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SUMMARY RECORD OF THE 37th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

later: Ms. WONG (New Zealand)
(Vice-Chairman)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

1. Mr. OMAR (Libyan Arab Jamahiriya), referring to the draft articles on State responsibility contained in chapter III of the report of the International Law Commission (A/51/10 and Corr.1), said that his delegation was dissatisfied with the form and substance of article 39, ("Relationship to the Charter of the United Nations") because it conflicted with the other draft articles on State responsibility, and with other provisions of international law. The words "as appropriate", for example, were incompatible with the draft articles in general and with those on the settlement of disputes in particular. The article was superfluous and should be deleted, as the relationship between the draft articles and the Charter was governed by Article 103 of the Charter. The powers of the Security Council were defined clearly in the Charter, and his delegation shared the view that the Security Council should not, as a general rule, deprive a State of its legal rights or impose upon it obligations beyond those arising out of the Charter and international law.

2. In connection with articles 47 to 49, his delegation believed that the right of injured States to take countermeasures should be invoked only as a last resort after all reasonable and peaceful means of dispute settlement had been exhausted. It supported article 50, concerning prohibited countermeasures, and in principle had no objection to embodying the draft articles on dispute settlement in the text as a whole. It would comment further on the subject at the appropriate time.

3. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

4. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapters IV, V and VI of the Commission's report and referring first to chapter IV on State succession and its impact on the nationality of natural and legal persons, said that the Special Rapporteur for the topic had submitted a second report, so that the Commission now had all the necessary materials for dealing with the nationality of physical persons. The Special Rapporteur had also outlined the scope and complexity of the question of the nationality of legal persons and had reiterated his view that at the current stage it would be preferable for the Commission to focus on the nationality of natural persons. He had further suggested that the question of the continuity of nationality should be considered in the framework of the topic of diplomatic protection and that the results of the work on the topic as a whole should take the form of a declaration of the General Assembly.

5. The Commission had established a Working Group to consider the problem of the nationality of legal persons, the form which the results of the work should take, and the calendar of work. The Working Group had also studied the question of the nationality of natural persons, including the structure of a possible future instrument and the main principles to be included therein. The results of that preliminary work were described in paragraphs 85 to 87 of the report.

6. Since the Working Group's recommendations had been approved by the Commission, the General Assembly might take note of the completion of the preliminary study and request the Commission to undertake the substantive study of the topic, on the understanding that: consideration of the nationality of natural persons would be separated from that of the nationality of legal persons and given priority; for present purposes - and without prejudicing a final decision - the Commission should draft a set of articles with commentaries on the nationality of natural persons, which would constitute a declaration of the General Assembly; the Commission should complete its first reading of the draft articles at its forty-ninth or, at the latest, its fiftieth session; and it would then decide how to deal with the question of the nationality of legal persons, in the light of the observations of States. In paragraph 24 of the report the Commission invited such observations on the proposed approach.

7. Turning to chapter V of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, he said that the parameters of that complex topic went far beyond the traditional notions of domestic jurisdiction and territorial sovereignty. In 1992, the Commission had finally decided to concentrate on the international effects of lawful activities which might cause significant harm beyond the boundaries of the country in which they took place and to draw up a set of articles on arrangements for preventing such harm. At its latest session the Commission had decided that it was time to submit to the Sixth Committee and to Governments an overview of the subject and to invite their comments, so that in 1997 it would be able to decide what direction its work should take.

8. The Commission had established a Working Group which had considered three of the most important points: the activities to be covered, prevention, and compensation or other relief. The Commission had not had time to consider the Working Group's report and had decided to annex it to its own report. The Working Group had started from the principle that there were essentially two elements to be taken into account: the prevention, in the broadest sense of the term, of transboundary harm arising from activities not prohibited by international law, and compensation for transboundary harm. It was assumed that there was nothing to prevent a State from engaging in activities not prohibited by international law, even if such activities could cause harm beyond national frontiers, but that its liability might be triggered even if the activities were characterized as lawful. One particularly important principle was that the victim of transboundary harm should not be left to bear the entire loss.

