed in paragraph 108. First, diplomatic protection was a right of the State, which had total discretion. Any suggestion that the State was a mere intermediary went far beyond the sphere of codification of the law. Secondly, it was better to base discussions on secondary rules, so that the admissibility of claims and the preconditions for their submission could be studied. It was therefore important to lay greater emphasis on the rule regarding the exhaustion of domestic resources. That principle, which was a well-established rule of customary international law, should be fully honoured in the draft

articles, but did not seem to have been given due importance, despite its inclusion in a number of recent treaties. It would be particularly interesting to analyse the possible impact of the new dispute settlement procedures established in some international instruments which gave aliens direct access to foreign courts. The clearest example of that was in agreements on protection of investments. Such new rights for the individual which eliminated the role of the individual's own State had obvious repercussions for the traditional treatment of diplomatic protection. The effect could be bad as well as good, since it could give rise to inequality: whereas a foreigner had various avenues of recourse open to him, the national of a State might be able to resort only to his own domestic courts. The Commission should look into such developments and establish rules that would protect the whole range of rights and obligations, which had so many political implications.

18. Lastly, it was important to maintain a distinction between international human rights protection and diplomatic protection. Although they were obviously linked, they should not be assimilated and no hierarchy should be established between them. Diplomatic protection did not necessarily have any connection with human rights, since it often had to do with questions of inheritance or property. Similarly, human rights protection could be achieved without recourse to diplomatic protection. Moreover, juridical bodies for the protection of human rights, unlike those concerned with diplomatic protection, were well established in both the internal legal order and the international system; that was a matter that the Commission should consider.

19. **Mr. Patriota** (Brazil), relevant to chapter IV of the report, said his delegation agreed that a regime on prevention should be separated from a regime of damage liability; the importance of the issue warranted its further in-depth examination.

20. On the difficult matter of diplomatic protection, the Commission's approach was satisfactory. Under traditional doctrine, such protection could be exercised only where certain conditions were met, including the exhaustion of local remedies and compliance of the claimant's previous conduct with the so-called "clean hands" rule. Diplomatic protection pertained to the State, not the individual; recognition of the rights of the individual at the international level involved another strand of international law, and the distinction between the two concepts should not be blurred.

21. He was pleased to announce that the Fundação Alexandre de Gusmão had recently published, on behalf of the Government of Brazil, the complete series of the Gilberto Amado Memorial Lectures, presented in the languages in which they had originally been delivered, to mark the Commission's fiftieth anniversary. The entire series would shortly be made available via the Internet.

22. **Mr. Choi** (Republic of Korea) said that while a preventive approach to the issue of transboundary damage from hazardous activities was commendable, the attempt to treat the issue of liability separately from that of prevention would involve a set of complex legal principles. The concept of an obligation based on due diligence rather than result embodied in draft article 3, left many questions unanswered. It was essential to strike a balance between the interests of the State of origin and those of the State or States likely to be affected, between developmental and environmental considerations, and between advanced and developing countries. In view of their very broad scope, the draft articles should form part of a framework convention rather than a convention or model law.

23. The title "Prevention of transboundary damage from hazardous activities" could be improved by inserting the word "potentially" before "hazardous", for in cases where transboundary damage was preventable, the activity should not necessarily be deemed hazardous. Issues of liability and State responsibility were involved, and the legal implications of the term "hazardous activities" might differ from those of the term "potentially hazardous activities".

24. **Mr. Raichev** (Bulgaria) said that the draft articles on prevention of transboundary damage from hazardous activities were generally satisfactory. The underlying obligation of due diligence was appropriate, and the emphasis on good faith and cooperation was commendable. However, draft article 3, which provided the basic foundation of the article, should deal not only with the obligation of States to take all necessary measures to prevent and minimize the risk of significant transboundary harm, but also with the closely related obligation to mitigate the effects of harm once it had occurred. The duty to prevent and minimize transboundary harm should be treated as an obligation of conduct or due diligence. Failure to comply with the general duty of prevention should entail State responsibility, civil liability, or, where a State of origin and an operator were simultaneously involved, both. The inclusion in draft article 7 of provisions requiring an authorizing State to ensure that an operator conformed to the requirements of the authorization was appropriate, as otherwise the rule of prior authorization would lose much of its practical effect. Articles 8 and 9, relating respectively to impact assessment and public consultation, were of great importance, in view of the potential implications of transboundary damage for life, health and property. His delegation supported the view that articles 10, 11 and 12 embodied a set of procedures that were

essential to the establishment of an equitable balance of interests. The issue of dispute settlement, dealt with in draft article 17, could not be definitively resolved until the Commission had taken a decision on the final format of the draft articles. A detailed procedure for the appointment and functioning of the proposed fact-finding commission should be included.

