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Summary record of the 15th meeting
Held at Headquarters, New York, on Wednesday, 28 October 1998, at 10 a.m.

Chairman: Mr. Enkhsaikhan ..... (Mongolia)
later: Mr. Mochochoko (Vice-Chairman) ..... (Lesotho)
later: Mr. Enkhsaikhan (Chairman) ..... (Mongolia)

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The meeting was called to order at 10.15 a.m.

Visit by the President, Vice-President and Registrar of the International Court of Justice

1. **The Chairman** welcomed to the Committee the President of the International Court of Justice, Mr. Stephen Schwebel, the Vice-President of the Court, Mr. Christopher Weeramantry, and the Registrar of the Court, Mr. Eduardo Valencia-Ospina. He then invited the President of the Court to address the Committee.

2. **Mr. Schwebel** (President of the International Court of Justice) said that he regarded the members of the International Law Commission and the Sixth Committee as workers and colleagues in the same field who were devoted to nurturing the progressive development and increased effectiveness of international law. He therefore expressed his gratitude for the privilege of seeing them at work.

3. **The Chairman** said that he looked forward to future visits to the Committee by the President of the International Court of Justice and to further contacts between the Committee and the Court.

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

4. **Mr. Cede** (Austria) endorsed the decision by the International Law Commission to hold a single session in Geneva in 1999 and another split session in 2000. Such an arrangement would make it easier for the Commission to evaluate which schedule was more conducive to the progress of its work.

5. With regard to chapter IV, his delegation was gratified that the decision taken the previous year to undertake the study of prevention should have already resulted in a set of draft articles. Its pleasure at such speedy action was, however, mixed with concern over what it perceived as basic shortcomings in the draft articles and the commentary. First, it could be questioned whether the Commission was right in choosing the wording "risk of causing significant transboundary harm" instead of "significant risk of transboundary harm" as one of the three defining criteria. The wording chosen unnecessarily blurred the exact legal interrelationship of the crucial elements of the risk, probability and consequence of the injurious event. Second, the related assumption in paragraph (13) of the commentary to draft article 1 that the core concern of the prevention topic was future harm as against present, or ongoing, harm, was not fully convincing and reflected a basic conceptual weakness in the Commission's approach. The proper distinction was rather between events that were certain and those that were less than certain, and possibly quite improbable. Third, the suggestion was that a State's obligation to prevent "significant transboundary harm" that was bound to occur might be discharged by the State's taking measures to prevent or minimize the risk of such harm. The assumption that State conduct involving the risk of inevitable significant transboundary harm did not, as such, also entail that State's obligation to cease and desist from the risk-bearing conduct was highly questionable; it reflected an anachronistic view of the fundamental balance of States' rights and obligations in situations in which a significant degradation of the environment was involved.

6. With regard to the specific questions posed in paragraphs 32–34 of the report, his delegation believed that failure to comply with any of the duties of prevention as set out in the draft articles would be covered by the law of State responsibility. Since all such duties had thus far been couched in terms of obligations upon States, there was no need for the Commission to address issues relating to the civil liability of the private operator involved in any given context. As for the eventual form that the draft articles might take, it would be premature to give an answer; his delegation would wait and see how the Commission proceeded in redressing some of the fundamental problems that he had identified. With regard to the form that the dispute settlement procedure should take, it would make sense to follow the example of the Convention on the Law of the Non-Navigational Uses of International Watercourses, given the very similar level of complexity of the interrelated rights and obligations of States. The Commission could readily adapt the provisions of article 33 of the Convention and the annex on arbitration to the draft articles on prevention. His delegation continued to support the Commission's decision to concentrate, as a first step, on the topic of prevention. The concerns that he had expressed should not be seen as a criticism of the Commission's work but only as ideas and suggestions that should be taken into account in future deliberations.

7. The Commission should not lose sight of the originally conceived task of elaborating rules on liability proper. Meanwhile, its work on prevention could and should make a useful contribution to clarifying and strengthening international law in support of sustainable development.

8. With regard to diplomatic protection (chapter V), it was regrettable that it had not yet been possible to produce draft articles that could provide a focus for the Commission's future debates. If the Commission intended to abide by its own schedule of work, it should consider specific, more narrowly

defined issues rather them engaging in yet another round of general discussions.

9. Human rights and diplomatic protection should not be specifically linked in any draft articles on the topic. The international norms governing the two had overlapping, but intrinsically different, public order functions. In particular, his delegation seriously doubted that the perspective of diplomatic protection as a human right could be based on existing international law or would become part of the international legal order in the immediate future. In general, however, it agreed with the conclusions of the open-ended Working Group on how the issues presented by the topic should be tackled.

10. With regard to unilateral acts of States (chapter VI), he said that, considering the intrinsically complex nature of the topic and the many diverging views on the meaning of "unilateral acts" in theory and practice. The report was commendable for its clarity and intellectual maturity. Given the differences of opinion and the sheer practical difficulties involved, however, the Commission ought to take a conservative or narrow approach. It should focus on unilateral declarations to the exclusion of other unilateral expressions of the will of States, thus enormously simplifying its work and, possibly, ensuring its early and successful conclusion. In that context, his delegation strongly believed that the final product ought to be in the shape of a draft guide to practice rather than a draft convention.

11. On the question of whether the scope of the topic should be extended to cover such unilateral acts of States as declarations issued vis-à-vis subjects of international law other than States, a broad approach would clearly be preferable. Given the growing participation of actors other than States in the international legal process, it was desirable for the Commission to include in its review declarations by States to international organizations and, possibly, to additional, limited subjects of international law. The Commission should also consider whether, and, if so, to what extent, declarations of States within international organizations would fall within its ambit. The draft document should avoid discussing unilateral acts giving rise to State responsibility or those covered by the Vienna Convention on the Law of Treaties. On the other hand, his delegation was not convinced of the usefulness of all the exclusionary criteria proposed in paragraph 156. If strictly applied, the proposed exclusions would deprive the Commission of much of its basic evidentiary material for developing a legal document on the topic.

