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Chair: Mr. Arrocha Olabuenaga (Vice-Chair) . . . . . (Mexico)

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19-18309 (E)

In the absence of Mr. Mlynár (Slovakia), Mr. Arrocha Olabuenaga (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 10 a.m.

Agenda item 77: Report of the United Nations Commission on International Trade Law on the work of its fifty-second session (*continued*) (A/74/17)

1. **Mr. Gani** (Brunei Darussalam) said that his delegation welcomed the texts of the United Nations Commission on International Trade Law (UNCITRAL), in particular the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), which had recently been signed by 46 countries, including Brunei Darussalam, which was carrying out the necessary domestic procedure to ratify the Convention. It was using the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation to assist it in the ratification process, including the preparation of its domestic legislation for the implementation of the Convention.

2. The Convention was a valuable addition to the existing set of dispute-resolution mechanisms available to parties to commercial disputes. It provided a harmonized framework for the enforcement of international settlement agreements resulting from mediation and for the invocation of such agreements by parties. It was also designed to facilitate international trade and provide a flexible and cost-efficient mediation process.

3. The Government of Brunei Darussalam had issued International Arbitration Order 2009, in which the role of mediators in settling disputes through arbitration was recognized. Mediation was thus being practised in the country, both formally and informally, in particular in private civil cases, and was recognized by the Supreme Court. Brunei Darussalam also welcomed the other work done by the Commission during the reporting period, including the finalization of the UNCITRAL Model Legislative Provisions on Public-Private Partnerships and the UNCITRAL Legislative Guide on Public-Private Partnerships, the UNCITRAL Practice Guide to the UNCITRAL Model Law on Secured Transactions and texts in the area of insolvency law.

4. **Mr. Fierens Gevaert** (Belgium) said that, having been elected as a member of the Commission, Belgium attached great importance to the Commission's work to harmonize and develop international trade law, and to ensure an international order anchored in international law and the rule of law.

5. Belgium supported the work of Working Group II (Dispute Settlement) in improving the efficiency and quality of arbitration, and had contributed to that work by putting forward a specific proposal relating to the independence and impartiality of arbitrators. The Working Group was currently focusing on developing rules relating to expedited arbitration; Belgium would continue to contribute to efforts to ensure the timely completion of that work.

6. With regard to Working Group III (Investor-State Dispute Settlement Reform), his delegation was in favour of in-depth reform and the establishment of a multilateral investment court. That work must be as inclusive as possible, taking into account the views of States and civil society alike.

7. Belgium supported the work of Working Group IV (Electronic commerce) in harmonizing international legal-certainty standards, in particular in the area of identity management and trust services. It appreciated the increasingly specific nature of the related discussions and hoped that the work would be completed expeditiously.

8. As a nation that relied on maritime trade, Belgium was well positioned to contribute to the work of Working Group VI (Judicial Sale of Ships) on the preparation of an international instrument on the judicial sale of ships. It would focus, in particular, on ensuring the existence of adequate guarantees to verify the authenticity of court decisions; on ensuring that priority was given to national laws at the time of the deletion of charges entered in a ship's registry; and on establishing a clear scope of application, which would require clarifying the concepts of a "ship" and a "judicial sale".

9. **Mr. Sharifi** (Islamic Republic of Iran) said that the Islamic Republic of Iran appreciated the Commission's work on expedited arbitration, which was less expensive and faster than standard arbitration, and more satisfactory to parties to disputes. It was important to increase the effectiveness of arbitration by ensuring its quality and fairness, as well as due process for the parties concerned.

10. His delegation expected that Working Group III would respond to the concerns of States and investors regarding the development of a new investment regime that enhanced consistency, access to justice and fairness. The Working Group should make concrete recommendations to address the defects of the current system and devise comprehensive solutions with regard to the protection of the rights of people and communities affected by foreign investment, the responsibility of multinational corporations to uphold human and labour rights, and environmental protection. The Working

Group should also ensure the full participation of developing countries in the process, taking into consideration their limited capacities and resources.

11. The Islamic Republic of Iran attached great importance to the work of Working Group IV on the legal aspects of identity management, which was critical for facilitating trustworthy electronic commerce and other online activities. It also appreciated the preparation by the Secretariat of a revised set of draft provisions on the cross-border recognition of identity management and trust services. Given the important role of public authorities in the development and deployment of identity management systems, and in the provision of identity management and trust services, the Commission should, in preparing the relevant draft provisions, not overlook the function performed by such authorities and their effectiveness, particularly in enforcing laws and preventing risks and abuses. Attention should also be paid to the different levels of economic and information-and-communications-technology development of Member States, as well as to the challenges faced by developing countries in cyberspace, particularly in the area of privacy.

12. His delegation took note of the work of the Secretariat in preparing a revised draft instrument on the judicial sale of ships, incorporating the outcome of the deliberations of Working Group VI at its thirty-fifth session. The new draft should address the concerns expressed by Member States regarding the draft international convention prepared by the Comité Maritime International and, without prejudice to the final form of any future instrument, should take into consideration a number of crucial points. First, it should uphold the right of access to justice, including ensuring that the rights of preferred creditors were not prejudiced by providing for solutions such as the extinguishment of rights through the issuance of a sale certificate. Second, it should provide for judicial approval of foreign judicial decisions, to enable administrative enforcement to take place internally. Third, it should provide that, to pursue a judicial sale, a claimant must have a contractual link to the ship in question. Fourth, State ships should be excluded from its scope.