25. **Mr. Baena Soares** (Chairman of the International Law Commission), introducing chapters VI, VIII and IX of the Commission's report, noted in connection with chapter VI, dealing with unilateral acts of States, that the Special Rapporteur for the topic had observed that rules of international law governing such acts could not be developed until the acts in question had been adequately defined. As a first step, it had been necessary to identify acts that fell outside the scope of the topic. Besides unilateral acts of a non-autonomous or dependent nature, which were governed by existing rules of international law, such acts included unilateral political acts, unilateral legal acts of international organizations, attitudes, acts and conduct of States which, though voluntary, were not performed with the intention of producing specific effects in international law, and unilateral acts of States which gave rise to international responsibility (a topic which the Commission was already considering). Other acts not falling within the scope of the topic were unilateral acts connected with the law of treaties (signature, ratification, the formulation of reservations and the like); acts which contributed to the formation of custom; acts which constituted the exercise of a power conferred by a treaty or a specific rule of customary law; acts which did not consist in the exercise of pre-existing legal powers but represented the exercise of a freedom under international law; and unilateral acts that created or gave rise to a treaty relationship. Estoppel likewise was not of direct concern to the study of unilateral acts, as in that case the legal effect flowed not from the will of the State making the representation, but from the reliance placed on that representation by the State to which it was made. Certain other forms of conduct were also excluded from consideration, such as silence and notification, which in order to generate effects in international law necessarily presupposed the performance of an act by another State or some other subject of international law.

26. The Special Rapporteur considered that in order for a legal act to be strictly unilateral in nature, that act had to be autonomous, i.e., it had to produce legal effects independently of any other manifestation of will, whether prior, simultaneous or subsequent, by some other subject of international law. The Special Rapporteur held that the legal basis of the binding nature of unilateral acts of States rested with the principle of good faith in international relations and the power of auto-limitation which States enjoyed under international law.

27. On the basis of the above considerations, the Special Rapporteur had proposed the definition of a strictly unilateral declaration contained in paragraph 142 of the Commission's report. As the Special Rapporteur had emphasized, that definition was limited to unilateral declarations. Other forms of unilateral acts were excluded, since the unilateral declaration was the basic instrument which States employed in order to accomplish the transactions which they chose to effect by means of unilateral acts. According to the Special Rapporteur, then, the Commission should focus on the unilateral acts as formal legal acts, i.e., as procedures or devices for the creation of legal rules, and in particular for the creation of legal obligations for the States that were their authors, regardless of the content of the act.

28. The commission had discussed various aspects of the topic (paras. 151 to 191 of the report), and had finally decided to reconvene the Working Group on Unilateral Acts of States. The Working Group's recommendations had been endorsed by the Commission and were contained in paragraphs 194 to 201 of the report.

29. With respect to the scope of the topic, there had been general endorsement of the Special Rapporteur's view that it should be limited to unilateral acts of States issued for the purpose of producing international legal effects, to the exclusion of acts of States which did not produce legal effects, unilateral acts of States which were linked to a specific legal regime, and acts of other subjects of international law, such as international organizations. There had been some divergence of opinion as to whether the scope of the topic extended to unilateral acts of States in respect of subjects of international law other than States or *erga omnes*, and whether the effects of unilateral acts issued in respect of States could also be extended to other subjects of international law. It had been felt, however, that at the current stage work could proceed even in the absence of a final decision on the matter.

30. As to the form which the Commission's work on the topic should take, it had generally been felt that the elaboration of draft articles with commentaries was the most appropriate way to proceed. As noted in paragraph 197 of the report, the Commission considered that the Special Rapporteur might already be in a position to produce three draft articles: one dealing with scope, another dealing with use of terms, and a third providing that the fact that the draft articles did not apply to unilateral acts of the State which were linked to a pre-existing international agreement was without prejudice to the application to them of any of the rules set

forth in the draft articles to which they would be subject under international law, independently of the draft articles. Another section of the draft articles could cover the study of possible effects of the act and the question whether it would be necessary, in order for the act to produce legal effects, for the addressee to accept it or subsequently behave in such a way as to signify such acceptance. It had likewise been suggested that the Special Rapporteur should examine the question of estoppel and the question of silence. The Commission had also asked the Special Rapporteur to proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States, including the question concerning the organs competent to commit the State unilaterally on an international plane and the question concerning possible grounds of invalidity concerning the expression of the will of the State.

31. The Commission would particularly welcome the Sixth Committee's views on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur or should also encompass other unilateral expressions of the will of the State, and on whether the topic's scope should be limited to unilateral acts of States issued to other States or should also extend to unilateral acts of States issued to other subjects of international law.

32. Turning to chapter VIII, dealing with the topic of nationality in relation to the succession of States, he recalled that at its forty-ninth session, the Commission had adopted on first reading a set of draft articles on the first part of the topic, i.e., the question of the nationality of natural persons, which had been submitted to Governments for comments and observations. In paragraph 40 of the current report, the Commission reiterated its request to Governments for their views on the draft articles, so as to enable it to begin the second reading at its next session.