9. The Working Group had proposed 22 draft articles, divided into three chapters. Most of the provisions contained in chapter I (General Provisions) and chapter II (Prevention) had already been adopted by the Commission. In paragraph (26) of the general commentary the Commission requested comments from Governments on article 1 (b), which dealt with activities which did not involve a risk of causing significant transboundary harm but nonetheless caused such harm. The obligations established by the articles on prevention were fairly light, for they addressed only liability leading to compensation or other relief.

10. The draft articles on compensation or other relief (chapter III) were new and went to the heart of the topic. The commentary discussed the theory which

served as the basis for establishing liability and the obligation to provide compensation or other relief. The draft articles did not incorporate the principle of "objective" or "absolute" liability, which had been developed in international law with regard to some activities but not for many others. In both international and domestic law the principle of justice and equity required that the victim of harm caused by someone else's activity must be compensated. Chapter III offered two means of relief: by an action before the courts of the State in which the harm originated, or by requesting the initiation of negotiations between that State and the State or States where the harm was suffered. Of course, that did not prevent the parties from agreeing on some other formula or the courts of the States where the harm occurred from exercising their jurisdiction. Such jurisdiction could derive from the principles of private international law, in which case the draft articles need not come into play.

11. The Commission would welcome comments on all the draft articles, and in particular on the matters referred to in paragraph 25 of its report. At the time when the Commission had included the topic in its programme of work, some of its members and some members of the Sixth Committee had thought it was presumptuous to venture into an area where many States considered that they had absolute freedom of action. But that position was no longer defensible in the light of what the International Court of Justice had said in paragraph 29 of its 1996 advisory opinion on the legality of the threat or use of nuclear weapons, to the effect that the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control was now part of the corpus of international law relating to the environment.

12. With regard to chapter VI of the report on reservations to treaties, he said that the Commission had decided, for lack of time, to consider the Special Rapporteur's second report at its next session. The report was divided into two chapters, followed by a bibliography on reservations. Chapter I offered an overview of the Special Rapporteur's study, while chapter II dealt with the question of the unity or diversity of the legal regime of reservations to treaties and more particularly the question of reservations to human rights treaties. The Special Rapporteur offered some conclusions and proposed a draft resolution on reservations to normative multilateral treaties, including human rights treaties. The Commission requested all States to reply to the questionnaire drawn up by the Special Rapporteur, which the Secretariat had circulated in 1995 and to which as yet only 19 States had replied.

13. Mr. CEDE (Austria) said that the topic of State succession and its impact on the nationality of natural and legal persons was an urgent one, owing to both its political implications and its significance for individuals. Since a statement dealing in detail with the vast amount of material on the topic would go beyond the time available to the Committee, his delegation would confine itself to certain basic ideas; its detailed comments were set out in an annex to the text of his statement, which would be circulated to all delegations.

14. The Commission had rightly decided that the nationality of natural persons should be discussed separately from that of legal persons, a suggestion made a year ago by his delegation, which also supported the idea of a non-binding

declaration of the General Assembly consisting of articles and commentaries. A convention which had not come into force might perhaps have more persuasive force, but a declaration was authoritative for all States in equal measure, whether they had voted for it or not, even though its true authority would stem not from its form but from its content. A declaration also had a certain legalizing effect since an action in conformity with it enjoyed the presumption of lawfulness. A problem might arise if the General Assembly altered the draft articles because then the commentary would have to be altered as well - something which did not happen in the case of a convention. The experience relating to declarations of the General Assembly had demonstrated their impact on relations among States, and it should be noted that the International Court of Justice had resorted to declarations as evidence of the opinio juris of the community of States. Other bodies had also felt the need to deal with the topics under consideration. The European Commission, for example, had recently concluded its work on a declaration on the consequences of State succession for the nationality of natural persons. The existence of that document illustrated the importance of closer coordination among international bodies dealing with identical issues.

15. The topic had an impact on individuals and on relations between States. The rules should thus be formulated in terms of human rights applicable within national jurisdictions or of rules applicable in inter-State relations. Even if a mixture of norms became unavoidable, their enforcement procedures would remain different. Only the injured State would be entitled to cite non-compliance with a rule by another State. In the case of human rights, however, the injured State was hardly discernible, so that the norm would be ineffective unless an enforcement mechanism was provided. In the absence of such a mechanism, the rules must be formulated in a way that made them applicable in inter-State relations. For example, the human rights rules should make the grant of nationality a duty of States but not one which an individual could invoke directly. Such an approach would satisfy the basic principle that nationality did not flow directly from international law but from national law.