13. The Islamic Republic of Iran had signed the Singapore Convention on Mediation, which would help Member States and their judicial authorities to settle disputes more efficiently. His delegation commended the Commission's efforts to promote the development, harmonization and modernization of international trade and commercial law, and remained committed to engaging constructively with the Commission in the upcoming year. Given the difficulties experienced by Iranian representatives in obtaining visas from the United States and the inhuman restrictions imposed on them by that country, it would be advisable to explore the possibility of holding all the Commission's meetings in Vienna, until the United States fulfilled its international obligations and revoked those restrictions.

14. **Mr. Prieto** (Peru) said that Peru was grateful for the Commission's work in modernizing and harmonizing international trade law, which facilitated transactions that promoted economic, political and social development.

15. Having recently been elected as a member of the Commission, Peru was participating actively in the work of the Commission's working groups. It welcomed the efforts of Working Group I to reduce the legal obstacles faced by micro, small and medium-sized enterprises, in particular the progress made on the draft legislative guide on an UNCITRAL limited liability organization. It also appreciated the progress made by Working Group II and would closely follow its work on expedited arbitration.

16. His delegation would also closely follow the work of Working Group III (Investor-State Dispute Settlement Reform), given the experience of Peru in that area and the continued increase in private investment in, inter alia, telecommunications, mining and energy, in the country. That Working Group should continue to hold intersessional meetings in different regions, which helped to keep regional actors, in particular those that could not attend meetings in New York or Vienna, abreast of its work. Peru also recognized the progress made by Working Group IV (Electronic commerce) and stood ready to share its experiences in the implementation of digital identity and the transfer of electronic data, including through its national identification and civil status registry.

17. Peru was committed to promoting the rule of law and the implementation of the 2030 Agenda for Sustainable Development, including Sustainable Development Goal 16, on peace, justice and strong institutions, which the Commission should take into account in considering future topics for its work programme.

18. **Mr. Rugeles** (Colombia) said that Colombia appreciated and had participated actively in the work of the Commission, undertaken in the context of Working Group III, on the possible reform of investor-State dispute settlement. That Working Group should discharge its mandate strictly and efficiently, allowing all countries to express their views, but without unnecessary delay. Colombia was grateful to the Secretariat for supporting the Working Group in considering the possible establishment of an advisory

centre, the adoption of a code of conduct and third-party funding in the context of investment arbitration. The Secretariat would play an equally critical role at the Working Group's thirty-ninth session, at which the Group would discuss the topic of a mechanism to review or appeal investment awards, a subject of particular interest to Colombia.

19. In the first stage of its discussions, the Working Group had sought to identify and consider concerns regarding investor-State dispute settlement. In 2018-2019, it had focused on assessing the need for reform in the light of the concerns identified and on developing solutions.

20. In the Working Group's discussions, the incoherence of arbitral awards had been recognized and, consequently, the inconsistency and unpredictability of the arbitral process. It had likewise been recognized that there were few mechanisms to ensure that arbitral awards were well founded, including early dismissal mechanisms that would address unfounded claims and mechanisms that would allow for counterclaims or appeals.

21. The ways in which arbitrators were selected by the parties and the repercussions that had on the impartiality and independence of awards, the lack of transparency of arbitral procedures and the increase in their duration and costs were also problems that could not continue to be ignored by the international community. Those problems were structural and required comprehensive solutions that would make it possible to restore the balance between the rights and obligations of States and standards of protection accorded to investors, so as to limit the proliferation of frivolous, meritless claims and ensure coherence and consistency in arbitral awards. Colombia therefore welcomed the support by a number of delegations for its proposal to consider the implementation of a methodology that would enable the adoption of a multilateral convention broad enough to encompass the thousands of existing multilateral investment agreements, but flexible enough to enable the adoption of necessary reforms according to the interests of each State.

22. **Mr. Varankov** (Belarus) said that his delegation noted with satisfaction the signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation. Working Group II continued to explore important issues such as expedited commercial arbitration and the development of a code of ethics for arbitrators. His delegation was convinced that comprehensive study of those topics would lead to significant practical results.

23. In its work on investor-State dispute settlement reform, Working Group III should give further consideration to such aspects as the requirement for investors to exhaust local remedies before referring an investment dispute to arbitration; the consideration of obligations of investors relating to, for example, human rights protection or the environment, as well as the related question of whether to allow counterclaims by States or third parties against investors; and the availability of dispute prevention methods and alternative means to resolve investment disputes. Regarding third-party funding, clear regulation was required to ensure that the practice did not result in excessive control or influence by third parties over arbitral proceedings, or in the filing of frivolous claims or the creation of obstacles to dispute settlement.

24. His delegation welcomed the recently adopted UNCITRAL Model Legislative Provisions on Public-Private Partnerships and the UNCITRAL Legislative Guide on Public-Private Partnerships; those documents could be used to update and refine national legislation in that area. It also noted with satisfaction the adoption of the UNCITRAL Practice Guide to the UNCITRAL Model Law on Secured Transactions. In his delegation's view, the Guide successfully met the objectives set: to illustrate how the Model Law operated and how potential users could benefit from such operation, and to bridge the gap between law and business practice.

25. The Commission continued to play an important role in promoting the rule of law at the national and international levels through its work on international and regional commercial dispute settlement, compliance with international legal obligations, the development of instruments to regulate international trade and the sharing of experiences and best practices, including through the Case Law on UNCITRAL Texts (CLOUT) system. The Commission had produced authoritative international regulatory instruments – both treaties and soft-law instruments – in the field of international trade, which was constantly evolving and thus required a concerted response from States. The success of the Commission and of its legal standards was largely due to its depoliticized nature and the high level of its expertise, which should serve as an example for other multilateral forums.