33. The Special Rapporteur had felt that a preliminary exchange of views at the fiftieth session of the Commission on possible approaches to the second part of the topic, namely the nationality of legal persons, would facilitate the future decisions to be taken by the Commission on the question. In his fourth report, the Special Rapporteur had therefore raised a number of questions concerning the orientation to be given to the work on the nationality of legal persons. The Commission had established a working group to consider the matter; its preliminary conclusions were set out in paragraphs 460 to 468 of the Commission's report. Bearing in mind those conclusions, the Commission would further need to decide which categories of "legal persons" should be covered by the study, to which legal relations the study should be limited and what could be the possible outcome of the work of the Commission on that part of the topic. It was very important for the Commission to have the views of States on that matter. Indeed, as indicated in paragraph 468 of the report, in the absence of any positive comments from States, the Commission would have to conclude that States were not interested in the study of the second part of the topic. He therefore appealed to the Committee to provide appropriate guidance to the Commission on that issue.

34. With regard to chapter IX concerning reservations to treaties, the Commission had adopted seven draft guidelines, accompanied by commentaries, on various questions pertaining to the wider issue of the definition of reservations and interpretative declarations. The starting point of the definition of reservations was found in article 2, paragraph 1 (d), of the 1969 Vienna Convention on the Law of Treaties. The next two Vienna Conventions, on State succession in respect of treaties and on the law of treaties concluded by international organizations, had also contributed to the completion of the original definition. A composite text (the Vienna definition) combining all those contributions therefore appeared at the beginning of chapter I of the Guide to Practice as draft guideline 1.1 "Definition of reservations". The substantive element of the definition was teleological in nature, since a reservation purported to exclude or modify the legal effect of certain provisions of the treaty in their application to the State or international organization concerned. That element, however, presented several technical problems, the first set of which referred to the expression "certain provisions", which was addressed by guideline 1.1.1.

35. Draft guideline 1.1.1 in fact reflected the practice of "transverse" or "across-the-board" reservations, which related not to any particular provision but, for example, to the way by which a State or an international organization intended to implement the treaty as a whole. The draft guideline purported to remove any ambiguity and to avoid any controversy by establishing the broad interpretation that States actually gave to the apparently restrictive formula of the Vienna definition. Such precision in no way prejudged the admissibility or inadmissibility of general and imprecise reservations.

36. Draft guideline 1.1.2 sought to remedy a flaw in the wording of the 1969 and 1986 Vienna Conventions. The spirit of the provision was that a State or an international organization could formulate or confirm a reservation when it expressed its consent to be bound by the treaty.

37. Draft guideline 1.1.3 concerned unilateral statements by which a State purported to exclude the application of a treaty in whole or in part in respect of one or more territories under its jurisdiction; such statements constituted reservations

within the meaning of the Vienna definition. While draft guideline 1.1.3 dealt with the scope *ratione loci* of certain reservations, draft guideline 1.1.4 dealt with the time factors of the definition, i.e., the moment at which certain "territorial reservations" could be made.

38. Draft guideline 1.1.7 addressed the issue of reservations formulated jointly by a number of States or international organizations. The possibility of joint reservations might arise in the future and the Commission had felt that it would be wise to anticipate that possibility in the Guide to Practice. The proliferation of common markets and economic unions made that possibility all the more likely.

39. The last draft guideline, which had been adopted without a title or number for the time being, had seemed necessary in order to clarify that the admissibility and effects of reservations were not otherwise affected by the definition, which did not prejudge the validity of statements defined as reservations.

40. Two other draft guidelines had given rise to a rich debate in the Commission and would be considered at its next session. The Commission would be grateful to have the comments and observations of States on those two guidelines, which concerned the problem of "extensive reservations". The issue had two aspects. The first concerned unilateral statements designed to increase the obligations or rights of the author beyond those stipulated by the treaty itself. The question was whether such statements should be considered as reservations. The second aspect related to statements purporting to limit not only the obligations imposed upon the author by the treaty but also the rights created by the treaty for the other parties.

41. Another draft guideline under consideration was the one concerning reservations relating to non-recognition. The Special Rapporteur had divided such statements into two categories: the first included general statements of non-recognition made on the occasion of the signature or the expression of consent to be bound by the treaty, and did not constitute reservations. The second category was more ambiguous, since it included statements by which the author did not accept any contractual relation with the entity it did not recognize. At the conclusion of the debate on that draft guideline, the Special Rapporteur had been inclined to consider that if such statements were not actually reservations, they could be thought of as statements similar to declarations of general policy which apparently did not produce legal effects on its application.

42. The Commission had also considered the definition of interpretative declarations, as well as the distinction between reservations and interpretative declarations. The Special Rapporteur had proposed a positive definition of interpretative declarations containing elements that were common to reservations and to interpretative declarations. In addition to declarations of general policy and informative declarations, the Special Rapporteur had mentioned another category, that of conditional interpretative declarations by which the consent of the author to be bound by a treaty was subordinated to its own interpretation and which were very close to reservations. The method of distinguishing between reservations and interpretative declarations could follow the model set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, containing the general rule of interpretation of treaties.

43. In conclusion, he reiterated the Commission's request for comments on the question of "extensive reservations", i.e., on whether unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself would or would not be considered as reservations, as well as any information on existing relevant State practice.