16. The broader the topic, the more difficult it was to reach agreement on it. The Commission should therefore restrict the content of the topic to a minimum and not take up matters which did not need to be regulated. His delegation supported the approach envisaged by the Working Group: the instrument should be divided into two parts, the first containing general principles concerning nationality in all situations of State succession, and the second containing rules on specific situations. However, that approach was only a starting point and might have to be changed or abandoned in the future.

17. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, it was necessary to bear in mind the linkage between that topic and the topic of State responsibility. At an early stage his delegation had voiced concern over the direction taken by the Commission's first drafts on the topic of international liability, which had already been addressed in a number of conventions. The Secretariat's survey of liability regimes established by earlier instruments demonstrated that despite the difficulties involved it was worthwhile to seek commonly acceptable legal rules in that area. The task of regulating the potentially detrimental external effects of intensive industrial activities not prohibited by international law

and finding a balance between the profits derived from such activities and the burden caused to third parties could be achieved in various ways, such as through the polluter-pays principle, which was not applicable in all cases, or through a regime of civil or State liability or through a combination of both. The duty of compensation arising out of such liability could be performed directly by the operator or by means of a two- or three-tier system based on the establishment of a compensation fund and another means. However, only articles 5 and 21 of the current draft were devoted to the codification of international liability. Moreover, the text contained no provisions concerning the nature of the liability or the measure of compensation and also failed to make any distinction between the concepts of responsibility and liability.

18. Concerning article 1, his delegation believed that activities other than those involving a risk of causing significant transboundary harm should be included, for otherwise the possibility of relief for third party damage caused by industrial emissions or exhaustion from combustion engines, for example, would be excluded. A further omission was the failure to define the term "significant boundary harm", which was pivotal to the whole regime. That omission was all the more significant because article 21 referred merely to negotiations, making no provision for mandatory judicial settlement of claims. In that connection, paragraph (4) of the commentary to article 2 was neither a substitute for a prescription, nor helpful for operational determination. In the event that a definition was unattainable, provision should be made for a procedure which went further than mere negotiations.

19. In the light of such considerations, his delegation believed that the Commission should approach the draft articles as a text concerning an environmental protection regime rather than international liability. If the Commission decided to pursue its current approach to the text, he suggested that it should concentrate on formulating a few basic principles governing an environmental protection regime with a view to their adoption as a non-binding instrument by the General Assembly, a procedure in keeping with article 23, paragraph 1 (b), of the Commission's statute. It would be a futile and time-consuming exercise to draft detailed articles that were intended to serve as the basis for a convention.

20. Turning to chapter VI of the Commission's report, he emphasized the fundamental importance of the question of the unity or diversity of the legal regime of reservations to multilateral treaties and of the effects of reservations, acceptances and objections. His delegation had repeatedly expressed the view that the legal regime governing reservations should be kept uniform and agreed that there should be no special regime for normative and, in particular, human rights treaties. It therefore supported the Special Rapporteur's endeavour to base his future work on his conclusion that the "Vienna regime" was generally applicable. In connection with the conditions for the permissibility and/or opposability of reservations, it was essential to address the basic difference between the two doctrines. His delegation strongly supported the permissibility doctrine, but where the permissibility of reservations was questionable due to the vagueness of the formulation, it proposed that States should engage in a dialogue with the reserving State after raising a "preliminary objection", thus providing the latter with the opportunity to clarify or demonstrate subsequently its intention to fulfil its

obligations in conformity with the object and purpose of the treaty. Such a procedure would also enable the objecting State to reserve its position without being bound by acquiescence, although his delegation nevertheless felt that the twelve-month rule was inapplicable to impermissible reservations which were invalid ab initio. In its view, application of the permissibility doctrine was the only means of ensuring the erga omnes effect of the impermissibility.