26. **Ms. Nguyen** Quyen Thi Hong (Viet Nam) said that Viet Nam welcomed the Commission's work on expedited arbitration and investor-State dispute settlement reform, in particular the considerable progress made on the latter topic. The Commission's consideration of future topics for its work programme was to be commended. However, in view of resource constraints, any exploratory or preparatory work

conducted by the Secretariat should not prejudice its assistance to Member States in considering the current topics on the work programme.

27. Over the past year, the technical-assistance activities of the Commission had benefited developing countries that lacked resources for law reform and sought to expand their commercial and economic relations for their sustainable development. Her delegation appreciated the Secretariat's efforts to support Member States in the areas of law reform, capacity-building and the rule of law. In particular, the Commission's regional presence played a key role in engaging regional stakeholders and tailoring technical-assistance and capacity-building activities to the needs of individual regions.

28. In recent years, the Commission's work had become highly visible among Member States. The Commission discussed many important topics that might have long-term implications for the international trade law framework, such as investor-State dispute settlement reform. In that connection, her delegation believed that the proposal by some delegations to expand the Commission's membership would have the benefit of enabling developing countries to participate actively in its work, which, in turn, would help to enhance their expertise in and knowledge of international trade law. Contrary to the suggestions of some countries, membership enlargement did not need to come at the cost of efficiency and effectiveness. Viet Nam supported the holding of inclusive and transparent discussions on the matter, with a definite timeline and the understanding that any future decisions on membership enlargement should be made taking into consideration the need for equitable geographical distribution, in accordance with United Nations practice.

29. **Mr. Taufan** (Indonesia) said that, as a member of the Commission, Indonesia was committed to enhancing its contribution to the Commission's work, particularly in ensuring the implementation of the 2030 Agenda and advancing sustainable economic growth. With regard to Working Group I, his delegation welcomed the finalization and adoption of the draft legislative guide on an UNCITRAL limited liability organization. Cost-effective and efficient business registration was critical to supporting the establishment of micro, small and medium-sized enterprises and to helping them access financial services. The micro, small and medium-sized enterprises sector was a priority of his Government, as evidenced by the recent introduction of a bill on the empowerment of such enterprises and a bill on job creation.

30. His Government had already submitted its comments on the work of Working Group III on possible reform of investor-State dispute settlement to the Secretariat, as reflected in document A/CN.9/WG.III/WP.156. While the Working Group had made important progress in identifying concerns in that area, much remained to be done to establish a fairer dispute-settlement mechanism. Indonesia was particularly concerned that the current mechanism had increased States' exposure to claims by foreign investors in international arbitration, even when such claims were frivolous, meritless or in bad faith, a phenomenon that could lead to a "regulatory chill" that undermined the fundamental right of States to undertake legitimate regulatory measures for public purposes. Potential solutions to that problem included providing more safeguards, in both substantive and investor-State dispute settlement provisions, to preserve the right to regulate; applying the rule of exhaustion of local remedies, which would require investors to pursue their claims through domestic courts before resorting to investor-State dispute settlement; reviewing the practice of automatic consent and introducing a requirement that investors obtain separate written consent before filing investor-State dispute settlement claims; and promoting early settlement of investment disputes, including through mandatory mediation, which could help limit the cost and duration of, as well as access to, investor-State dispute settlement.

31. Indonesia welcomed the progress of Working Group IV (Electronic Commerce) and encouraged the continuation of its work on the basis of the revised set of draft provisions on the cross-border recognition of identity management and trust services to be prepared by the Secretariat. With regard to Working Group V, his delegation welcomed the finalization and adoption of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment. With the commitment and cooperation of all stakeholders, the Commission's work could be leveraged to the benefit of all nations, in particular developing and least developed countries.

32. **Ms. Melikbekyan** (Russian Federation) said that her delegation noted with satisfaction the adoption of the UNCITRAL Model Legislative Provisions on Public-Private Partnerships and the UNCITRAL Legislative Guide on Public-Private Partnerships. It welcomed the continuing efforts of Working Group I to develop standards aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises, and it was taking an active part in the preparation in Working Group II of amendments to the UNCITRAL Arbitration Rules, concerning expedited arbitration.

33. Regarding the discussion of investor-State dispute settlement reform in Working Group III, she wished to reiterate the need for a cautious and balanced approach that was based on a broad consensus and an objective analysis of existing mechanisms and that took account of regional approaches to regulation.

34. Her delegation was grateful to the UNCITRAL secretariat for the preparation of the draft notes on the main issues of cloud computing contracts. Working Group IV should continue to consider the legal aspects of identity management and trust services. In the light of rapid digital transformation, best practices should be taken into account, particularly in view of the potential consideration of issues relating to effective legal protection of cross-border electronic interaction.

35. The adoption of the UNCITRAL Model Law on Enterprise Group Insolvency and its Guide to Enactment was welcome. Her delegation hoped that Working Group V would have similar success in preparing a set of solutions to common issues facing micro, small and medium-sized enterprises in the context of insolvency.

36. Her delegation was pleased to note the adoption of the UNCITRAL Practice Guide to the UNCITRAL Model Law on Secured Transactions, which was intended to facilitate the interpretation and application of laws adopted on the basis of the Model Law. Lastly, it welcomed the progress made by Working Group VI (Judicial Sale of Ships) under its new mandate.