12. With regard to State responsibility (chapter VII), he would restrict himself to restating his delegation's position on some key issues. The concept of international crimes should be deleted from the draft articles. Not only had the distinction between "international crimes" and "delicts as internationally wrongful acts" become increasingly attenuated in the draft articles, as far as consequences were concerned, but the concept itself fitted uneasily into a set of secondary rules. For the same reason, "Circumstances precluding wrongfulness" should not be revisited. Consideration of any legal consequences flowing from State conduct, notwithstanding the existence of circumstances precluding the wrongfulness of that conduct, was clearly beyond the scope of the draft articles on State responsibility, which were, of course, predicated on there having been wrongful State conduct in the first place.

13. On the issue of attribution, consistency and symmetry of language in the provisions of chapter II of Part One of the draft articles were important. The draft text – and specifically draft article 9 – was deficient in that respect. Moreover, on the specific question in paragraph 35, which asked whether all conduct of an organ of a State was attributable to that State under article 5, irrespective of the nature of the conduct, his delegation questioned the usefulness of the *jure gestionis* or *jure imperii* criteria. The relevant draft articles (5–10) distinguished between conduct of the organ of the State acting in that capacity and conduct by persons, entities or organs of another State involving the exercise of elements of governmental authority of the State. Neither formulation was entirely free of ambiguity and the former, in particular, was potentially problematic. The attribution of one and the same type of conduct to the State might well vary in accordance with a given State's definition of "organ". The attempt to give a more precise definition of "act of State" was understandable, but the assumption that the act of State for purposes of State immunity was identical with the act of State for purposes of State responsibility was unwarranted, even if any act of State for purposes of State immunity (*actum jure imperii*) would also involve conduct of a State organ "acting in that capacity" for purposes of State responsibility. The reverse, however, was not true. The law of State responsibility and of State immunity represented different fields of international law and were thus subject to different policy considerations.

14. His delegation was in basic agreement with the general structure of the draft articles, however, including that of Part Two. The Commission ought to focus on revising and refining the existing draft articles – only where necessary – with a view to the early completion of a generally acceptable instrument on State responsibility. The draft articles provided an excellent basis and, indeed, had already begun to shape the practice of States. Any major changes would therefore

undermine the growing authority that many of the draft articles were acquiring. Revisions would create undesirable delay in finalizing the draft articles – whether they appeared in the form of a draft declaration of principles or a draft convention – and at worst would render the prospect of their adoption uncertain.

15. With regard to nationality in relation to the succession of States (chapter VIII), his delegation did not wish to see a continuation of the second part of the topic, as currently defined. The issues concerning legal persons were too specific and, at the same time, not sufficiently pressing for consideration by the Commission. His delegation was, however, inclined to endorse the idea of the Commission's taking up the nationality of legal persons as a wholly separate new topic.

16. On reservations to treaties (chapter IX), his delegation particularly welcomed the attempt to define the meaning of "reservations". It also agreed with the substance of draft guideline 1.1.5 of the proposed guide to practice, but questioned the need for such a provision. The fact that a State or an international organization expressed its willingness to extend its obligations beyond those to which it had agreed under a treaty did not modify the legal effects of any obligation arising under that treaty. Such a declaration did not therefore amount to a reservation. By the same token, the formulation of draft guideline 1.1.6 was rather clumsy and unbalanced. More importantly, the guideline was essentially superfluous, merely restating the essence of the notion of reservation.

17. With regard to the Commission's long-term programme of work (chapter X.C), his delegation expected that the Commission would follow through on its study of prevention, as the first part of a two-step analysis of the original topic of international liability. It would be prepared to support a project focusing primarily on the principles of the liability of non-State actors for transboundary physical harm, as established in various international legal conventions, and only secondarily on States' subsidiary liability. Such an approach would be more germane to the realities of international – or rather transnational – life, which were increasingly shaped, especially in the economic sphere, by individuals or corporations. The second part of the study should therefore focus not only on the principles of civil liability but also on States' international liability, and it would have to address the specific relationship between the two. As for new topics, his delegation would particularly welcome the inclusion as a matter of priority, of the following topics: responsibility of international organizations; effects of armed conflicts on treaties (focusing on international rather than domestic conflicts); expulsion of aliens, as the Commission had proposed; and shared natural resources.

18. In response to the Commission's request for guidance on issues relating to the protection of the environment, raised in chapter II, his delegation urged the Commission to adopt a modest approach in that regard. There would be little merit in a project that sought to cover the international law of the environment, even if only in the form of a framework instrument. International law on the topic was, paradoxically, too generic on the one hand, yet too specific on the other, to lend itself to any meaningful general restatement. Moreover, there was a risk of duplicating work being carried out in other, mostly specialized law-making forums. The topic had already been discussed in the Second Committee under agenda item 94, entitled "Environment and sustainable development", and in the report of the Secretary-General on ways and means of undertaking the review of progress made in implementing conventions related to sustainable development (A/53/477). The Commission should take stock of the work undertaken in other bodies within the United Nations system before it embarked on elaborating rules on environmental issues. In short, apart from those already mentioned, there were no obvious environmental topics that the Commission could suitably adopt for its long-term work programme.

19. **Mr. Baker** (Israel), referring to chapter IV of the report, said that his delegation fully agreed with the decision to separate the regime of prevention from that of liability. In cases involving a private operator, however, State responsibility and civil liability would not adequately protect legitimate environmental interests. The duty of prevention should therefore be regarded as an obligation of conduct that was inspired by a detailed and universally applicable code of conduct comprising the standards already embodied in the current international conventions on the environment and other related matters. That being so, it was not essential that the draft articles should take the form of a convention. The elaboration of guidelines forming the framework for regional arrangements could therefore be considered instead. He wished to emphasize need for an expeditious mechanism for the settlement of disputes arising from the interpretation or application of the draft articles, particularly in connection with the assessment of the obligation of conduct. He fully concurred with the approach of adopting prevention as a preferred policy, and wished to stress that it was vital to avoid means of dispute settlement that could lead to extended delay or controversy. To that end, he recommended the use of direct and open negotiation and conciliation between the State of origin and any other States concerned.