21. His delegation also shared the Special Rapporteur's strong opinion that treaty monitoring bodies should have the power to determine the permissibility of reservations to treaties which they were monitoring, even if such power was not expressly vested in them by treaty provisions, as they could not properly fulfil their monitoring function without being aware of the exact scope of the obligations undertaken by a treaty party. In cases where a treaty monitoring body determined that a reservation was null and void, it should give the reserving State the opportunity to withdraw or reformulate the reservation, or to declare its withdrawal from the treaty with a view to respecting consensuality. In the latter instance, it would be necessary to address the issue of whether the withdrawal would have effect ex nunc or ex tunc. It would also be necessary to establish a new procedure whereby a State could reformulate its reservation in order to make it permissible or even make a new reservation after ratification. His delegation further suggested that the Special Rapporteur should consider the matter of clarifying the notion of "object and purpose of a treaty", as that was the criterion on which the permissibility of a reservation depended. Lastly, it regarded the resolution proposed by the Special Rapporteur on reservations to normative multilateral treaties, including human rights treaties, as an interesting, if unusual, approach to the work. However, it wished to reserve its position until the Commission completed its discussion of the draft resolution in 1997.

22. Mr. LALLIOT (France) said that the topic of State succession and its impact on the nationality of natural and legal persons involved an analysis of the respective roles of internal and international law in granting nationality. It had been rightly pointed out that identification of the nationals of a State was a matter for internal law, even in cases of State succession. Customary law in that regard was reflected in article 1 of the Hague Convention of 12 April 1930. Restrictions on the freedom of States to grant nationality were thus very limited. The Special Rapporteur's second report (A/CN.4/474 and Corr.1 and Corr.2 (Chinese only)) sometimes confused existing law (lex lata) and the law as it should be (lex ferenda). It was important to distinguish clearly between mere codification and the progressive development of the law.

23. Any limitations on the freedom of States to grant nationality had their basis in treaties, which were fairly cautious in that regard. There was currently no universal convention setting forth a general right to nationality, although article 24, paragraph 3, of the International Covenant on Civil and Political Rights provided that "every child has the right to acquire a nationality" and article 15, paragraph 2, of the Universal Declaration of Human Rights provided that "no one shall be arbitrarily deprived of his nationality". In considering whether the successor State had an obligation to grant its nationality to its inhabitants, the Commission should take account of the current state of the law. In any case, the solutions ultimately adopted must show scrupulous respect for human rights. As no obvious solution was available,

one of the basic objectives of the study undertaken should be to formulate a comprehensive inventory of State practice. While his delegation had no objection in principle to according priority to the question of the nationality of natural persons, it wished to point out that the question of the nationality of legal persons also gave rise to a number of important problems that must be addressed.

24. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law his delegation was surprised at the procedure adopted by the Commission in submitting the draft articles, which had not been considered by the Drafting Committee or debated fully in plenary. It would have been better to postpone their consideration until the next session.

25. The definition of harm caused to the environment brought together disparate elements and was not yet satisfactory. The emphasis should be placed on the harm, rather than on the means of relief. Article 5 indicated the general principle underlying the draft articles, establishing that liability arose from significant transboundary harm caused by an activity referred to in article 1 (namely, an activity not prohibited by international law) and gave rise to compensation or other relief. However, the Working Group had not defined the characteristics of that liability. The liability of the State could be conceived only residually vis-à-vis the liability of the operator of the activity at the origin of the transboundary harm. Recognition of the residual liability of States for harm caused by lawful activities would itself constitute a very considerable development of international law. States would be unlikely to accept such a development in a general form. To date, they had accepted it only in specific treaties such as the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972. There, however, the States originating the Convention had considered space activities as activities reserved exclusively to States, which would clearly not be the case for all the activities envisaged in the draft articles under consideration. It would therefore be preferable to make the draft articles a sort of compendium of principles, to which States could refer when establishing specific regimes of liability. That would be a realistic, pragmatic and constructive approach to the topic.

