United Nations A/C.6/58/SR.18

General Assembly
Fifty-eighth session

Official Records

Distr.: General
30 December 2003
English
Original: Spanish

Sixth Committee

Summary record of the 18th meeting
Held at Headquarters, New York, on Thursday, 30 October 2003, at 10 a.m.

Chairman: Mr. Baja . . . . . (Philippines)

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03-58808 (E)

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The meeting was called to order at 10.08 a.m.

Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*) (A/58/10)

1. **Mr. Tavares** (Portugal) said that his delegation continued to advocate that the draft articles should cover diplomatic protection of crew members of ships. The flag State should have the right to protect the members of a ship's crew in the event that the State of nationality was unable to exercise that right.

2. In principle, international organizations should be entitled to exercise diplomatic protection in respect of nationals employed by them. However, it would have to be established whether the international organization or the State of nationality of the person in question should have priority in exercising that right. A possible criterion would be whether the person employed by an international organization had a permanent link with the organization in the sense of being an international civil servant. In that case, his delegation thought that the primary right to protect the person would belong to the organization, and only subsidiarily to the State of nationality. Furthermore, it would have to be considered whether that reasoning would apply to all international organizations or only to those possessing an objective international legal personality distinct from that of its member States and whether its constituent instrument endowed the organization with its own separate powers.

3. His delegation reiterates that it would be appropriate to consider the question of diplomatic protection where a State or an international organization administered a foreign territory or State. In particular, it must be determined who should exercise diplomatic protection in respect of persons from that territory suffering injury abroad, and against whom the State of nationality could exercise its right of diplomatic protection when foreign nationals suffered injury in the administered foreign territories or States. Although the topic of diplomatic protection was mainly one of codification, further discussion of progressive development was warranted.

4. With regard to diplomatic protection of stateless persons and refugees (draft article 7), his delegation continued to feel that the requirement of both lawful and habitual residence set too high a threshold and might deprive such individuals of effective protection. The Commission should give due consideration to the issue during its second reading of the draft articles.

5. The topic of international liability raised important issues concerning the role of the operator and of the State with regard to the loss; the possibility of limiting such liability and of resorting to insurance and funds to provide supplementary compensation when necessary; and the final form the work on the topic should assume, which his delegation believed should be a set of draft articles complementing those already adopted on prevention.

6. With regard to allocation of loss, the Commission should draft a set of articles regulating the following issues: the definition of loss, hazardous activity and operator; the general principle that States and persons under their jurisdiction should not bear losses resulting from an incident caused by a hazardous activity that did not take place in their territory and with which they had no relationship; the need for operators involved in hazardous activities to be held liable for losses caused by their activities, to plan for the possibility of an incident and to be ready to take certain measures if an incident should occur; the principle of the subsidiary or residual liability of the State; the possibility of limiting the liability of the operator; the necessity of requiring insurance and creating funds for supplementary compensation; the need to put in place adequate remedies for those suffering damage; and, lastly, the inclusion of all types of damage, including damage to the environment.

7. **Mr. Mathias** (United States of America) said that there was no established customary law on the issue of diplomatic protection of the crew members of a ship by the flag State. In fact, a number of the draft articles provisionally adopted or referred to the Drafting Committee were not based on international customary law. Although the United States was willing to consider the progressive development of law with respect to some of those issues, for example, the issue of the protection of stateless persons and refugees addressed in draft article 7, it felt that the Commission should limit the scope of its work on diplomatic protection to the codification of customary international law and therefore omit the issue of the protection of non-national crew members from the scope of the project.

8. The rule of continuous nationality required that the person injured must be a national of the claiming State continuously from the time of injury to the date

of resolution. Draft article 4 deviated from that rule of customary international law in two important respects. First, it shifted the endpoint of the continuity requirement from the date on which the claim was resolved to the date on which it was presented. Second, it left open the question of whether the continuity requirement applied during the period between the injury and the end date, whether that was taken to be the date of presentation or the date of resolution. His delegation did not believe that a persuasive argument had been made for that deviation from customary international law. The Commission should revise draft article 4, together with draft articles 6, 7 and 20 (which repeated the same errors), so that they reflected customary international law. The same could be said about the treatment of diplomatic protection of shareholders. A State should only be able to exercise diplomatic protection on behalf of shareholders when the shareholders suffered unrecovered direct losses.