20. Draft article 3 was too concise and could be enhanced by the addition of elements derived from existing conventions on the environment that would enable it to serve as a basis for the code of conduct he had already mentioned. The concept of cooperation in good faith referred to in draft article 4 could be strengthened with a view to overcoming any tendency to sideline environmental considerations in favour of political and security interests, for example. That being so, the principle of bona fides should perhaps be given a more pragmatic and detailed character in the draft articles, and the need for a more detailed mechanism to ensure that States upheld the principle of cooperation in good faith could also be considered. Lastly, the concept of authorization covered in draft article 7 required further elaboration, particularly in order to define the type of operator referred to in paragraph (8) of the commentary to that article in view of the legislative and administrative proceedings that could be involved.

21. Turning to the topic of diplomatic protection (chapter V of the report), he expressed his support for the conclusions summarized in paragraphs 108 (a) and (c). Clearer reference should be made, however, to the view that the exercise of diplomatic protection in certain cases involving a foreign State could become secondary to foreign policy considerations deemed substantial enough to justify overriding the relative importance of such protection. The fact that State practice appeared to bear out that position indicated the need to introduce some element of hierarchy into the weighing of a State's interest or obligation concerning the protection of its nationals against its wider diplomatic or political interests, particularly in the case of human rights issues. In certain cases, however, arrangements to realize an individual's right to protection could be better achieved between the two States concerned through the diplomatic channel. Given the number of instances in which the individual was treated as a direct beneficiary of international law, he also concurred with the recommendation contained in paragraph 108 (d) that the effect of such developments should be examined in the light of State practice. Consideration might later be given to situations in which a State was placed in an unnecessary position by an individual who made a wrongful claim or a claim that was unfounded in international law.

22. **Mr. Monagas-Lesseur** (Venezuela) emphasized the need for a broad interrelationship between the Commission, composed of independent experts, and the Committee, composed of representatives of Member States. The Commission could not discharge its mandate properly if States did not provide it with definite guidelines. In that connection, it was essential for States to respond, both orally and in writing, when their views were sought.

23. Turning to chapter IV of the report, he said that the draft articles bore an important relationship to the Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted in 1997 after a long and complex negotiating process. His delegation hoped that the General Assembly would adopt a resolution seeking comments from States on the proposed articles so as to be able to conclude the draft during the current quinquennium, as indicated in paragraph 54 of the report.

24. While it might be premature to define at the current stage the final form which the draft articles should take, his delegation believed that the most appropriate form would be that of a framework convention modelled on the 1997 Convention.

25. While the dispute settlement mechanism provided for in draft article 17 was appropriate, it could be fleshed out along the lines of the 1997 Convention. It might be possible to delete the second sentence of paragraph 2 of the article, which suggested that the findings of the independent and impartial fact-finding commission should be non-binding or of a recommendatory nature, as they would only reflect the facts and would in no way constitute suggestions for settlement of the dispute.

26. The scope of application of the draft, as defined in article 1, was limited to activities not prohibited by international law which involved a risk of causing significant transboundary harm. The term "significant transboundary harm" was complex and tainted by ambiguity, as discussed in other contexts. In that connection, his delegation shared the view of most members of the Commission that the article should refer in general terms to activities not prohibited by international law, without entering into an enumeration of such activities, as that could affect the scope of application of the draft.

27. Consideration should be given to article 2 (c), which limited transboundary harm to "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border". That provision, which was otherwise acceptable, should essentially have a spatial connotation.

28. Article 2 (a) referred to the "risk of causing significant transboundary harm" as encompassing "a low probability of causing disastrous harm and a high probability of causing other significant harm". The phrase "other significant harm" appeared, at least in the Spanish version, to refer to a second type of harm, whereas it was his delegation's understanding that the harm was the same in both cases.

29. His delegation was also of the view that the obligation set out in draft article 3 should be regarded as an obligation of conduct and not of result. The State was thus obligated to prevent or to minimize the risk of causing significant transboundary harm.

30. Article 4 set forth a basic principle of the draft, namely, the obligation of States to cooperate in good faith. His delegation believed that the article should simply state that principle; the rest of the text could be placed in a separate article stipulating that States should, as necessary, seek the assistance of international organizations.

31. Lastly, Venezuela believed that the notification system, including procedures in the absence of notification and the procedures relating to information and consultations, were generally appropriate.

32. **Mr. O'Hara** (Malaysia), speaking in connection with chapter IV of the report, said that his delegation approved of the Commission's view that prevention as a policy was better than cure. He stressed, however, that the concept expressed in draft article 8 on impact assessment, while worthy of merit, should under no circumstances be interpreted as depriving a State of its sovereign right to develop its natural resources in the interests of its economic well-being.

33. Concerning chapter V, he believed that caution should be exercised in the effort to develop universal acceptance of laws on the subject of diplomatic protection with a view to avoiding undue reliance on outdated materials and ideas. In addition, it was essential to take the views of the developing world into account. There was a clear need to distinguish between the possession by States of diplomatic protection rights and their consequent exercise of such rights in regard to individuals under their protection. It was a State's sovereign prerogative to protect the rights and interests of an individual who was linked to it by nationality. However, since a State might fail to pursue the cause of such an individual for reasons beyond his control relating to the relative influence which his State possessed in the international arena, the Commission should take into account the need to establish guidelines on the discretionary power of States to provide diplomatic protection.

34. Turning to chapter VI, unilateral acts of States, he pointed out that Article 38 of the Statute of the International Court of Justice did not specifically mention unilateral acts and recalled the common argument that such acts could not be a source of international law, as well as the argument that they were simply instruments of execution that did not establish general rules. The Statute of the International Court of Justice, however, did not constitute an exhaustive list of the sources of international law, in which case his delegation believed that unilateral acts could be included as one such source. In view of the work yet to be done on that subject, he supported the suggestion that the Commission should elaborate draft articles defining a unilateral act. That definition was vital to establishing the parameters of the topic and would also provide the necessary focus for the achievement of progress in that regard.

35. *Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair*.