44. **Ms. Hallum** (New Zealand) said her delegation noted with satisfaction that the Commission had adopted on first reading 17 draft articles on prevention of transboundary damage from hazardous activities. Nevertheless, it felt that principles concerning prevention could not be determined in isolation from the principles concerning liability. While prevention of transboundary harm was, of course, very important, it was important to be realistic and also have a regime which dealt adequately with the consequences of harm when it nonetheless occurred. Her delegation urged the General Assembly and the Commission to reconsider the decision to pursue the two aspects of the topic separately. The basic assumption of the topic, that the competing rights and interests of States were best adjusted without the need to determine wrongfulness, required primary rules of liability to be formulated in conjunction with primary rules of prevention.

45. As the Secretariat's valuable survey of liability regimes showed, developing State practice since the Commission had first taken up the topic had confirmed that that assumption was fully justified. By considering liability regimes in conjunction with prevention regimes, States had the opportunity to tailor both regimes to the nature and extent of the risk of a particular activity, whether transboundary harm resulted from a failure to take the agreed prevention measures or from the fact that the measures had turned out to be inadequate.

46. Referring to the questions raised by the Commission in paragraphs 31 to 34 of its report, she noted that the

Commission had asked what kind of regime should apply to activities which actually caused significant harm. Clearly, a liability regime was required, because the natural corollary of a prevention regime to deal with the risk of harm was a liability regime to deal with any actual harm which might nonetheless occur. Her delegation urged the Commission to remain seized of the liability aspects of the topic, and of the inherent linkages between those aspects and prevention.

47. Secondly, the Commission had asked about the type of consequences that were appropriate or applicable following failure to comply with the duties of prevention of transboundary damage. It was well settled that a breach of a State's obligation to use due diligence not to cause harm to other States was an internationally wrongful act. To the extent that the draft articles on prevention codified that obligation, their breach must give rise to State responsibility for wrongfulness. To the extent that they represented the progressive development of international law through more detailed obligations assumed by treaty, a breach of the rules of prevention which caused harm to the nationals or territory of other States must also engage the secondary rules of State responsibility. That was so, whether or not the rules of prevention were accompanied by rules of liability.

48. Breaches of the primary rules of prevention which did not cause actual harm, or could not be shown to have a causal connection with any actual harm suffered, but which, for example, wrongfully exposed other States to risk of harm, must also engage State responsibility. However, one would expect the forms of that responsibility to be different in scale and in kind if harm had not actually occurred, or had occurred, but could not be shown to have been caused by the breach.

49. With respect to the form which the draft articles would take, her delegation was in favour of incorporating articles on both prevention and liability in a convention which would lay down residual rules of international law but allow States, by mutual agreement, to add or substitute more detailed regimes to govern particular activities.

50. Her delegation considered that since dispute settlement procedures would be covered by the draft articles on State responsibility, they need not be included in those which dealt with prevention and liability. However, failure to achieve acceptable solutions as a result of consultations (art. 11) should not be regarded as a dispute concerning interpretation or application (art. 17, para. 1). In such cases, it might be useful to appoint a fact-finding commission (art. 17, para. 2).

51. In closing, she reiterated her delegation's position that prevention and liability were a continuum which began with the duty to assess the risk of significant transboundary harm and ended with the obligation to ensure compensation if such harm occurred. The set of draft articles on liability included in the Commission's 1996 report (A/51/10, Annex I) showed that the concept could be accommodated under international law and should allay the fears of States which had opposed its codification and development.

52. **Mr. Abraham** (France), referring to chapter VI, said that his delegation supported the Commission's decision to limit the topic to unilateral acts of States performed with the intention of producing effects in international law and to begin by establishing a clear definition of such acts by excluding those which were not relevant to the topic. Unilateral acts of international organizations should be the subject of a separate study. Unilateral political acts should also be excluded, although it was not always easy to determine whether a given act was legal or political in nature; international courts had often made that determination on the basis of the intention of the State, and the consequences of the act, in question. Unilateral acts connected with the law of treaties should likewise be excluded.

53. However, he did not agree with the Special Rapporteur's proposal to exclude unilateral acts which gave rise to international responsibility. It was true that the Commission was engaged in a specific study of State responsibility, but the question of whether, and to what extent, a unilateral act might entail State responsibility was of great interest; for example, he wondered whether a State could be held responsible for failing to follow through on a unilateral act which had established a right to the benefit of another State. There was an interesting parallel with the law of treaties; article 37, paragraph 2, of the Vienna Convention on the Law of Treaties stated that when a treaty created a right for a third State, that right could not be revoked or modified by the parties if it was established that it was intended not to be revocable or subject to modification without that State's consent. It might, then, be considered, *mutatis mutandis*, that if a unilateral act, such as a declaration, was clearly intended to create a right for a third party, the author State could not unilaterally revoke it and, if it did so, it would incur responsibility. Such questions fell logically within the scope of the Commission's study.