Agenda item 81: Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm (A/74/131, A/74/131/Add.1 and A/74/132)

37. **Ms. Anderberg** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries welcomed the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss arising out of hazardous activities, contained in the annexes to General Assembly resolutions 62/68 and 61/36, respectively.

38. In its resolution 71/143, the General Assembly had invited Governments to submit further comments on any future action, in particular on the form of the articles and principles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the articles, as well as on any practice in relation to the application of the articles and principles. While the Nordic countries had no particular preference with regard to the final form of the articles and principles, they saw merit in combining the two draft instruments into a single document. In any event, the articles and principles were part of the international law framework, either reflecting customary law or representing non-binding guidance.

39. **Ms. Boucher** (Canada), speaking also on behalf of Australia and New Zealand, said that the three delegations welcomed the references by international, regional and domestic courts, tribunals and other bodies to the articles and the principles, both commended to the attention of Governments by the General Assembly in its resolution 71/143. Given the increasing risk of transboundary harm from such activities, it was necessary to have a consistent, coherent and widely supported international framework setting out relevant standards of conduct and practice.

40. There was little to be gained from attempting to transform the articles and principles into a convention. The continued use of those instruments, together with the ongoing relevant discussions in multilateral and bilateral forums, could contribute significantly to the progressive development of international law in the area. Member States should therefore continue to be guided by those draft instruments.

41. **Mr. Yang** Xi (China) said that the articles and the principles were valuable points of reference for countries. Both instruments, in particular the principles, contained elements that reflected the development of existing international law, an area in which national practices varied. Given the need to consider the various features of environmental damage specific to, inter alia, the atmosphere, water, soil and biological resources, Member States should avoid applying a “one-size-fits-all” standard in contemplating further action on the instruments. The current work should therefore continue to be focused on the monitoring and analysis of developments in State practice. The elaboration of an international convention should not be considered until the requisite conditions were in place.

42. As one of the countries with the largest number of neighbours in the world, China shared the same risks of transboundary harm from hazardous activities many countries. Its Government therefore stood ready to engage in bilateral, regional and international cooperation to address such harm, including by improving international rules in that area.

43. **Mr. Dixon** (United Kingdom) said that there had not been any developments in the previous three years that would necessitate a change in his delegation’s position that there was no need for a convention on the prevention of transboundary harm or the allocation of loss in the case of such harm. Those topics were already covered by a number of binding, sector-specific and

regional instruments. His delegation also questioned the benefit of adopting a convention that took a "one-size-fits-all" approach to all categories of transboundary harm. There was an obvious advantage in subject-specific initiatives tailored to address different activities and potential harms. In that context, a convention on the topic was neither necessary nor desirable; the articles and principles on the topics should remain as non-binding guidance.

44. **Ms. Elgindi** (Sudan) said that the prevention of transboundary harm from hazardous activities and the allocation of loss in the case of such harm were topics of the utmost importance in international relations. The principle of having States share the costs arising from transboundary harm constituted a form of equitable justice. It was important to elaborate a convention based on the articles and principles, especially in view of the need to prevent the harm to health, agriculture, water resources and ecosystems that could be caused by environmentally harmful transboundary activities. The elaboration of such a convention would represent the progressive development of contemporary international law in respect of environmental issues with an international dimension, especially considering that environmental issues could not be resolved exclusively by individual actions of States. The instrument should take into account the principles set out in the Charter of the United Nations, the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and the Rio Declaration on Environment and Development. There was a growing need to build intergovernmental cooperation mechanisms to settle disputes between polluting and affected States. States had the sovereign right to exploit their own resources pursuant to their own environmental and development policies, but also the obligation 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 their national jurisdiction.

45. Referring to the articles on prevention of transboundary harm from hazardous activities, she said that article 1 was unclear in what was meant by the words "physical consequences", given that hazardous activities that might cause transboundary harm could also be associated with situations involving radiological, biological, chemical and physical risks, representing threats to health and the environment. The expression "significant transboundary harm", as used in articles 2, 3, 4, 8, 9, 10, 11, 12 and 15, would exclude the high probability of causing catastrophic harm that could arise, for example, when a toxic waste mining dyke broke. The scope of what was to be understood as "significant transboundary harm" had not been determined. Moreover, article 3 should be amended to read: "The State of origin shall take all appropriate measures to avoid, prevent or reduce significant transboundary harm". Furthermore, a fault-based approach was perhaps not suitable for addressing all environmental harm, because some risks were the result of activities that were hazardous by nature and not covered by international law. In that connection, the expression "all appropriate measures" in that article should be replaced by the words "all necessary measures", as the former could be interpreted as relating to the capacity of the State of origin to prevent harm. Cooperation to prevent harm should be compulsory rather than optional and should not be contingent on good faith.

46. Since article 6 contained no reference to specific activities covered by the articles, it would be advisable to include priority activities and a mechanism for the incorporation and updating of new activities. With regard to article 7, a standard methodology for assessing risks and harm should be established. Consideration should be given to extending response times under article 8, where such extensions were justified. Specific periods or a mechanism could be set up for the establishment of reasonable periods for suspending activities under article 11. Her delegation supported the inclusion of the following provision in article 14: "For the purposes of this convention, information on health and human and environmental safety shall not be considered confidential." The wording "the State likely to be affected" in articles 16 and 17 should be amended to read "the State or States likely to be affected".