36. **Mrs. Reza** (Indonesia) said that her delegation concurred with the widely-held view that in the context of international liability for injurious consequences arising out of acts not prohibited by international law, prevention as a policy was better than cure, an approach which was also reflected in various conventions and multilateral treaties on the environment. However, it might be disadvantageous to draw up a comprehensive list of all hazardous activities at the current stage in view of the rapid pace of technological change and its potential consequences. In that connection, she cited the four criteria covered by draft article 1 and listed in the commentary thereto. Her delegation attached great importance to the fundamental principle of a State's inherent sovereign right to exploit its natural resources in accordance with national legislation while simultaneously ensuring that such activities caused no damage to the surrounding environment, and considered that assistance should be extended to developing nations to enable them to meet the standards of care required under draft article 1. Draft article 4 contained the essential elements for promoting cooperation for environmental protection, a prerequisite for furthering the implementation of policies aimed at deterring exposure to harmful risks. Draft articles 9, 10 and 14 followed the new trend in international law by obliging States to provide the necessary information to the public in the decision-making process concerning environmental issues, while draft article 15 sought to create a balance between the information disclosed to the public and information withheld by a State due to national security considerations. Her delegation looked forward to commenting in further detail on the legal regime governing the draft articles.

37. With regard to the question of diplomatic protection, it was timely and appropriate for the Commission to codify that area of law and in so doing to give particular consideration to the views of the developing countries. Her delegation subscribed to the view that the exercise of diplomatic protection was the sovereign prerogative of a State that paralleled the time-honoured tenets of sovereignty and territorial integrity. As to the relationship between diplomatic protection and human rights, they should be dealt with as separate issues, as diplomatic protection could not be

marginalized by human rights considerations and vice versa. The proposal made in 1997 by the Working Group on diplomatic protection to focus on the basis for diplomatic protection was a constructive beginning, just as the proposal contained in the Commission's current report to elaborate draft articles and commentaries on the topic was worthy of merit.

38. Having reiterated her delegation's support for enhancement of the mutually beneficial cooperation between the Commission and other legal bodies, in particular the Asian-African Consultative Committee, she underscored the importance of promoting international law through seminars, particularly for students from developing countries. Her delegation was confident that, in fulfilling its mandate, the Commission would reflect new developments in international law, as well as the concerns of the international community.

39. **Mr. Mounkhou** (Mongolia), said his delegation welcomed the significant progress made on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The draft articles appeared to meet their intended objective, while the suggested title was compatible with their substance. In that context, the definition of their scope of application was acceptable and the provisions giving effect to the concept of prevention were in order. Draft article 3, on prevention, which was regarded as an obligation of due diligence and not one of result, was clearly the most important of all the draft articles, although the importance of the principle of good faith embodied in draft article 4 could not be overemphasized. Draft article 7, in particular paragraph 2, was similarly important and in full compliance with the task of prevention. His delegation welcomed draft article 9, which reflected new trends in international environmental law, and commended the approach adopted in draft article 12, which provided significant guidance to States. Draft article 17 was also acceptable at the current stage, although it required some elaboration in respect of arbitral settlement. His delegation also favoured the provision contained in draft article 17, paragraph 2, concerning recourse to the appointment of a fact-finding commission.

40. Despite their excellent drafting, the draft articles left his delegation with a feeling of perplexity, which had to do perhaps with the separation of the regime of prevention from that of liability, an effect to which the representatives of Guatemala and the United Republic of Tanzania had also referred. His delegation had doubts as to the effectiveness of separating prevention from liability, especially in the context of preventing transboundary damage resulting from hazardous activity. Mongolia would have preferred a broader approach to international obligations that would also cover liability. The obligations of States in the area of environmental protection were very important, involving as they did the well-being of current and future generations. In that connection, he drew attention to Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which declared, *inter alia*, that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The International Court of Justice had confirmed in its advisory opinion on the legality of the threat or use of nuclear weapons that that obligation had become part of the corpus of international law on the environment.

41. Lastly, while his delegation would prefer that the questions raised by the Commission be considered following the review of the regime of liability, it was prepared to join other delegations in taking a decision on them at the current session. His delegation considered that the draft articles should take the form of a model law; as to the form of the dispute settlement procedure, it was in favour of a provision on arbitral settlement.

42. **Mr. Lemma** (Ethiopia) said the fact that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was being discussed after the adoption by the General Assembly of the Convention on the Law of the Non-Navigational Uses of International Watercourses further complicated the issue. The Convention, because of the sensitivity of its subject-matter, did not stand a very good chance of coming into force in the near future. The main issue which had threatened to undermine its adoption and which continued to impede its implementation was the relationship between the principle of equitable use and that of "no significant harm". Many countries, including his own, had refrained from endorsing the Convention mainly because the "no-harm" element was given undue prominence therein.

43. His delegation believed that the topic under consideration overlapped somewhat with the subject-matter of the Convention. The fact that both instruments formed part of the body of international law and were destined to influence each other's interpretation was the source of his delegation's concern.

44. It should be noted that the phrase "significant harm" was used in the draft articles in the same way as in the Convention. In draft article 2, an attempt was made to define the term "harm" as including harm to persons, property or the environment. That was a clear indication that the term "harm" in the current context related to "harm" as defined in article 7 of the Convention.

45. While no attempt had been made to define the term "significant" in the Convention, the Commission's commentary for the draft articles contained a definition of the term which had a detrimental effect on the Convention. Paragraph (4) of the commentary to draft article 2 stated: "It is to be understood that *'significant' is something more than 'detectable' but need not to be at the level of 'serious' or 'substantial' "*. It was further stated that "harm" included a detrimental effect on human health, industry, property, environment or agriculture in other States. His delegation failed to understand how that discussion differed from the earlier debate on article 7 of the Convention and how it could be guaranteed that the draft articles would not be used in interpreting the controversial concepts referred to above.