9. Moreover, the draft articles on the rule of exhaustion of local remedies did not appear to reflect closely customary international law. For example, a State was entitled to exercise diplomatic protection only after the injured person had exhausted all remedies available in the injuring State. Thus, an injured person must appeal any judicial or administrative court decision until no further appeal was possible. Draft article 8 attempted to embody that rule, but used an overly narrow definition of the phrase "local remedies", according to which an injured person might pursue only the remedies available "as of right". The definition deviated from the rule of customary international law requiring the injured person to pursue all potential remedies, including those available only at the discretion of the highest judicial or administrative court.

10. The requirement of exhaustion of local remedies was subject to certain exceptions, which the Commission addressed in draft article 10. The United States questioned whether the standard for the futility exception set forth in subparagraph (a) of article 10 accurately reflected customary law. Of the two exceptions set forth in subparagraph (c), the first did not accurately express the exception under customary law discussed in the commentary and the second was vague and overly broad.

11. The topic of international liability for injurious consequences arising out of acts not prohibited by international law raised very complex legal issues that could only be resolved in the context of specific sectors and activities. States should have sufficient flexibility to develop schemes of liability to suit their particular needs.

12. His delegation did not agree with the Special Rapporteur's conclusion that "States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss". The Special Rapporteur had not set forth the legal basis for that conclusion. Without clearly defining the details of such a supposed "duty", the Special Rapporteur suggested that it might be fulfilled by negotiating a liability convention, by promulgating domestic measures or through some other means, depending on the circumstances. While States should continue to provide for liability of private parties in appropriate circumstances, there was no international legal obligation to do so.

13. International regulation in the area of liability ought to be preceded by careful negotiations concerned with particular topics (such as oil pollution or hazardous wastes) or with particular regions (such as environmental damage in Antarctica).

14. His delegation hoped that the Commission would not take up the recommendation of the Special Rapporteur to elaborate a liability protocol to a convention on prevention. The United States did not support the development of a general international legal regime on liability and did not believe that other States had much interest in doing so.

15. **Mr. Liu** Zhenmin (China) said that the Commission's approach of codifying customary law, as reflected in the draft articles provisionally adopted during its recent session, was appropriate. His delegation supported those draft articles in principle.

16. With regard to the four exceptions to local remedies provided for in draft article 10, his delegation wished to make the following observations. Firstly, the assumption must be that the judicial system of any State was capable of providing reasonable legal remedies, and there should be no subjective prejudgement negating the fairness and effectiveness of the injuring State's legal remedies. Determination of the reasonable possibility of effective redress should be primarily based on whether the actual application of local remedies gave rise to clear and serious violations of the local law, the burden of proof being on the State intent on applying diplomatic protection. Secondly, the absence of a voluntary connection between the injured

person and the State where the injury occurred could constitute an exception, although, should relevant circumstances rule out application of the principle of diplomatic protection pursuant to the relevant international law, there would be no justification for the voluntary connection exception. For example, when an act of a State constituted a direct violation of the international rights of another State, or when transboundary harm arose out of acts not prohibited by international law, the injured State might seek to resolve the matter directly with the responsible State, rather than by applying the principle of diplomatic protection and the rule of exhaustion of local remedies. Thirdly, the clause in subparagraph (c) of article 10 reading "the circumstances of the case otherwise make the exhaustion of local remedies unreasonable", while offering the court presiding over the dispute the benefit of a discretionary ruling, could open the door to an arbitrary expansion of the application of exceptions. Peaceful settlement of a dispute between States need not be through a judicial avenue. Arbitrary invoking of exceptions by States in the bilateral settlement of disputes would be harmful to the effective application of the local remedies rule. Since the criterion concerning a reasonable possibility of effective redress was already rather broad, no further elements of uncertainty should be added. His delegation therefore favoured deleting the quoted language. Lastly, waiver by the responsible State of the requirement that local remedies should be exhausted could constitute an exception, but it would be better if such a waiver were explicit.