54. He did not think that silence could be viewed as a unilateral act, even though it could be considered a sign of a State's intention to assume legal obligations or to accept a legal situation. He also doubted that unilateral statements made by the agent of a State in the course of proceedings before an international court or tribunal could be considered to be unilateral acts of the State. He looked forward to the Special Rapporteur's comments on those matters.

55. It was important to prevent the scope of the topic from becoming too broad or narrow and to stress the criteria for a unilateral legal act, which must produce legal effects in respect of subjects of international law which had not participated in its performance and must generate legal consequences independently of the manifestation of the will of some other subject of international law. His delegation also considered that the obligatory nature of such an act was dependent on the intention of the State which performed it rather than on another State's legal interest in compliance with the obligations it created.

56. The Commission's definition of a unilateral act as an autonomous [unequivocal] and notorious expression of the will of a State which produced international legal effects provided an interesting basis for further work. The primary question was whether the act of the State had been intended to produce legal effects vis-à-vis one or more other States which had not participated in its performance and whether it would produce such effects if those States did not accept its consequences, either explicitly, or as implied by their subsequent behaviour.

57. While it was too soon to decide whether the scope of the topic should be limited to unilateral acts of States issued to other States, or should also extend to unilateral acts of States issued to other subjects of international law, he thought that the Commission should take into account all possible beneficiaries of unilateral acts. It should also consider the role of unilateral acts of States in the development of customary law. In his opinion, it was far too soon to decide what form the results of the Commission's work should take.

58. The question of nationality in relation to the succession of States, while interesting, was complicated by the variations in treaty law, the lack of clarity in customary law, the paucity of precedent and the fact that rules varied according to the type of State succession involved. Nevertheless, the draft articles would be a useful complement to the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

59. The draft articles had been prompted by the need to prevent cases of statelessness or multiple nationality as a result of State succession and to ensure that individuals were, to a certain extent, free to choose their nationality in such cases. However, he had reservations concerning certain assumptions made in the draft articles. It was important not to over-regulate States. In particular, it must be determined whether an individual's exercise of the right of option to retain the nationality of a predecessor State obliged the State to repatriate that individual and whether exercise of the right of option to assume the nationality of a successor State entailed automatic renunciation of the nationality of origin. In that regard, the stipulation in article 10, paragraph 4, that when persons entitled to the right of option had exercised such right, the State whose nationality they had renounced would withdraw its nationality from such persons unless they would thereby become stateless was excessively restrictive; that provision should be amended to read that the State whose nationality such persons had renounced could withdraw its nationality from such persons only if they would not thereby become stateless.

60. The draft articles established an inappropriate link between the question of nationality and that of human rights. They also overemphasized the principle of effectivity which had no basis in international law. He took particular exception to article 18, paragraph 1, which appeared to authorize any State to contest another State's granting of nationality. While it was true that the International Court of Justice had made a similar ruling in the 1955 *Nottebohm* case, that decision had been criticized and was, moreover, an isolated example. Draft article 18, paragraph 1, appeared to create an unfortunate extension of the principle of effectivity and to assume that States attributed their nationality under public international law, whereas in practice, the reverse was the case.

61. The draft articles also implied that individuals had the right to free choice in the matter of nationality. Such was not the case, and the rights of States should not be reduced excessively to the benefit of individual rights. Draft article 20, if adopted, would create an imbalance between the two categories of rights. States must retain control over the attribution of nationality. Furthermore, article 11 ("Unity of a family") appeared to have significant implications for the right of residence, which was not the subject of the draft articles, and article 13 ("Status of habitual residents") was more closely related to the rights of non-nationals in State succession than to the subject of the draft.

62. With respect to the final form of the draft, his delegation did not wish to exclude the possibility of a convention since the purpose of the draft articles was to alter certain rules of customary origins already being applied by States.

63. Before embarking on a study of the nationality of legal persons, the Commission should endeavour to clarify the concept of such persons in international law; recent negotiations on the statute of the International Criminal Court had shown the difficulty of achieving consensus on that concept. It might be best for the Commission to first undertake a study of legal persons in general, then to deal with the question of their nationality and only then to consider the question of that nationality in relation to State succession.

Such a procedure would be quite different from that which the Commission had initially proposed, but it was a far more logical one.

64. With respect to reservations to treaties, he supported the Commission's decision to make no change in the relevant provisions of the 1969 Vienna Convention but rather to fill the gaps in that instrument.

65. Concerning the guidelines the Commission had adopted at its 1998 session, he noted that the French word "*directive*" was not an appropriate translation of the English word "guidelines" and should be replaced by "*lignes directrices*".

66. It was true that none of the three Vienna Conventions gave a comprehensive definition of reservations. His delegation considered that "reservation" meant a unilateral written act or statement made by a State or international organization when expressing its consent to be bound by a treaty, the purpose of which was to exclude or to modify the legal effect of certain provisions of the treaty. In that regard, it might be better to replace the verb "modify" with "restrict" or "limit" since, in such cases, the modification of legal effect was necessarily restrictive in nature. In order to avoid confusion, it might also be better to deal with States and international organizations in separate paragraphs. It was important to avoid giving States and international organizations complete freedom as to the moment when they formulated reservations, since that could introduce legal uncertainty into treaty relations. It was therefore essential to establish a comprehensive list of the moments at which reservations could be made.