46. Turning to chapter V of the report, he said that the title "diplomatic protection" did not seem to cover the content of the instrument to be developed. The underlying concept was the role of the State as an agent in protecting the rights of its nationals under the jurisdiction of other States. The State acted on behalf of its nationals who lacked the capacity to exercise their rights under the legal system of the host State. If the issue could be handled by the Government or authority of the host State, the case would fall within the domestic jurisdiction of that State. His delegation therefore suggested that the title should be amended, as the phrase "diplomatic protection" connoted traditional State-to-State relations and appeared to be easily confused with the law on diplomatic relations, which had the protection of diplomatic rights and duties as its main purpose.

47. The relationship between State responsibility and diplomatic protection needed further elaboration because of the large common ground that existed between the two concepts. The efforts made by the Special Rapporteur in that area were very encouraging.

48. Lastly, human rights and diplomatic protection were closely interrelated. A significant share of the issues falling under the topic of diplomatic protection were human rights issues; all allegations of mistreatment of nationals of one State in another State generally involved the abuse or alleged abuse of human rights. Accordingly, caution must be exercised when trespassing on the regime of human rights law, as a delicate balance existed in that area which must be preserved.

49. **Mr. Yin Yubiao** (China) said that the topic of diplomatic protection involved a series of complicated theoretical and practical questions. As was well known, diplomatic protection had an unfortunate history, having been regarded as an extension of colonial power or a system imposed by powerful States on weak States. The Calvo clause had been a kind of legal reaction on the part of Latin American developing countries to the exercise of diplomatic protection by foreign States. In 1924, in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice had stated clearly that a State had a right to protect its nationals when they were injured by internationally wrongful acts of another State and a satisfactory settlement could not be obtained through normal channels. That had become a basic principle of international law.

50. Hence, the purpose of diplomatic protection was to rectify the unfavourable and unjust treatment suffered by a State's nationals as a result of violations of international law by another State. Although it had been abused in the past and would probably be abused in the future, diplomatic protection was not in itself a system used by the big and powerful to bully the small and weak. Practice had shown that diplomatic protection had its advantages and it had been adopted by many States in various regions.

51. The core of diplomatic protection was that protection could be exercised only by the victim's State of nationality, because only that State could invoke the responsibility of the host State as a result of the latter's violation of international obligations. Nevertheless, in deciding whether to exercise diplomatic protection in a certain case, a State needed to consider not only the interests of the victim, but its overall interests in accordance with its foreign policy.

52. The Special Rapporteur had raised an important issue in his report, namely, that in the light of recent developments, such as the increasing tendency to regard the individual as a subject of international law and the establishment of claims committees through which victims could make claims directly against another State, traditional diplomatic protection appeared to be obsolete and should be reassessed. His delegation was of the view, however, that in the current international context, the argument that the individual was regarded as a subject of international law was untenable, and therefore, the role of States in exercising diplomatic protection could not be denied.

53. On the question of primary and secondary rules, diplomatic protection belonged mainly to the category of secondary rules. The question of whether rules should be classified as primary or secondary, however, also depended on the specific issues involved. The "clean-hands" rule, the rule requiring exhaustion of local remedies and other rules had a dual function; accordingly, a certain flexibility was needed.

54. In exercising diplomatic protection, consideration should also be given to the use of countermeasures, as permitted by international law.

55. **Mr. Beránek** (Czech Republic), referring to chapter IV of the report, said that his Government was still in the process of studying the draft articles. The Czech Republic supported the Commission's recent decision to split the topic of international liability into two parts and to deal first with prevention and later, if at all, with liability. That approach seemed to be a promising way out of the impasse in which the Commission had increasingly found itself. It was encouraging to note that after taking that decision, the Commission had been able to move expeditiously and to complete the first reading of the draft articles within a short period of time.

56. His delegation supported the main thrust of the draft articles. The scope of application appeared to be defined adequately by means of a threshold applying to both risk and harm. The term "significant" had given rise to much debate in the past, including during the negotiations concerning the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, to the point where the controversy now appeared to have exhausted its potential. Under those circumstances, the choice of the term "significant" appeared to be justified.

57. Prevention was construed appropriately in the draft as an obligation of conduct, based not on an absolute concept of minimization of risk, the limits of which would be very difficult to grasp, but on the crucial requirement of an equitable balance of interests among the States concerned. The proposed system, as set out in draft articles 3, 11 and 12, seemed to be satisfactory and fairly close to the one adopted in the context of the 1997 Convention. His delegation regretted, however, that article 3 of the draft, unlike article 7 of the Convention, contained no reference to a balance of interests among the States concerned. The relevant provisions were found only in draft articles 11 and 12, which contained procedural provisions. That could lead to difficulties and possible misunderstandings. The Commission should perhaps reconsider the issue during its second reading of the articles.

58. The draft procedural provisions established mechanisms for the implementation of the obligation of prevention, mainly through information, notification and consultations, and including the requirements of prior authorization and transboundary impact assessment. Some questions, however, required further clarification. For instance, in the commentary to draft article 13, it was unclear what the rationale was for including in "Procedures in the absence of notification" the additional and somewhat ambiguous elements contained in paragraph 3 of the draft article.

59. As to the specific issues identified in chapter III of the report on which comments would be of particular interest to the Commission, his delegation envisaged in reply to the question raised in paragraph 32, three distinct cases.

60. First, if there was no breach of the obligation of prevention or of other obligations under the draft articles or other rules of international law and transboundary harm nonetheless occurred, that posed the problem of liability, which clearly fell outside the scope of the topic.

61. Secondly, if damage occurred as a result of a breach of the obligation of prevention or of other obligations of the State of origin, the latter's international responsibility was engaged and full reparation was due, provided that a causal link could be established between the wrongful act or omission and the damage. The obligation of prevention was, by definition, an obligation of conduct, and its breach might therefore not always be easily proved. A breach of some of the procedural obligations under the draft articles, such as timely notification or temporary suspension, might be easier to establish, but the causal link between such a breach and the occurrence of the damage might frequently be missing. In such a case, the resulting situation might often be similar to one where there was no material or moral damage as a result of the breach of an obligation.