47. A future convention on the topic should include aspects of responsibility for environmental harm, particularly with regard to adequate compensation and reparation, and the determination of appropriate measures for the prevention of such harm and its related risks. The term "hazardous activities" should include a reference to disaster management, which was subject to human assessment and was a type of action not covered by international law. With regard to the allocation of loss, it was important that both the State of origin and the affected State adopt the necessary measures. The allocation of loss should be carried out in a way that ensured cooperation between States and the establishment of funds to address the harm done.

48. **Mr. Bigge** (United States of America) said that the articles and principles represented a positive step in encouraging States to establish mechanisms to address such issues as notification in specific national and international contexts. It was most appropriate for the articles and principles to be treated as non-binding standards to guide the conduct and practice of States,

and for the work on prevention of transboundary harm to remain formulated as articles. The articles and principles would be more likely to gain widespread acceptance and fulfil their intended purpose if retained in their current form. Clearly innovative and aspirational in character, they were each designed to serve as resources for encouraging national and international action in specific contexts, rather than to form the basis of a global treaty.

49. **Ms. Ozgul Bilman** (Turkey) said that, as documents of a guiding nature that provided standards of conduct for States, the articles and principles should be retained in their current, non-binding form.

50. **Mr. Jaime Calderón** (El Salvador) said that, in a globalized world, it was increasingly necessary to recognize and apply the principles of customary international law to matters relating to the environment. Ensuring a comprehensive approach to the scope of the international responsibility that could arise from an action or omission by a State in connection with the protection of its environment, ecosystems and cross-border natural resources remained a challenge. In that regard, the obligation to prevent transboundary harm to the environment constituted an obligation under international environmental law whereby States could be liable for the significant harm done to persons beyond their borders by activities originating in their territory or under their authority or effective control. El Salvador thus supported the elaboration of a convention based on the articles and principles, given the necessity, as part of the progressive development and codification of contemporary international law, to turn them into law, in order to more effectively compel States to preserve and respect the environment, and thus ensure intergenerational sustainable development.

51. In addition to those that it had submitted in writing in response to General Assembly resolution 71/143, El Salvador had several recommendations on the articles. At the end of the third preambular paragraph, it proposed to add the words “particularly if such activities pose serious risks to neighbouring States”. It also suggested that the fifth preambular paragraph be modified to read “Recognizing that international cooperation is of critical importance to fulfilling the purposes of the present resolution”. Lastly, it recommended the addition of a definition of the word “significant”, used for quantifying transboundary harm in articles 1, 2, 3, 4, 8, 9, 10, 11, 12 and 15, in order to clarify its intended meaning.

52. Given the types of guarantees that they provided for, the principles could have a significant impact on State practice and could thus give rise to customary norms with legally binding effects which could be applicable to the international community. Incorporating those principles and the related practices into a draft convention would make them part of international treaty law and would ensure their effective and universal application by States.

53. A draft convention was critical to the fulfilment of international obligations to comprehensively address environmental emergencies and prevent transboundary harm. His delegation was committed to advancing the work on the topic in order to ensure the timely adoption of a final outcome.

54. **Mr. Proskuryakov** (Russian Federation) said that notwithstanding the lack of consensus concerning future action on the articles, they could be used by States, including for the conclusion of agreements on the topic in question. Efforts to find the most acceptable form for the articles in view of their future practical use should continue.

55. **Mr. Amaral Alves De Carvalho** (Portugal) said that, although the action taken by the General Assembly in respect of the articles and the principles represented a positive step, much remained to be done to fulfil the recommendations made by the International Law Commission in its reports on the work of its fifty-third (A/56/10) and fifty-eighth (A/61/10) sessions. His delegation welcomed the Secretary-General’s report (A/74/132), which contained a compilation of decisions of international courts, tribunals and other bodies, with relevant examples, from the period 2016 to 2019, of decisions of the national courts of two Member States and of an advisory opinion of the Inter-American Court on Human Rights in which the articles and principles were specifically referenced. As such information was relevant for the Committee’s discussions, his delegation hoped that the Secretariat could continue updating the compilation.

56. The topics of prevention of transboundary harm from hazardous activities and of allocation of loss in the case of such harm arising out of hazardous activities should be analysed in the light of their history and of the purposes of codification and progressive development of international law. As the concept of a human right to the environment was becoming a cornerstone of international human rights law, it was to be expected that regional human rights courts, tribunals and other relevant bodies would be increasingly called on to deliver decisions and opinions on the recognition and scope of that right, as exemplified by the advisory opinion of the Inter-American Court on Human Rights cited by the Secretary-General in his report (A/74/132). The articles and principles could thus serve as a point of departure for the

progressive development and progressive interpretation of international environmental law. In addition, given that the International Law Commission had included the prevention of transboundary harm, on the one hand, and international liability in the case of loss arising from such harm, on the other, under the topic "International liability for injurious consequences arising out of acts not prohibited by international law", it was necessary to ensure that the phases of prevention and allocation of loss were dealt with together, with equal legal force and enforceability.

57. Portugal hoped that it would be possible to develop a single convention on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm that would adequately establish State responsibility in those areas and provide for the implementation of an effective and fair system of compensation for the effects of lawful activities of States. In the meantime, however, given the need for coherence, a single set of articles or principles addressing those topics together would be a positive step.