17. On the subject of diplomatic protection of corporations as legal persons, equal emphasis should be laid on the interests of the corporation and those of the host State. His delegation favoured taking the principle established in the judgment in the *Barcelona Traction* case as the primary basis for the exercise of diplomatic protection in respect of corporations. The right to exercise diplomatic protection should belong solely to the State of nationality of the corporation; the State of nationality of the shareholders, as a general rule, should not have the right to accord diplomatic protection to them. In determining the State of nationality of a corporation, international practice and the approach widely adopted by States should be taken into account. Draft article 17 as prepared by the Special Rapporteur was basically acceptable. Since domestic law generally specified the conditions for incorporation within the national territory, the fact that a corporation was incorporated in a State under its laws was, in effect, sufficient to meet the requirement for a genuine link between the corporation and the State in question. If, for economic reasons, an investor chose to set up a corporation in a State that did not have adequate requirements for incorporation, the risk of losing diplomatic protection because of the lack of a genuine link between the corporation and its State of nationality was borne solely by the investor. Hence, it was preferable to treat the State of incorporation and the place of registered office as the State of nationality of a corporation, without the need to adopt other criteria, such as a "genuine link" or an "appropriate link".

18. The phrase "has ceased to exist" in subparagraph (a) of article 18 referred to cessation of the status of the corporation as a legal person rather than to its de facto paralysis, financial crisis, cessation of business operations or even liquidation. As indicated in the judgment of the International Court of Justice in the *Barcelona Traction* case, only changes in legal status should be considered. The exception should be aligned with the principle of continuous nationality as contained in draft article 20. As currently drafted by the Special Rapporteur, article 18, subparagraph (a), and article 20 could give rise to a situation in which the State of nationality of a corporation and the State of nationality of the shareholders of the corporation were both entitled to exercise diplomatic protection. The Special Rapporteur did not believe that to be problematic. China, however, believed that in such a situation the State of nationality of the shareholders might accord diplomatic protection to its shareholders, while the State of nationality of the corporation might do the same for the corporation, leaving the host State to face two different disputes resulting from the same injury. That would undoubtedly complicate resolution of the dispute and place an additional burden on the host State. The Commission should avoid situations in which multiple States might claim the right to exercise diplomatic protection with respect to the same injury and should reconsider the problem. To avoid disagreement, the words "the place of its incorporation" in draft article 18, subparagraph (a), should be changed to read "the State of its incorporation".

19. Subparagraph (b) of draft article 18 should not be construed to mean that the State of nationality of the foreign shareholders would automatically initiate the procedure of diplomatic protection when the State of

nationality of the corporation had infringed upon the rights of the corporation. Only after the corporation's attempt to assert its rights to obtain redress from its State of nationality had failed, owing to a serious violation of the law by that State, could the State of nationality of the foreign shareholders exercise diplomatic protection. Even then, the foreign shareholders must first exhaust local remedies, and only when they had been denied redress through that channel would their State of nationality be allowed to intervene to exercise diplomatic protection.

20. With regard to the exception set forth in draft article 19, protection of shareholders by their State of nationality in the event of direct infringement of their rights constituted the exercise of diplomatic protection in respect of natural persons. Under the relevant rules, diplomatic protection in such cases presented no problems.

21. The provisions of draft article 21 on lex specialis should be expanded to be applicable to all the draft articles on diplomatic protection in respect of natural and legal persons alike. There were many lex specialis regimes relevant to diplomatic protection. As a general rule, it was essential to give clear priority in application to lex specialis rules, such as bilateral investment protection agreements.

22. With regard to draft article 22, the application mutatis mutandis to other legal persons of the provisions on the exercise of diplomatic protection in respect of corporations would give rise to serious problems. In real life, the specific circumstances of other legal persons varied greatly, given the wide variety of organizations, institutions and entities comprised by the category. Such entities were not only different from one another but very different from corporations as well. Their connections with the protecting State were not easy to establish in a uniform manner. Although they were engaged in extensive international exchanges, they were rarely accorded diplomatic protection by States. In that area there was little solid case law to draw upon, so that insistence on applying the principles mutatis mutandis could create new problems and produce great political uncertainty. His delegation therefore proposed that the article should be deleted.

23. **Mr. Abraham** (France) noted, with regard to the draft articles provisionally adopted by the Commission at its fifty-fifth session, that draft article 8 made reference to draft article 7, which his delegation had criticized as inconsistent with law. The principle that a State might exercise diplomatic protection in respect of stateless persons or refugees was not based on practice, was contrary to the Protocol to the Convention relating to the Status of Refugees of 1951 and had no basis in the Convention on the Reduction of Statelessness of 1961. Apart from that major reservation, draft article 8 adequately expressed the customary norm of exhaustion of local remedies. It referred only to judicial or administrative remedies available as of right and excluded remedies as of grace, although it was unclear whether recourse to a jurisdiction that was not national but was open to all nationals of the State would have to be exhausted before a State could exercise diplomatic protection.