62. Thirdly, if obligations were not fulfilled, but no damage was caused, then there was still, strictly speaking, room for international State responsibility, which was defined in broader terms than the notion of responsibility in a number of domestic legal systems. In accordance with article 1 of the Commission's draft articles on State responsibility, "Every internationally wrongful act of a State entails the international responsibility of that State". The injury suffered by a State was understood simply as any infringement of its rights by a wrongful act of another State. In practical terms, however, in the absence of any material or moral damage, responsibility would entail merely the obligation of cessation of the wrongful conduct and perhaps elements of satisfaction. Those issues should be dealt with not in the framework of prevention, but under the topic of State responsibility.

63. With regard to the other questions raised in paragraphs 33 and 34 of the report, his delegation did not consider a model law to be the appropriate form for the eventual outcome of the Commission's work on the topic. As far as the dispute settlement provisions of the draft were concerned (article 17), his delegation saw merit in preserving the necessary flexibility in the choice of peaceful means of settlement. Compulsory recourse to a fact-finding commission was sufficiently flexible and might be useful for the purposes of establishing and assessing facts relevant to the dispute. The details concerning the composition and functioning of the fact-finding commission could be laid down in a separate

annex, for which the provisions of article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses might serve as a model.

64. **Mr. Leanza** (Italy) said that the length of time which the Commission had devoted to the topic of international liability for injurious consequences arising out of acts not prohibited by international law demonstrated the difficulty of distinguishing between liability in the absence of a wrongful act, no-fault liability and strict liability, whether relative or absolute. Except in the case of certain treaties, contemporary international law could not really be said to include a concept as sophisticated or as characteristic of solidarity as that of liability for acts not prohibited by law. He therefore fully supported the Commission's decision to separate the question of prevention of damage from that of State responsibility and to focus, at least initially, on the former. Prevention was the best system of protection because of the difficulty of restoring the situation prevailing prior to the event which had caused harm, regardless of whether such harm had been incurred by individuals, property or the environment. From that point of view, the draft articles developed by the Commission were logical, complete and moderate.

65. He also supported the decision to distinguish between harmful activities and those which were merely hazardous in the sense that they entailed a risk of significant transboundary harm. On the other hand, he understood, but did not agree with, the reasons for the decision to limit the obligation of prevention to harm caused in the territory of or in other places under the jurisdiction or control of another State. The International Court of Justice, in its advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, had referred to prevention specifically in relation to regions over which no State had sovereignty.

66. He was pleased that the new set of draft articles included not only the concept of prevention (article 3) but also that of cooperation (article 4), which was closely linked to the former principle and complemented it by stressing the transboundary nature of environmental protection. Article 12 was also interesting in that it specifically set forth the need to achieve a balance between the interests of the State of origin and those of States likely to be affected by hazardous activities, which was an important principle from the point of view of sustainable development.

67. Under international law, States had a responsibility to exercise due diligence in the prevention of significant transboundary harm, particularly beyond a certain threshold of tolerance. Therefore, States which carried out harmful activities or allowed others to do so within their territory failed to comply with that obligation and incurred liability for wrongful acts. That conclusion was based on international judicial practice, various international, bilateral and multilateral agreements and declarations and resolutions adopted at international conferences. However, the possibility must be borne in mind that no liability would be incurred if the State or States which might be harmed gave their consent, however conditional or temporary, for such activities to be carried out within their territory.

68. He did not support the Commission's definition of prevention as an obligation of conduct, not of result. Because prevention consisted of taking all necessary measures to prevent hazardous activities from causing harm, it presupposed certain standards of due diligence which, if met, relieved the State of all responsibility. However, an obligation of result would make the State responsible for all transboundary damage, regardless of its own behaviour, and would therefore assign absolute responsibility for an unspecified range of hazardous activities. Moreover, prevention was an obligation of conduct under most systems of domestic law.

69. He did not think that the draft articles should call for penalties in cases where States failed to comply with their obligation of prevention, whether or not transboundary damage had occurred. In the first place, the purpose of the international legal system was not to punish, but to correct, violations. Furthermore, since the obligation of prevention applied specifically to transboundary harm and therefore, by implication, to violation of the sovereignty of another State, in cases where no violation had taken place there could be no justification for the imposition of penalties.

70. It would be preferable for the draft articles to take the form of a framework convention, so that States would be bound by its provisions without losing the freedom to conclude more detailed bilateral or multilateral agreements with respect to specific hazardous or harmful activities or geographical regions with a high concentration of such activities.

71. The issue of procedures for dispute settlement was closely linked to that of the final form of the draft articles. If it was decided to include those articles in a convention, the procedures for dispute settlement should be described in detail and included in the text of the instrument, and a compulsory mechanism such as an arbitral tribunal must be provided for. If, however, the Commission opted for a framework convention, it would be better for the section on dispute settlement, including a compulsory procedure, to take the form of a protocol. Lastly, if the draft articles took the form of a model law there would be no need for a detailed description of dispute settlement procedures, and a reference

to diplomatic and arbitral instruments for the amicable resolution of international disputes under international law would suffice.

72. With regard to diplomatic protection, the Special Rapporteur's preliminary report provided a useful basis for discussion of a broad and complex topic which was appropriate for codification and progressive development. The report was particularly useful for its treatment of diplomatic protection under customary law, the relationship between human rights and diplomatic protection, the criteria for diplomatic protection, the question of "primary" and "secondary" rules and the relationship between diplomatic protection and State responsibility.

73. With respect to the customary conception of diplomatic protection, he did not think that the State's legal interest in the fate of its nationals involved a legal fiction. While that fiction had been useful in the past, when it had been the individual's only protection at the level of international law and had provided a means of engaging the host State's responsibility for individuals, numerous more recent international agreements had recognized the right of individuals to protection, independently of any action by the State of which they were nationals, by establishing an obligation *erga omnes* for the protection of their human rights. However, no fiction was involved in recognition of States' right to ensure that their citizens were treated in accordance with international standards and human rights instruments. As had been established in the *Mavrommatis Palestine Concessions* case, that right was exclusive to the State, which, in extending diplomatic protection, protected not only its own sovereignty but also the interests of its nationals.