58. **Mr. Azizan** (Malaysia) said that, in order to reduce the significant social, economic and environmental impact of transboundary harm, it was necessary to develop a consistent, coherent and widely supported international framework setting out relevant standards of conduct and practice. The articles and principles would contribute positively to the progressive development of international law in the area of transboundary harm and would lead to the further development of comprehensive standards for all States. Although the consolidation of the articles and the principles into a legally binding international or regional convention was likely to take many years, States had a general duty under international law to act with due diligence in order to prevent or minimize transboundary harm.

59. **Mr. Avramović** (Bosnia and Herzegovina) said that Bosnia and Herzegovina was firmly committed to upholding international law and the General Assembly resolutions on the prevention of transboundary harm from hazardous activities. It was therefore concerned at the plan by Croatia to build a facility for the storage and disposal of low- and intermediate-level radioactive waste from the operation and decommissioning of the Krško nuclear power plant near the border with Bosnia and Herzegovina and the national park surrounding the Una River, once deemed the cleanest river in Europe. That nuclear power plant, located in Slovenia, was jointly owned by Croatia and Slovenia and was scheduled to be shut down in 2043; Croatia was responsible for the disposal of one half of the nuclear waste. Should the construction be approved, that facility would be located only two miles away from the town of Novi Grad, Bosnia and Herzegovina, whose more than 30,000 inhabitants unanimously opposed the project. It would also expose the citizens of nine other neighbouring municipalities to radioactive waste.

60. Bosnia and Herzegovina strongly opposed the construction of the facility in the proposed location, as it would jeopardize good neighbourly relations between Bosnia and Herzegovina and Croatia; would not only have a professional impact, but would also influence socioeconomic conditions in the affected area; and would be at odds with article 3 of the articles on prevention of transboundary harm from hazardous activities, which provided that "the State of origin shall take all appropriate measures to prevent significant transboundary harm or, at any event, to minimize the risk thereof". The authorities of Bosnia and Herzegovina wished to protect the people living near the proposed location in both Bosnia and Herzegovina and Croatia, and had already expressed their concerns to the authorities of Croatia. Although they fully understood the position of Croatia and the need to build such a facility, they called upon the latter to find a mutually agreed solution and to avoid any possible legal disputes.

61. **Mr. Sharifi** (Islamic Republic of Iran) said that the two by-products of the International Law Commission's work on the issue of international liability for injurious consequences arising out of acts not prohibited by international law, namely, the articles and the principles currently under consideration, contained elements common to domestic civil liability regimes in place in many countries and embodied in international and regional schemes and, as such, were part of *lex lata*. However, because of the progressive nature of some of their elements, it would be long before States could adapt to them and fully incorporate them into their domestic law. While the overall perception regarding certain principles derived from existing universal instruments, namely, prevention, cooperation, prior authorization, notification and information, remained undisputed, their implementation seemed likely to be a matter of controversy. Likewise, despite universal agreement on such notions as compensation and response measures, the definitions of the term "damage" and of what constituted "significant" damage were open to interpretation and therefore controversial. In that context, principles 6 (International and domestic remedies) and 7 (Development of specific international regimes) were particularly important. Given that some time would be required for Member States to develop relevant liability regimes at the national and

international levels, the time did not seem ripe for the adoption of the instruments as conventions.

62. The Islamic Republic of Iran was a party to international instruments regulating liability regimes in areas such as the transport of petroleum, for the purpose of which specific domestic regimes had been developed in recent years; efforts were also under way to complement them with liability regimes for hazardous activities. Were all Member States to show due diligence in cases of transboundary harm, such as that to which vast swaths of the Islamic Republic of Iran had been exposed, no State would remain injured or uncompensated and no victim would remain without remedy. The Islamic Republic of Iran stood ready to work with other countries to prevent and respond to transboundary harm.

63. **Mr. Abdelaziz** (Egypt) said that the articles on the prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities constituted a valuable contribution to general international law. An international legal framework was needed to define the rules for addressing the social, environmental and economic impact of such transboundary harm. It was important to continue compiling the opinions and related practices of Member States in that regard, without prejudice to the possibility of distilling them in some form of international legal instrument at a later date. His delegation's full statement was available on the PaperSmart portal.

64. **Mr. Bručić-Matic** (Croatia), speaking in exercise of the right of reply, said that Croatia attached great importance to the protection of the environment, as evidenced by its status as a party to relevant international agreements and the contribution of its experts to relevant international forums. Bosnia and Herzegovina had unfortunately politicized the agenda item under discussion; prior to the current session, it had not commented on that item since its inclusion on the agenda of the General Assembly. Croatia was fully entitled to build on its territory a storage facility for its own low- and intermediate-level radioactive waste and institutional waste. Although no final decision had been taken in that regard, a number of relevant activities had been carried out. Experts from the International Atomic Energy Agency had participated in the preliminary site-selection process and had positively evaluated the methodological approach and multi-criteria assessments used, as well as the results. Once formally initiated, the process would include an environmental impact assessment and consultation with stakeholders, including the public and neighbouring States. As a State member of the European Union whose laws incorporated high standards and which applied the Union *acquis*, Croatia was committed to carrying out all its activities in accordance with the highest international standards.

65. **Mr. Avramović** (Bosnia and Herzegovina), speaking in exercise of the right of reply, said that his delegation's position on the matter was firmly supported by the facts on the ground.

Agenda item 85: The law of transboundary aquifers

66. **Mr. Jensen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that, as access to safe freshwater was essential and billions of people still lacked access to safe freshwater, the Nordic countries welcomed further discussion on the law of transboundary aquifers. The articles on the law of transboundary aquifers provided helpful tools for the sustainable management of such aquifers. Indeed, given the vulnerability of transboundary aquifers and the dependence of a large number of people on well-managed transboundary aquifers, it was particularly important for aquifer States not to cause harm to such bodies of water.