24. Draft article 9 stipulated that local remedies must be exhausted where a claim was brought "preponderantly" on the basis of an injury to a national. However, the Commission did not specify what factors would make it possible to gauge the predominance of the indirect injury. Examination of the relevant case law should make it possible to extract the principal factors to be considered in making the assessment.

25. Subparagraph (b) of draft article 10 provided that local remedies did not need to be exhausted when there was "undue delay" in the remedial process, but the delay should be taken into account only when it was tantamount to a denial of justice. The second exception in subparagraph (c) presented some difficulties; the scope of the general rule would be seriously altered if an exception from the rule could be obtained merely by invoking the "unreasonable" nature of exhaustion of local remedies in the particular circumstances. Only extraordinary difficulties should be allowable as an exception to the primary exhaustion of remedies rule. Therefore, the Commission should note in the commentary the pertinence of the *ad impossibilia nemo tenetur* rule.

26. Draft article 17, paragraph 2, addressed the delicate question of how to determine the State of nationality of a corporation. The best solution would be to retain the cumulative criteria of place of incorporation and place of registered office. That formula would not significantly restrict the exercise of diplomatic protection, since in practice corporations usually had their registered office in the State in which they were incorporated, and the combination of the two criteria could serve to restrict the protection facilities

that corporations sought by incorporating in tax havens. To opt for a more flexible formula allowing for either the place of incorporation or the place of registered office would lead to the phenomenon of dual protection. But to adopt the two criteria together would have the disadvantage that a corporation that had established its registered office in a State other than the one in which it was incorporated would be left without protection. In order to cover that gap, the Commission might indicate that, as a subsidiary consideration, the existence of genuine links between the corporation and the State of incorporation or the State of registered office should be taken into account. In that case, the State of nationality would be the State with which the corporation had the closest link. On the other hand, the criterion of a genuine link, considered in isolation or as a principal condition, would introduce elements of assessment with regard to economic control of the corporation and the composition of its body of shareholders, which could entail the risk that diplomatic protection of corporations would be nothing more than a pretext for protecting its shareholders.

27. Draft article 18, subparagraph (a), and draft article 20 entailed the same risk regarding the right to protect corporations and shareholders. His delegation would submit written comments in that regard to the Commission secretariat. Subparagraph (b) of draft article 18 raised a major problem by providing that the State of nationality of the shareholders could exercise diplomatic protection on their behalf if the corporation had the nationality of the State responsible for causing the injury to it. In the *Barcelona Traction* case, the Court had not confirmed that proposition but had mentioned it briefly in connection with considerations of equity. From the standpoint of general international law, that solution would call into question one of the most solid bases of diplomatic protection, which required that a distinction should be drawn between the rights of the corporation, which were to be protected, and the interests of the shareholders, which were not. In other words, the proposed exception would undermine the very essence of the regime of diplomatic protection of corporations. Moreover, the exception failed to be admissible as a concession to equity, since the Court in the *Barcelona Traction* case, had held that permitting the State of nationality of the shareholders the right to protect would create a climate of confusion and uncertainty in international economic relations and would disturb the balance between the advantages that a shareholder might obtain abroad and the risk the shareholder ran in investing capital in a corporation that was not of the same nationality.

28. Draft article 21 should apply to all the draft articles, since there was no valid reason for the traditional lex specialis clause to apply only to diplomatic protection in respect of corporations. The wording of draft article 21 could be modelled on article 55 of the articles on the responsibility of States for internationally wrongful acts, so that it would read, “These articles do not apply where and to the extent that the protection of persons is governed by special rules of international law”.

29. Article 22 addressed the problem of whether legal person other than corporations could enjoy diplomatic protection. Although in principle there was no reason why they should not, the practice of States was too disparate to allow for the elaboration of specific rules in that regard. Moreover, the regime of diplomatic protection of legal persons in general should not necessarily be the same as for corporations. Therefore, draft article 22 should be replaced by a clause in the general part of the draft articles that would state that the provisions were without prejudice to the exercise of diplomatic protection in the case of injury to a legal person other than a corporation.