74. Great caution must be exercised in assimilating diplomatic protection and the protection of human rights or establishing a hierarchy between them. International human rights instruments limited the scope of national jurisdiction by guaranteeing uniform standards of protection, whereas diplomatic protection functioned exclusively in relations between States and after domestic remedies had been exhausted. In his opinion, the conditions for the exercise of diplomatic protection were those established in the *Mavrommatis Concessions* case; they were contingent on the existence of harm suffered by an individual and failure to obtain satisfaction under domestic legislation.

75. Lastly, he agreed with the members of the Commission who had considered the distinction between "primary" and "secondary" rules useless in the context of diplomatic protection, and he did not think that it would be appropriate to focus on the relationship between the international responsibility of States and diplomatic protection since the latter was only one aspect of a much larger field of responsibility.

76. **Mr. Westdickenberg** (Germany), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, observed that the Commission's 1997 decision to deal first with the issue of prevention of transboundary damage from hazardous activities had been a very wise one. The draft articles on the topic struck a judicious balance between the economic interests of States of origin and of States likely to be affected, and correctly concentrated on the key principle of prevention.

77. The entire set of draft articles was based on the obligation of States to exercise due diligence, to act in good faith and to cooperate, as set forth in draft articles 3, 4 and 5. That was the right way to achieve an effective and reasonable legal framework on the subject of prevention of transboundary damage from hazardous activities. His Government agreed with the core idea of draft article 10 that it was the duty of the State of origin to notify those States that were likely to be affected by the planned activity. The use of the words "with timely notification" allowed for more flexibility than the corresponding wording used in the 1996 draft (A/51/10, Annex I, art. 13).

78. Article 11 maintained an appropriate balance between the interests of the States concerned by emphasizing the manner in which, and the purpose for which, the parties entered into consultations. Article 12 provided some guidance for States in their consultations about an equitable balance of interests, and seemed to establish many factors that States could consider in seeking to strike such a balance.

79. It was difficult at the current stage to answer all the questions the Commission had put to Governments. For that reason, the Commission should proceed with caution. In that connection, he wished to emphasize draft article 6, which stated clearly that the existing draft articles were without prejudice to the existence, operation or effect of any other rule of international law. That was an important clarification. His Government completely supported the Commission's work on a comprehensive set of articles on prevention of transboundary damage from hazardous activities. On the other hand, other rules and developments in that area of international law should be admitted, and it was important not to make premature commitments concerning the subject.

80. Two other articles on the topic of international liability were of central importance. One of them was article 16, which was based on article 32 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses and provided that the State of origin had to grant access to its

judicial or other procedures without discrimination on the basis of nationality, residence or the place where the injury occurred. Therefore, that State had to ensure that any injured person received the same treatment as that afforded by to its own nationals under domestic law. That constituted a very central provision. Article 17, on settlement of disputes, which was inspired by article 33 of the 1997 Convention, provided the possibility of a compulsory settlement procedure by instituting a fact-finding commission if the dispute had not been settled by any other means within a period of six months. That provision was a very useful amendment to the 1996 draft; it remained to be seen whether it would be sufficient. In any case, the procedure for the settlement of disputes arising from the application and interpretation of the draft articles was of great importance and was even more essential in the topic under consideration than in other fields of international law.

81. With regard to the topic of State responsibility, his Government was satisfied not only with the new article 5, but also with the other new articles of chapter II of Part One. The Commission had drafted clear, precise definitions of the conduct which could be considered as attributable to a State as an act of the State. Especially, articles 7, 8, and 8 *bis*, covering different situations involving persons or groups acting outside the structure of State organs, seemed to fill a gap in the previous draft articles. The same was true for articles 9 and 15.

82. Concerning the questions of reparation and compensation dealt with in chapter II of Part Two, his Government would prefer to emphasize general principles rather than very detailed and specific provisions, so that the relatively complex subject matter of reparation and compensation could be dealt with in a satisfactory way while allowing enough flexibility for specific cases.

83. He noted that in 1996. the Commission had adopted on first reading draft article 40, paragraph 2 (e) (iii) of which provided that every State had to be considered an injured State where the act of another State infringed a right arising from a multilateral treaty or from a rule of customary international law, if it was established that the right had been created or was established for the protection of human rights and fundamental freedoms. That definition implied the *erga omnes* effect of violations of fundamental human rights or of international humanitarian law, and established the right of any State to take reprisals against the State responsible for such violations. The principle established by article 40, paragraph 2, was of the utmost importance to his Government, which considered that it restated customary international law by allowing reprisals by any State against States that violated fundamental human rights or international humanitarian law.

84. *Mr. Enkhsaikhan (Mongolia) resumed the Chair.*

85. **Mr. Lahiri** (India) said that because of its far-reaching implications, the prevention of transboundary damage from hazardous activities called for broad-based debate rather than precipitous action in order to avoid the type of controversy that had beset the framework convention on the law of non-navigational uses of international watercourses. It must be remembered that the international community's growing concern for the environment and for the transboundary consequences of hazardous activities had been expressed within a framework that acknowledged the relationship between environment and development. Sustained economic growth, the eradication of poverty and the importance of meeting the basic needs of populations were overriding priorities for developing countries, which could not meet the goal of environmental protection without the international community's financial and other assistance and recognition of the fundamental premise of common but differentiated responsibility.

86. He was concerned at the lack of a specific definition of hazardous activities, many of which were crucial for development, and of precision in defining terms such as "risk of causing significant transboundary harm". Such imprecision was particularly disturbing in a legal instrument which dealt with issues of liability, compensation and unilateral invocation of arbitration as a procedure for dispute settlement. Principle 11 of the Rio Declaration stated that environmental standards applied by some countries might be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

87. The Commission had sought to address the need for an equitable balance of interests in draft article 12 and the issue of the relationship between prevention and the capacity of the States concerned in the commentary to article 3 (para. 16). However, much remained to be done if the draft articles were to be brought into line with the international consensus on the need to balance developmental and environmental imperatives. The draft articles failed to embody important principles such as the sovereign right of States to exploit their own natural resources according to their own policies, the concept of common but differentiated responsibility and the international consensus on the right to development; in that regard, it was unfortunate that none of the draft articles had been devoted specifically to the need for an overall balance between the environment and development, as established at the United Nations Conference on Environment and Development.