67. With regard to the object of reservations, they could be intended to limit or sometimes even exclude the legal effect of certain provisions of a treaty. He agreed with the wording of the relevant guideline (1.1.1). Reservations could be general in scope in that they did not relate solely to one or more specific provisions of a treaty, but if a reservation was too general it would call in question the commitment and good faith of the reserving State and its will to implement the treaty effectively. General reservations gave rise to the most difficulties and had become more common in recent years, especially in the domain of human rights.

68. Draft guideline 1.1.2 gave rise to no particular difficulties. With regard to draft guideline 1.1.3, he agreed with the Special Rapporteur that a unilateral statement by which a State purported to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constituted a reservation. In the absence of such a reservation, the treaty should be considered applicable to the entire territory of the State in question under article 29 of the 1969 Vienna Convention on the Law of Treaties; however, that article did not prevent States from limiting the territorial application of a treaty, nor did it prejudge the question of the legal characterization of the statement made by the State in that connection. He did not agree with the members of the Commission who had considered that a territorial reservation could be formulated only if expressly provided for in the treaty to which it related. Article 29 of the Vienna Convention should not be interpreted too restrictively: while the Commission's discussion of that article at its 1998 session had been interesting, it was unrelated to the definition of reservations as such.

69. Concerning the question raised in paragraph 41 of the report, he did not think that unilateral statements by which a State purported to increase its commitments beyond those stipulated by a treaty could be considered reservations. However, the situation was somewhat different in the case of a State which, through a unilateral statement, sought to increase its rights under a treaty, a possibility not covered by the 1969 Vienna Convention. It was important to distinguish between treaty law and customary law; a State could not modify customary international law to its own benefit by formulating a reservation to a treaty codifying that law but in the case of treaty law, it might be possible for it to do so. The Commission might consider both that question and the options available to other States parties to a treaty which might wish to contest such a situation. Nevertheless, the term "reservation" was not appropriate in such situations, particularly since to so define the acts in question would have serious consequences for States whose silence would be considered to constitute acceptance after a certain period of time, as was the case with reservations.

70. Lastly, it was important to remember that the definition of a unilateral statement as a reservation did not render it admissible or valid; however, only when such a definition had been established could the question of the act's validity be settled, taking into account its legal scope and effect.

71. **Mr. Chimimba** (Malawi), referring to chapter IV, said that while the narrowing of the topic had helped to make it more manageable, some theoretical and practical problems remained, raising doubts as to the relevance of the topic. Draft article 6, while important in underlining the residual character of the draft articles, did not seem to be informative, particularly when read in conjunction with draft article 1. In its report on the work of its thirty-ninth session (A/42/10), the Commission had noted that: "Contrary to State responsibility, international liability rules were primary rules, for they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation had arisen". A restatement of

that pertinent distinction in the commentary might be useful. In addition, while his delegation appreciated the Commission's preference not to spell out at the current stage the activities to which the draft articles applied, it was possible that a list of such activities and a final review of the main title of the topic, which continued to be misleading, could prove useful in resolving the lingering conceptual difficulties.

72. His delegation noted with appreciation that the draft articles gave effect to six important elements necessary for any regime based on prevention, namely: prior authorization; impact assessment, including of pre-existing activities; notification and information; consultations, based on an equitable balance of interests; the principle of unilateral preventive measures, and an appropriate standard, that of due diligence. His delegation would study the draft articles in order to ascertain that the proper balance had been struck. It was worth noting, however, that while assistance was implicit in the provisions dealing with cooperation, it merited separate treatment.

73. It might be necessary to explore further the question of an equitable balance of interests in order to assess its relationship to the draft articles on liability. Consideration of that question might be helpful in determining remedies that could be appropriate and complementary to the traditional remedies under the regime of State responsibility.

74. His delegation reserved its position for the time being on the form that the draft articles should take and on the dispute settlement procedure that would be most suitable. Nevertheless, in view of the residual character of the draft articles, the model-law option appeared to be unsuitable. In addition, it might be useful to make more explicit the residual and non-executory nature of the dispute settlement clauses, leaving the further elaboration of the appropriate mechanisms to be placed in an annex.

75. Turning to chapter V, he welcomed the Commission's intention to complete the first reading of the topic by the end of the current quinquennium. The topic was ripe for codification, with the *Mavrommatis Palestine Concessions* case as a useful point of departure. His delegation agreed with the Working Group that the customary-law approach had formed the basis of the topic. The recognition that any contemporary study of the topic should take into account the evolution of human rights law was very logical and relevant. In practice, there were many similarities in the espousal of claims under the two regimes, and a study of such an impact might prove worthwhile.

76. Lastly, his delegation found the possibility of extending the topic to situations where nationals of a State suffered as a result of an internationally wrongful act committed against them in their own State to be worth pursuing.