67. With regard to the substance of the articles, the Nordic countries found, for example, that the threshold of "significant harm" referred to in articles 6 and 12 was too high for the safeguarding of aquifers for the benefit of the people using them.

68. On a positive note, a number of bilateral and regional agreements and arrangements on transboundary aquifers had been concluded, such as the Guarani Aquifer Agreement between Argentina, Brazil, Paraguay and Uruguay. The Nordic countries commended the States that had entered into such agreements and arrangements, and recommended that all States take similar steps to ensure proper management of transboundary aquifers. The Nordic countries were committed to continuing the discussions on the law of transboundary aquifers.

69. **Mr. Berger** (Israel) said that Israel attached great importance to the issue of transboundary aquifers. As a result of desertification and climate change, freshwater scarcity affected the entire world, including Israel and the surrounding region. Coordinated legal and technical work was required to improve water management at the local, regional and international levels, and to generate new water sources through the use of relevant technologies. International efforts in that regard, including by the United Nations on the implementation of the 2030 Agenda for Sustainable Development, in particular work aimed at achieving Sustainable Development Goal 6, were to be commended. As

reflected in its voluntary national review report, presented at the 2019 high-level political forum on sustainable development, Israel was fully committed to the Sustainable Development Goals and hoped to make a positive contribution to the development of desalination and water-saving agricultural technologies.

70. Although the articles were useful guidelines for the negotiation of bilateral or regional agreements on the reasonable utilization of transboundary aquifers and the obligation not to cause significant harm to such aquifers, his delegation was of the view that it was not appropriate to codify them formally into an international convention. Specific factors had to be taken into consideration, including the geophysical conditions and hydrological characteristics of the aquifer; present and future uses; climate conditions; economic and social considerations; political realities and inter-State dynamics; and emerging technologies. An appropriate balance could be struck through a practical, non-dogmatic approach that took into account the principles underlying the articles. There was thus no need to move beyond the articles.

71. **Mr. Bigge** (United States of America) said that the International Law Commission's work on transboundary aquifers constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers. Given that there was much to be learned about transboundary aquifers and that many aspects of the articles clearly went beyond current law and practice, his delegation believed that context-specific arrangements were the best way to address pressures on transboundary groundwaters in aquifers, as opposed to a refashioning of the articles into a global framework treaty or into principles.

72. Numerous factors might be taken into account in any specific negotiation, such as the hydrological characteristics of the aquifer, present and future uses, climate conditions and economic, social and cultural considerations. Maintaining the articles in draft form would be the best way of ensuring that they would be a useful resource for States in all circumstances. States should enter into appropriate bilateral or regional agreements or arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the articles.

73. **Mr. Bukoree** (Mauritius) said that, as humanity's most important natural resource, water had often been at the centre of global challenges. Indeed, groundwater was a primary source for water supply and supported agriculture and irrigation, particularly in dry regions. However, water quantity and quality were deteriorating, and the struggle among all common water users was likely to intensify as a result of climate change. That struggle might become even more visible in river basins and aquifers that crossed political boundaries. However, the mutual need for water might give rise to strategic cooperation rather than open conflict and might lead to peaceful solutions to water disputes. Decision-makers attached great importance to ensuring the availability of and access to freshwater, most of which was found in aquifers, many of which were transboundary.

74. The water crisis was primarily a crisis of governance. Institutions often lacked the capacity to reconcile conflicting approaches to the use and allocation of water from within one basin or aquifer system, at both the national and the transboundary levels, a situation that had resulted in fragmented management of freshwater resources. Given their interdependent nature, water-related systems needed to be managed in an integrated manner. Furthermore, owing to the non-static nature of water, water management posed more complicated challenges in terms of control, authority and dominance than management of land resources.

75. Mauritius was of the view that the articles on the law of transboundary aquifers could constitute a basis for countries to develop agreements with neighbouring countries for the proper management of transboundary aquifers. While the articles might eventually lead to a convention, such an instrument would require thorough review by States and might be difficult to implement. Regional agreements were therefore preferable.

76. In the meantime, it was critical to ensure proper management of transboundary aquifers, which provided 65 per cent of the world's drinking water. The implementation of the 2030 Agenda, in particular the pursuit of Sustainable Development Goal 6, was essential in that regard. There was also a need for closer cooperation among Member States and United Nations agencies on transboundary aquifers, as well as for further relevant scientific studies. Technical cooperation, such as that carried out in the context of the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization (UNESCO), was particularly critical to supporting future agreements among countries on joint management of water resources.

77. While the increasing demands of population growth and food production created a need for larger and more reliable quantities of water, useable water resources were declining as a result of pollution, over-pumping and climate change. If not sustainably managed, the Earth's natural resources could soon become depleted or unusable.

78. Water could serve as a catalyst for dialogue in otherwise confrontational relationships. To that end, transboundary aquifer management required greater political and diplomatic engagement worldwide. Riparian States should harness synergies between "hard" and "soft" politics, and among foreign, development, economic and environmental policies, in order to promote hydro-diplomacy and ensure the successful implementation of the 2030 Agenda.

79. **Ms. Ozgul Bilman** (Turkey) said that, as each transboundary aquifer had its own specific characteristics, it would be inappropriate to apply a single framework to all such aquifers. The work on the law of transboundary aquifers should therefore focus on general principles, and the articles should remain as voluntary, non-binding guidance for State practice.