88. He also had reservations regarding the requirement that the public must be informed of potential risk (draft article 9) and the principle of non-discrimination (draft article 16). Unless the States concerned had compatible legal systems, the implementation of those provisions could raise numerous questions of jurisdiction and effective implementation. Draft article 16, in particular, could serve only as a guideline for progressive legislative development.

89. He was opposed to compulsory third party dispute settlement since the type of dispute which was likely to arise was more amenable to resolution through negotiation; moreover, settlements achieved through third party intervention were unlikely to result in compliance and, at best, might provide only a temporary solution. Further consideration should therefore be given to the inclusion of draft article 17, paragraph 2, in its current form. In any case, if the draft articles were to form part of a framework convention or set of guidelines, it was less important to provide for a compulsory dispute settlement mechanism. He noted that the programme for the further implementation of Agenda 21 reiterated the need for dispute settlement procedures or mechanisms to be broad-based and in line with Article 33 of the Charter of the United Nations.

90. The concept of "due diligence" did not lend itself to codification. Furthermore, in view of the differences between the levels of economic and technological development of States and the shortage of financial and other resources in developing countries, there should be no penalties for non-compliance with obligations by a State or operator which, while willing, lacked the capacity to do so.

91. In his opinion, many of the concepts reflected in the draft articles did not yet constitute established principles of international law, nor did they reflect the international consensus on the need for a balanced approach to development and the environment. Moreover, they were handicapped by a lack of precision with respect to the very activities with which they purported to deal. He therefore suggested that the Commission should reconsider the issues reflected in the draft articles and endeavour to provide a more balanced framework for the Committee's discussion.

92. **Mr. Rebagliati** (Argentina) said that his delegation noted with satisfaction the progress made by the Commission in its reformulation of the rules on State responsibility. The discussion on the distinction between "crime" and "delict" had been particularly enlightening.

93. He wished to point out that earlier in 1998, Argentina had argued in favour of reconsidering the matter of excluding damage from the definition of an internationally wrongful act. Damage was a fundamental element of State responsibility, the principle being that anyone who caused damage must make reparation. His delegation had reservations regarding the terminology used in distinguishing between international crimes and delicts. That terminology, which was taken from penal law, did not adequately describe the different categories of wrongful acts under international law. His Government did not believe it was necessary to draft provisions on countermeasures, which could only be tolerated under international law as an extreme remedy to be taken only in exceptional cases.

94. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation was pleased that draft articles had been drawn up on the subject of prevention. Work on the conceptual clarification and identification of the rules on prevention should not be delayed. Any breach of those rules entailed international liability on the part of the State of origin for the unlawful act. It was important to clarify and establish the consequences under international law in cases where substantial transboundary damage was caused, even when the State of origin had complied with all the rules of prevention. Given the unique nature of the obligation to make reparation in such cases, the rules on reparation should embody certain principles supplementary to those governing liability for unlawful acts. In cases of liability in the strict sense, even full compliance with due diligence did not exempt a State from liability.

95. On the question of nationality in relation to succession of States, it was significant that the Commission had considered the possibility of including the question of the nationality of legal persons. With countries becoming more and more interdependent economically and the volume of investments growing, the time had come to rethink the traditional approach to the question. Argentina had signed many bilateral agreements on promotion and reciprocal protection of investments which included criteria for defining the concept of "foreign legal person" in terms of the country of incorporation and the location of the company's main office. That represented a change in the traditional view that legal persons did not have nationality, only domicile. The Commission's work on that issue would undoubtedly contribute to the development of other topics as well, including diplomatic protection. On the question of the nationality of natural persons, it was worth recalling that the decolonization process had not ended, and there were still a number of cases in which the status of non-self-governing territories had not been resolved.

96. His delegation was following with interest the work of the Special Rapporteur on diplomatic protection. Codification of practice in that area could contribute greatly towards

preventing conflicts between States. The topic of diplomatic protection could not be separated from the topic of State responsibility.

97. Turning to the topic of unilateral acts of States, he pointed out that such acts were a source of international law and needed to be properly defined. The Commission should not limit its study to a single category of unilateral acts, such as declarations, but should work on all the main categories of such acts. The plan for the study outlined in paragraph 210 of the Commission's report on its forty-ninth session (A/52/10) provided a suitable basis for work on codification of that topic.

98. With regard to reservations to treaties, his delegation was generally in agreement with the guidelines on the definition of reservations and interpretative declarations. It also agreed with the Special Rapporteur on the matter of so-called "reservations to bilateral treaties", which, in fact, were not reservations at all, but proposed amendments.

99. The Commission's future work should focus on continuing the systematization of the major issues of international law, particularly those which so far had only been considered in the writings of jurists or in judicial decisions.

100. In order for the codification exercise to be effective, its results should be embodied in multilateral conventions, as had been the case with the law of treaties and the law of diplomatic and consular relations. Because of the difficulties encountered in recent years in regard to the ratification of some multilateral conventions, the Commission seemed to have focused more on the formulation of principles, guidelines or model rules (soft law). Although that procedure was appropriate in some cases, the Commission should not lose sight of the fact that codification should be aimed at the elaboration and systematization of customary rules in the form of legally binding international conventions. In that regard, the Commission should maintain close relations with the International Court of Justice, whose decisions and advisory opinions played a fundamental role in determining the existence of customary rules and developing the principles of international law. The Commission should also take into account the contributions to codification and doctrine made by regional bodies such as the Inter-American Juridical Committee.

101. His delegation hoped that the Commission would be able to complete its work on State responsibility at its next session. It would also like to see rapid progress on the topic of international liability for acts not prohibited by international law, and trusted that the Commission would make progress in its study of nationality and succession of States.

102. In conclusion, he wished to stress the importance of ensuring equitable representation of candidates from developing countries in the annual Geneva seminars. His delegation supported the allocation of the necessary budgetary funds for that purpose and welcomed the voluntary contributions that had been made.

The meeting rose at 1.15 p.m.