77. **Mr. Beránek** (Czech Republic), referring to chapter IX, said that for the purposes of the Guide to Practice, guideline 1.1 (Definition of reservations), which combined all the elements of the definitions contained in the three Vienna Conventions of 1969, 1978 and 1986, was satisfactory. Its main purpose was to draw a clear distinction between reservations and unilateral statements. The first difficulty in that regard arose in guideline 1.1.1 (Object of reservations), which provided that a reservation might relate "to the way in which a State, or an international organization, intends to apply the treaty as a whole". His delegation endorsed the Commission's intention to re-examine that guideline in the light of the discussion on interpretative declarations. As currently drafted, the text was too vague and did not provide a reliable criterion that would enable States to distinguish clearly so-called across-the-board reservations from interpretative declarations.

78. Contrary to the Commission's commentary to guideline 1.1.1, his delegation did not share the criticism concerning the use of the word "provisions" in the Vienna definition. The view that the intention behind the reservation was not to eliminate a "provision" but an "obligation" might not be entirely correct. In fact, reservations mostly eliminated precisely the application of "provisions". Whether the reserving State would be an obligated or an entitled State, should the provisions be applicable, might not be fully evident at the moment when the reservation was made. For example, provisions on the privileges and immunities of diplomatic or consular agents worked both ways.

79. The reasons given by the Special Rapporteur for refining the three formal components of the Vienna definition, as set out in paragraph 495 of the report, were convincing and the conclusions adopted by the Commission were acceptable.

80. Concerning guideline 1.1.2 (Instances in which reservations may be formulated), his delegation agreed that it must include all situations envisaged in article 11 of the 1969 Vienna Convention. The fact that some elements of article 11 were not explicitly referred to in the definition of reservations contained in that Convention could not be interpreted as excluding the possibility of making reservations on such occasions. His delegation agreed with the interpretation that guideline 1.1.2 focused on the link between the definition of reservations and article 11 of the Convention, and that the purpose was not to provide an exhaustive enumeration of all moments at which reservations could be made. As indicated in paragraph (10) of the Commission's commentary to the guideline, other instances to which the

definition made reference, such as notification of succession, would be examined by the Commission at a later date.

81. With regard to notification of succession, his delegation noted that the right of a successor State to make reservations in respect of multilateral treaties to which the predecessor State was a party could not be accepted as granted in all cases of succession of States. It must be limited to situations where the devolution of the treaty to the successor State did not operate automatically, in other words, where the notification of succession in respect of the treaty in question had a constitutive, not a declaratory, character. The distinction between those two situations emerged clearly from a comparison of the practice of newly independent States created by decolonization and those States which had come into being through the dissolution of a State. While the first case was covered by the "clean-slate" rule, the second situation was governed by the rule of automatic succession. Newly independent States which became parties to many multilateral treaties by means of notification of succession often formulated new reservations. On the other hand, once there was an automatic succession, the successor State became a party to a treaty modified, as the case might be, by the reservation of its predecessor. It did not, however, have the right to make new reservations. Even if there was a notification, its function was different from that of notification of succession of newly independent States. That interpretation was also based on the provisions of the 1978 Vienna Convention and the relevant commentaries of the Commission. Accordingly, following the dissolution of Czechoslovakia, neither his country nor Slovakia had made a single reservation to any treaty to which they had become parties through succession.

82. The Commission's commentary to guideline 1.1.3 (Reservations having territorial scope) contained convincing arguments in support of reservations of that kind. While that category of reservation was not explicitly covered by the definitions in the Vienna Conventions, the Commission appeared to infer the possibility of such reservations from article 29 of the 1969 Vienna Convention. Guideline 1.1.3, however, called for careful examination of the question of the instance in which that kind of reservation could be made. While classic examples of reservations of that kind had been made on occasions referred to in article 11 of the 1969 Vienna Convention, such as when the State gave its consent to be bound by the treaty, it should be kept in mind that the main field in which the rule of "movable treaty frontiers" applied was that of territorial cessions. Those situations were covered by article 15 of the 1978 Vienna Convention on Succession of States in respect of Treaties. Nothing in that article, however, made it possible to conclude that the State acquiring the territory had, on that occasion, the right to exclude the application of the treaty in the newly acquired territory by means of a reservation having territorial scope. Moreover, abundant State practice gave no support to the idea of reservations aimed at excluding the application of the rule of movable treaty frontiers. His delegation therefore failed to understand how the application of the principle of movable treaty frontiers within and outside the context of succession of States could lead to opposite conclusions as far as the possibility of making reservations having territorial scope was concerned. That question should be left to the Commission for further consideration when it addressed the question of reservations in situations of State succession and their permissibility in general.

83. Guideline 1.1.4 (Reservations formulated when notifying territorial application) raised a similar problem. It followed from the wording of the guideline that the unilateral statement aimed at excluding or modifying the legal effect of the treaty, made on the occasion of the notification of the expansion of the application of the treaty to the territory in question, was a reservation. While it was not the moment to discuss whether and under what conditions such a reservation was permissible, the Commission should, when it reached that stage of the debate, clarify whether a reservation of that kind would also be permissible if the expansion of the territorial application of the treaty was automatic, without the need for notification, as it was in the case of a transfer of part of a territory between two States.