30. **Mr. Wickremasinghe** (United Kingdom) said that his delegation concurred with the Special Rapporteur’s decision to base his recommendations on the judgment of the International Court of Justice in the *Barcelona Traction* case. The nationality of a corporation should be determined by the place of incorporation, since that criterion was unambiguous and straightforward to apply in practice. His delegation was concerned, therefore, that the text of draft article 17 required an additional connection between an injured corporation and the protecting State. There was no basis for such an additional requirement, and the proposed language did not offer a clear basis on which such a departure from the existing law could be justified.

31. Draft articles 18 and 19 set out the exceptional circumstances under which the State of nationality of the shareholders could exercise diplomatic protection on their behalf. Under those rules, shareholders might be of different nationalities, enabling more than one State to exercise protection. In cases where the United Kingdom might be entitled to make such claims, it would, as a matter of practice rather strict law, seek to

do so in concert with other relevant States, and, in cases in which the requirement of continuous nationality set out in draft article 20 was not met, the United Kingdom's claims rules would hold open the possibility of taking up a claim in concert with the State of former or subsequent nationality.

32. In relation to the discussion on draft article 21, his delegation noted the reasons given for the deletion of the proposal, but would favour the insertion of a general savings clause in respect of special regimes at the end of the draft articles, believing that the matter should be made explicit and not simply left to the commentary. That solution might provide an answer to the question raised by the Commission in paragraph 28 of its report concerning the protection of members of a ship's crew by the flag State. The judgement of the International Tribunal on the Law of the Sea in the *M/V "Saiga" (No. 2)* case should be considered in that light. With regard to the question about the diplomatic protection of nationals employed by an intergovernmental international organization, such protection was functional and did not form part of the topic at hand.

33. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation commended the Rapporteur for the work reflected in his report but urged that further work should be done on the level of success or failure of existing regional and sectoral instruments and the reasons for it. The Special Rapporteur's findings set out in paragraph 174 of the Commission's report provided a sound basis for further consideration of the topic and might assist States in identifying relevant principles if the Commission should continue to explore practical scenarios to which the work on the topic might apply.

34. In paragraph 30 of its report the Commission requested comments and observations from Governments on a number of points. The United Kingdom was still considering its response; however, before answering some of the more detailed questions on substantive issues, it would be very helpful for States to have before them an analysis of the advantages and disadvantages of the existing regional and sectoral arrangements. With regard to the final form of the work on the topic, at the current stage it was not certain that a convention or legally binding instrument would be the best option. A comprehensive study of the existing law in that area, together with a set of flexible recommendations, might be a more realistic and feasible goal. The Special Rapporteur's first report represented a significant step in that direction.

35. With regard to unilateral acts, his delegation was not persuaded that the topic was well-founded and would join with the other delegations that were asking for it to be removed from the Commission's agenda. On the topic of reservations, his delegation did not propose to offer comments on the definition of objections without a clearer idea of the Commission's substantive proposals on the matter.

36. **Mr. Prandler** (Hungary) said that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was closely related to some of the vital interests of his country, which had suffered on a number of occasions from pollution of its rivers due to the activities of industries situated beyond its borders. Hungary had therefore welcomed the adoption in 2001 of the final text of the preamble and a set of 19 draft articles on the prevention of transboundary harm from hazardous activities and had called the attention of the Sixth Committee and the International Law Commission to the various conventions dealing with the matter that acknowledged the "polluter pays" principle.

37. His delegation was in agreement with the broad policy considerations that appeared in paragraph 169 of the Commission's report and with most of the conclusions of the Special Rapporteur. However, it shared the concerns of some other delegations with regard to the title of the Special Rapporteur's report, namely, "First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities". It would be more appropriate to speak of the legal regime for liability in case of loss from transboundary harm. The representative of Austria had rightly pointed out that the objective of liability regimes was not the allocation of loss but the allocation of the duty to compensate for damages arising from acts not prohibited by international law. The primary responsibility should be borne by the operator, with a strict liability regime backed by insurance coverage, "plus governmental backup", as the New Zealand delegation had put it.

38. State practice and case law had already established a regime of clearly defined principles and specific rules on liability in case of loss from

transboundary harm, which to a great extent had become part of treaty law and customary law. In that regard, the adoption in Kiev in 2003 of the Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters was a significant achievement.

39. **Mr. Ascencio** (Mexico) said that the study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law reflected the expansion of liability regimes and was a positive step in the progressive enrichment of international environmental law. The Commission's work would help States meet the goals set forth in the Rio Declaration on Environment and Development, in particular principle 13, which urged States to cooperate in a more determined manner to develop international law regarding liability and compensation. Mexico therefore agreed with those members of the Commission who did not think the viability of the topic should be made an issue again.