26. On the topic of reservations to treaties, his delegation shared most of the views and many of the concerns expressed by the Special Rapporteur in his prudent and pragmatic report. At the fiftieth session, his delegation had indicated France's attachment to the reservations regime established by the relevant provisions of the 1969 and 1986 Vienna Conventions on the law of treaties, to which it was not, however, a signatory. France had not signed the 1969 Vienna Convention on the Law of Treaties because it contained provisions declaring void treaties conflicting with a peremptory norm of general international law (jus cogens). The pacta sunt servanda principle on which the law of treaties rested was thus in danger of being undermined by abusive invocation of alleged norms of jus cogens, the content, means of formation and effects of which were still undefined. It was for the same reason that France had not signed the 1986 Vienna Convention or the 1978 Vienna Convention on Succession of States in respect of Treaties. While regretting that the authors

of those Conventions had deviated from customary international law on certain matters, France nevertheless considered that the rules concerning reservations contained in the 1969 Vienna Convention functioned fairly well and that the system established in 1969 must not be abandoned in favour of positions adopted by some international human rights bodies concerning the allegedly special case of human rights treaties. Those positions deviated too much from the generally accepted rules of international law and might hamper the development of the protection of those rights through treaties, by discouraging States from becoming parties thereto. It was in any case always possible, when negotiating each treaty, to ensure that rights considered as essential were not subject to derogation. Not all reservations lacked legitimacy and there was no need to draw a distinction between human rights treaties and other treaties. It was neither necessary nor desirable to establish a special regime of reservations for human rights treaties.

27. The Special Rapporteur had rightly pointed out that the establishment of monitoring machinery by many human rights treaties created special problems that had not been envisaged at the time of the drafting of the aforementioned conventions, connected with determination of the permissibility of reservations formulated by States. In his delegation's view, the monitoring bodies could in no circumstances determine the permissibility of those reservations. It was for the reserving State to draw the conclusions with regard to the incompatibility of its reservation with the object and purpose of the treaty, and for the State objecting to the reservation to draw the conclusions with regard to its decision concerning the maintenance of the treaty link between itself and the reserving State. As for the view that a monitoring body was particularly well placed to determine the compatibility of a reservation with the object and purpose of the treaty, the body in question owed its existence only to the treaty and had no powers other than those conferred on it by States parties; it was thus for the States parties alone, unless the treaty provided otherwise, to decide on the incompatibility of a reservation with the object and purpose of the treaty.

28. It had been claimed that the provisions of certain international conventions that represented rules of customary international law could not be the subject of reservations. His delegation wished to point out that international custom was evidence of a general practice accepted as the law. Unfortunately, where human rights were concerned, it was difficult to identify practices that conformed strictly to that definition. It would be premature, to say the least, to claim that all such practices conformed to that definition of international custom. Furthermore, even if one accepted that some human rights treaties formalized customary principles, the duty of a State to comply with a general customary principle and its acceptance to be bound by its expression in a treaty must not be confused. Lastly, the concept of a "customary rule" was not synonymous with a "peremptory norm of international law". The uncertainties surrounding the concept of jus cogens must not be allowed to compound those concerning the place of custom in human rights matters.

29. France considered that reservations, as governed by the 1969 Vienna Convention, were a normal and legitimate means of formulating a State's consent to be bound by a treaty, if applied in accordance with the conditions set forth therein. A State that had qualified its consent by entering reservations in accordance with international law thus had no need to subject itself to any

conditions, constraints or procedures other than those arising from the law of treaties or the instrument in question. By permitting compatibility between constitutional and treaty norms and the adaptation of treaty rules to individual internal laws, reservations promoted wide acceptance by the international community of a number of treaties that would otherwise never gain the requisite number of accessions. In practice, reservations were the prerequisite for ensuring such compatibility. The validity of reservations could be assessed only in the light of the object and purpose of the treaties, and there was no reason to refer to other, more subjective considerations. The Commission should not risk destabilizing a system that functioned in a satisfactory manner by calling into question the relevant provisions of the Vienna Conventions. Lastly, the draft resolution that the Special Rapporteur had appended to his report was prudent, but nonetheless raised a few difficulties which should be discussed at the fifty-second session.