80. **Ms. Rivera Sánchez** (El Salvador) said that the consideration of the current agenda item reflected States' commitment to developing awareness of the need to protect natural resources and the environment. Owing to the globalization of natural phenomena, the principle of intergenerational equity, whereby States had an obligation to preserve the environment for the benefit of future generations, had gained prominence in the international legal order. In that regard, the articles could serve as guidelines for bilateral and regional agreements and arrangements for the proper management of transboundary aquifers. In particular, they could have a significant impact on the practice of El Salvador, including with regard to the joint management of the transboundary aquifers that it shared with Guatemala and Honduras, and could ensure better use, conservation and management of its transboundary aquifers. To that end, the transformation of the articles into a binding convention would be valuable.

81. Referring to the substance of the articles, she said that, with respect to draft article 2 (Use of terms), it was her delegation's understanding that the term "watercourse" referred to a system of surface and underground waters constituting, by virtue of their physical relationship, a unitary whole and flowing into a common terminus. El Salvador also proposed the inclusion of a definition of the term "significant harm", in order to ensure a consistent interpretation of that concept. Lastly, her delegation encouraged other delegations to consider the appropriateness of modifying paragraph 3 of article 6 to provide for the compensation of the affected State by the State whose activities caused the harm.

82. The articles strengthened States' efforts to preserve and manage their watersheds. It was therefore essential to incorporate those articles into national legal frameworks. While El Salvador did not have a specific law on the management of transboundary aquifers, its national laws contained a number of relevant rules. For example, one law provided that the management of construction projects should be regulated to ensure the stability of watersheds. Another law established critical zones for the protection of water resources, including the upper parts of watersheds delineated for that purpose. In addition, El Salvador was a party to the Convention on Biological Diversity, which provided that States had, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and 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.

83. It was of great importance to her delegation that the articles have a binding effect on the practice of States, as they harmonized regulations pertaining to water resources and promoted better governance of transboundary aquifers, in order to ensure that States addressed difficulties in managing such aquifers in an orderly manner. El Salvador therefore supported the continuation of the discussions under the current agenda item.

84. **Mr. Machida** (Japan) said that, to achieve sustainable development, Member States should establish legal instruments regulating the use of transboundary aquifers, particularly given the increasing demand for freshwater and the overexploitation and pollution of a number of such aquifers. The articles provided valuable guidelines that countries could consider in establishing bilateral or regional legal frameworks to manage their aquifer systems. They reflected a wide range of State practices, were well supported by scientific evidence and could serve as a common basis for negotiation of bilateral or regional agreements or arrangements.

85. Given the slow but steady progress being made in the codification of the law of transboundary aquifers at the bilateral and regional levels, with the conclusion of agreements and arrangements based on the articles, Japan proposed that the next discussion on the item be held at the seventy-ninth session of the General Assembly, in order to allow adequate time for further developments in State practice that could guide the Committee in its decision on the final form of the articles. Although Japan had no transboundary aquifers itself, it had, in the interest of advancing sustainable development and the rule of law, served as facilitator of the discussions on the current agenda item in the Committee since the adoption of the articles on second

reading by the International Law Commission. While Japan had not assumed that role at the current session for technical reasons, it would continue to participate actively in the relevant discussions.

86. **Ms. Pereira** (Portugal) said that the relevance of sharing transboundary watercourses was demonstrated by the attention paid to it, its potential to cause conflict and its political, economic and environmental ramifications. The articles were a valuable contribution to the proper management of transboundary aquifers and hence to the promotion of peace. They incorporated principles of international environmental law and, through references to "vital human needs", took into account significant aspects of the human right to water.

87. That the articles were similar to some provisions of the Convention on the Law of the Non-navigational Uses of International Watercourses and the United Nations Convention on the Law of the Sea demonstrated that they were in line with developments in contemporary international law. The articles were also compatible with relevant European Union law, which was binding on Portugal. His delegation encouraged all States to contribute actively to the development and universal codification of the law of transboundary aquifers. In that connection, Portugal believed that the articles should evolve into a framework convention.

88. **Mr. Skoknic Tapia** (Chile) said that his delegation was committed to the guiding principles of the articles, in particular the principle of equitable and reasonable utilization, the obligation not to cause significant harm and the obligation to cooperate. Chile considered that the principle of sovereignty of aquifer States, set out in article 3, applied to a permeable, water-bearing geological formation situated in the territory of a particular aquifer State. In that regard, it should be borne in mind that article 2, paragraph (a), in which the term "aquifer" was defined as including the water contained in the saturated zone of the formation, had been proposed to that end. It should be interpreted and applied in accordance with the principles of customary law applicable to shared water resources.

89. Notwithstanding the importance of making progress towards a multilateral framework agreement on the law of transboundary aquifers, the utilization of shared groundwater resources was subject to the principle of equitable and reasonable utilization, and the application of that principle needed to be determined in the light of all relevant factors, identified on a case-by-case basis and without preconceived ideas, with due regard for basic human needs. His delegation supported all initiatives to promote scientific knowledge and information exchange concerning transboundary aquifers and stressed the need for States to respect the independence and neutrality of international technical bodies called on to give advice on related matters.

90. **Mr. Abdelaziz** (Egypt) said that Egypt attached great importance to the issue of transboundary aquifers. It considered that the articles contained positive elements and that no potential approach to the topic should be ruled out. Its full statement was available on the PaperSmart portal.

The meeting rose at 12.30 p.m.