84. Lastly, with regard to guideline 1.1.7 (Reservations formulated jointly), his delegation shared the Commission's view that the universal character of the reservation did not exclude the possibility for States to formulate reservations jointly if they wished to do so. The warning against an unduly formalistic approach to the "unilateralism" of reservations was pertinent in that regard.

85. **Mr. Jayaratnam** (Singapore), referring to chapter IV, said that his delegation welcomed the Commission's decision to focus its study of international liability for injurious consequences arising out of acts not prohibited by international law on the prevention of transboundary harm.

86. Turning to chapter V, he observed that the Working Group had agreed that the customary law applicable to diplomatic protection would form the basis for the Commission's work. His delegation suggested that the Commission should consider the relationship between customary international law and the provisions of any applicable treaty enforced between the so-called "wrongdoing" and "injured" States. If a treaty conferred certain rights or afforded certain remedies only to the injured

State or its nationals, the question arose as to whether that State would be barred from having recourse to other remedies under the general customary international law on diplomatic protection.

87. His delegation noted that the Working Group had, after debate, agreed that the exercise of diplomatic protection was the prerogative of a State, to be exercised at its discretion. The efficacy of diplomatic protection might depend in practice on the relative power of the wrongdoing and injured States. It was important, therefore, for the Commission to consider what safeguards should exist to prevent abuse of the right of diplomatic protection.

88. The issue of the standard of treatment that should be afforded to aliens was another important issue. According to the Commission's report, it had been asked whether the result of diplomatic protection was that an alien enjoyed more rights than the national of the offending State. It had also been asked if the standard of treatment should be defined by the domestic law of the offending State. Those were important issues requiring clarification. A related issue was the obligation of a foreign national to respect the laws of the host country.

89. **Mr. Benítez Saénz** (Uruguay), referring to chapter IV, said that the current version of the draft articles on international liability was an improvement over the previous version because they placed special emphasis on the prevention of damage. His delegation deemed that to be essential, as the legal interest requiring protection was, first and foremost, the environment, and its preservation should be a paramount consideration in the draft articles. That approach was consistent with the principles of the Stockholm Declaration, the Rio Declaration on Environment and Development and United Nations resolutions, and should continue to be reflected in any new rules incorporated into international law. In that connection, the statement made at a previous meeting by the representative of Chile concerning the possibility of establishing a high commissioner for the environment was of great interest.

90. His delegation believed that it was appropriate not to limit the scope of application of the draft articles to a list of activities, but to refer more broadly to activities not prohibited by international law, as that would make it possible to include activities as yet unknown. It was also a good idea not to limit the scope of application to the territory of the State which caused the damage, but to refer instead to activities within the jurisdiction or control of a State, which could include activities in outer space, on the high seas or the continental shelf, or in the exclusive economic zone of a State.

91. The inclusion in the definition of activities to which the draft articles applied of the concepts of risk, damage and significant harm made good sense, as they ensured an adequate balance between the sovereign interests of States in carrying out activities not prohibited by international law and the legitimate concern that some activities could cause harm to third States. His delegation agreed with the Commission's statement in paragraph (4) of its commentary to draft article 2 that "significant" was something more than "detectable" but need not be at the level of "serious" or "substantial", and that the damage must be assessed on a case-by-case basis. Furthermore, the assessment of transboundary damage should not be limited to the territory of the State which was the victim of the damage, but should include any other territory within its jurisdiction, such as the exclusive economic zone or the continental shelf.

92. The formulation of the principle of prevention as set out in draft article 3 was sufficiently clear and consistent with the principles of environmental law. In accordance with recent court decisions, due diligence should be interpreted as including the obligation of the State to take appropriate legislative and regulatory measures to minimize the risk inherent in certain activities.

93. His delegation was of the view that the principle of strict liability should apply and that, even in cases where the State which caused the damage had taken appropriate measures, that did not exempt it from liability.

94. Since the interest requiring protection was the preservation of the environment, his delegation deemed it appropriate that States should provide the population which might be affected by an activity covered by the draft articles with relevant information on the risk entailed by that activity.

95. Turning to chapter V, he said that the scope of the topic must be clearly defined. In principle, diplomatic protection should be limited to so-called indirect damage, in other words, the damage sustained by a natural or legal person represented by a State. The damage sustained by States and not by their nationals was regulated by other rules of international law. It was also important to adopt the principle of exhaustion of local remedies as a prerequisite for triggering the diplomatic protection mechanism.

96. His delegation endorsed the view that diplomatic protection was a prerogative of the State as a subject of international law.

97. With regard to the alleged link between human rights and diplomatic protection, his delegation shared the views expressed by other delegations as to the complete autonomy of the two concepts.

98. Lastly, with regard to chapter VI, his delegation shared the concern that, if unilateral acts of international

organizations were to be studied, such a study should be limited to formal legal acts.

The meeting rose at 1.15 p.m.