30. Mr. AL-BAHARNA (Bahrain) said that the statement by the Special Rapporteur contained in paragraph 13 of his second report on State succession and its impact on the nationality of natural and legal persons to the effect, that while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States, struck a reasonable balance between the sovereign right of a State to pass nationality laws and the right of an individual to a nationality under international law. The Commission's work on that topic should highlight its human rights aspects, protecting individuals from detrimental effects such as statelessness resulting from nationality legislation passed in the process of State succession. With respect to working methods, his delegation supported the Special Rapporteur's recommendation that the Commission should adopt a flexible approach involving both codification of international law (inasmuch as fundamental human rights were involved) and its progressive development (as far as matters of succession of States were concerned). As to the form which the outcome of work on the topic might ultimately take, the proposal to elaborate a declaratory instrument in the form of articles accompanied by commentaries appeared to have widespread support.

31. His delegation supported the Special Rapporteur's pragmatic proposal to retain the definition of certain basic concepts contained in 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. The study of the categories of succession should be based on the 1983 Vienna Convention. That should not rule out the possibility of adding further classifications that might be relevant to the specific problems of nationality. Basically, however, the definition of the term "succession of States" contained in the 1978 and 1983 Vienna Conventions should be retained.

32. The issue of the individual's right to nationality should constitute the heart of the topic under consideration. That right reposed on article 15 of the Universal Declaration of Human Rights, the effect of which was to restrict statelessness and to confer on individuals the right to retain or change their nationality. Its restrictions should be binding on the predecessor and successor States. His delegation agreed with the Special Rapporteur that the right of option required further clarification, and that although the Commission should endeavour to strengthen the right of option, there could be no

unrestricted free choice of nationality. The obligation to negotiate with respect to nationality issues affecting nationals of predecessor and successor States should also be at the heart of the study. That obligation should, however, be balanced by consideration of the problems that might arise from negotiations, and in particular, of the fact that they might drag on for years before the problems of the transfer of nationality were resolved satisfactorily, with statelessness on a massive scale emerging in the meantime.

33. Concerning the principle of non-discrimination in the granting of nationality, his delegation fully supported the Commission's conclusion that it was totally unacceptable that States should apply such criteria as ethnicity, religion, gender or language in refusing to grant nationality to categories of persons who would otherwise be entitled thereto.

34. His delegation welcomed the Commission's practical approach to the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and urged Governments to respond to the Commission's request for comments on the draft articles contained in annex I to its report, particularly on paragraph (26) of the commentary to article 1 and the issue of compensation or other relief as set out in chapter III. He noted that the Working Group had decided, in view of the recommendations in General Assembly resolution 50/45, to present its report to the Commission in the form of a complete set of draft articles, including the articles in chapters I and II, which had been provisionally adopted by the Commission on first reading. The Commission would therefore be in a position to make a fully informed decision at its next session about how to proceed in the future. His delegation believed that the draft articles provided the necessary framework for the completion of work on the topic and supported the Commission's recommendations on its future approach contained in annex I.

35. He agreed with the Working Group that there was a clear distinction between State responsibility and State liability; in the draft articles concerning the latter, the State of origin was only permitted to pursue activities "at its own risk". State liability was concerned with preventing transboundary harm arising from acts not prohibited by international law, in other words, preventing certain harmful consequences which fell outside the area of State responsibility. The draft articles were rightly based on the principle that, although States were not precluded from carrying out activities not prohibited by international law, they were liable to provide compensation or other relief to the victims of transboundary harm arising from such activities.

36. Mr. ROTH (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), welcomed the attention paid by the Working Group on international liability to the prevention of transboundary harm and the duty to pay compensation for harm caused. In the view of the Nordic countries, prevention should cover not only hazardous activities but also accidents and normal activities with unforeseen harmful effects. Although, according to article 8, the articles did not apply to transboundary harm arising from a wrongful act, the draft was replete with State obligations which, if breached, would seem to entail State responsibility. It was possible to imagine a case where unexpected harm occurred which entailed liability in itself; the harmful effects might then increase significantly if the affected State did not receive

timely notification, and, since the increased harm would then have been the direct consequence of a breach of duty, State responsibility would appear to be involved.

37. Turning to article 1, he said that the Nordic countries were of the view that, since it referred to "activities", the word "acts" in the title of the draft articles should be replaced by "activities". The Working Group had rightly chosen not to draw up a list of activities involving a risk of transboundary harm, as it was impossible to foresee all activities which might involve a risk in the future. He favoured removal of the square brackets from article 1 (b), as the draft articles should cover activities which caused transboundary harm despite involving no apparent risk. Although it could seem unfair to impose liability on States which had had taken due care, it would be even more unfair to leave a State which had had no part whatsoever in the harmful activity to bear the losses alone. To impose liability for unexpected losses would also provide a strong incentive for States and operators to take precautionary measures. As for the question of the scope of the obligations regarding harm under article 1 (b), the same principles should apply as for harm arising out of activities under article 1 (a).

38. The definitions in subparagraphs (a) and (b) of article 2 posed no problems, but there was a possible overlap between the criteria of territory, jurisdiction and control in subparagraphs (c) and (d), which it would be difficult for an instrument of the current type to resolve. In article 2 (d), the inclusion of the criterion "control over" meant that a State which illegally had control over a territory could be eligible for compensation, which was perhaps not the desired effect.

39. The basis for the obligations contained in chapter II could be strengthened by replacing "appropriate" with "possible" in article 4.

40. Article 5, on liability, needed to be more precise. It should be made clear in the text that not only persons and property but also the environment were protected. It was unclear from the text what exactly compensation was due for; as a minimum, compensation should be given for costs incurred. It also had to be made clear that it was primarily incumbent on the operator to provide compensation and that the liability of the State, if any, was residual.

41. Article 6 could be clarified somewhat by making explicit the duty of notification in cases where harm had occurred, even though that was implied in the duty to cooperate in good faith.

42. Article 7 would benefit from a provision to the effect that States must ensure that effective recourse was available in national courts; as it stood, there was no clear duty to do so.

43. Article 8, which revealed the residual nature of the proposed instrument, highlighted the difficulty in making a clear distinction between liability and State responsibility.

44. The important obligation of States to ascertain actively whether hazardous activities were taking place within their territory or otherwise under their

jurisdiction or control, as mentioned in the commentary to article 9, should be spelt out in the text.

45. The "assessment" required by article 10 should be replaced by the more specific "environmental impact assessment", prescribed in Principle 17 of the Rio Declaration on Environment and Development and now an accepted concept in international environmental law.

46. In article 13, it would be preferable to clarify that, where an assessment indicated a risk, notification should be provided before domestic authorization was given according to articles 9 and 10.

47. In article 15, the qualifier "whenever possible and by such means as are appropriate" was too vague and should be deleted. Also, in order to ensure that the information provided was the same as that given to potentially affected States, the article should use the same wording as article 13, and refer to "available technical and other relevant information on which the assessment is based".

48. It was certainly important to protect information which was vital to national security or industrial secrecy, but article 16 should reflect the view of the Working Group that there should be an element of proportionality, particularly when the harm originated in the business whose secrets were being protected.

49. Article 17 was to a large extent a codification of certain basic principles of good-neighbourliness. Paragraph 3 made it clear that completing consultations did not free the State of origin from liability and that it was obliged to take into account the interests of the affected State. A more comprehensive duty to settle disputes through a third party ought to be considered, especially as the procedure in the domestic courts of the State of origin, discussed in the general commentary to chapter III, was not explicitly evoked in the text.

50. Article 20 was a standard provision prohibiting discrimination, but it prescribed no duty for States to ensure a right of redress, nor even a right of access to effective national forums; that omission should be remedied.

51. The provision in article 21 that compensation should be negotiated "in accordance with the principle that the victim of harm should not be left to bear the entire loss" seemed at odds with of the natural presumption that the polluter should pay the entire loss, in the absence of circumstances warranting an adjustment. Furthermore, the dispute settlement obligation was very weak, which was a serious shortcoming that could be rectified, for example, by compulsory reference to the International Court of Justice or arbitration.

52. Subparagraphs (a), (b) and (c) of article 22 seemed to undermine the concept of liability for lawful acts. In particular, if subparagraphs (a) or (b) pertained, there would appear to be a breach of obligation, in which case there was a duty of reparation that went further than the liability envisaged in the draft articles. Subparagraphs (d) to (j) seemed reasonable when taken one at a time, but together they seemed to erode the "polluter pays" principle.

53. In conclusion, a considerable amount of work remained to be done on the draft text. As far as the Nordic countries were concerned, it was too early to decide whether to aim at a convention or a less ambitious non-binding instrument.

The meeting rose at 5.10 p.m.