40. His delegation had some doubts about the use of the term "allocation of loss" in the title of the Special Rapporteur's report, since one of the functions of any liability regime was to provide for compensation for damage and not mere distribution of loss. Moreover, in speaking of "allocation of loss", the Commission appeared to deviate from the objective enshrined in the "polluter pays" principle and the principle that the innocent victim should not have to bear the loss. Mexico was in favour of the Commission's focusing its efforts on the elaboration of a regime that would be general and residual in character. The broad definition of "dangerous activity" contained in the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment demonstrated the viability of general regimes. Moreover, given the ecological unity of the planet, which ignored political boundaries, it was imperative for the Commission to consider the topic of damage to the global commons.

41. His delegation maintained that, in accordance with the "polluter pays" principle, the operator should be the person or persons primarily liable. Provision could be made for joint and several liability when several operators were involved or when the damage resulted from more than one activity. The concept of operator should be as broad as possible to include all persons exercising control of the activity, as stipulated in the 1999 Basel Protocol on Liability for Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal. Furthermore, the State should require operators to be covered by insurance and other adequate financial guarantees. His delegation thought that the need to prove a causal link placed an excessive burden on innocent victims and that the "polluter pays" principle should extend to the procedural aspects, so that the burden of proof of a causal link between the activity and the damage did not fall on the innocent victim. The draft articles should incorporate the principle of strict liability, with the usual exceptions in cases of armed conflict or natural disaster. In general, State practice when concluding treaties on civil liability regimes was to attribute strict liability to an operator using hazardous materials or engaging in hazardous activities. Hence, the Commission should take into account the nature of the activities, using as a reference the provisions of the draft articles on prevention. It should also set financial limits, in order to make insurance and additional funding mechanisms feasible, and time limits for bringing suit.

42. Attention should be given to the establishment of compensation funds like those set up to deal with pollution of the marine environment by hydrocarbons or pollution resulting from the transport of hazardous or dangerous materials by sea. Such funds could be supported by contributions from the entities that benefited directly from the exercise of the activity in question. The State could then assume a subsidiary responsibility to compensate and should create systems for resolving the problems associated with transboundary damage. Reference could be made to the system provided for in the Vienna Convention on Supplementary Compensation for Nuclear Damage. All the above issues underscored the relationship between liability and prevention, and the relevance of regional regimes should be assessed in that light.

43. Lastly, his delegation thought that the Commission, perhaps at a later time, should consider issues related to damage to the environment per se. With regard to the form the articles should take, Mexico would prefer a convention, with one part on prevention and another part on liability, because of the close relationship between the two topics.

44. **Mr. Candioti** (Chairman of the International Law Commission) introduced chapters VII and VIII of the Commission's report on unilateral acts of States and reservations to treaties. He said that the Commission

had had the topic of unilateral acts on its agenda since 1996 and had encountered difficulties from the start in arriving at a clear conceptualization of the topic, delimiting its scope and gaining access to State practice. The year before some members of the Commission and some representatives in the Sixth Committee had suggested that the Special Rapporteur should focus on the unilateral act of recognition of States, which he had done in his sixth report.

45. The debate in the Commission had revealed that the main difficulties with the topic still persisted. The global approach had been shifted to a case-by-case approach, and the limited references to State practice had not assisted the Commission in drawing any conclusions on the best way of addressing the topic. Different views had emerged in the Commission as to whether it should attempt to formulate common rules for all unilateral acts or whether the topic did not lend itself to drafting treaty-type articles.

46. The Commission had established a Working Group on the topic, which had examined the fundamental questions of scope, approach and methodology and had made a set of recommendations, which the Commission had accepted. As regards the scope of the topic, the Commission had viewed the compromise text prepared by the Working Group as a guide both for the Special Rapporteur's future work and for its own discussions. For those purposes, the Commission had decided that a unilateral act of a State was a statement expressing the will or consent by which that State purported to create obligations or other legal effects under international law. In relation to such unilateral acts *stricto sensu*, the study would propose draft articles accompanied by commentaries. In addition, the study would examine State practice in relation to conduct which, in certain circumstances, might create obligations or other legal effects under international law similar to those of unilateral acts and, if appropriate, might adopt guidelines or recommendations.

47. As regard the method of work, first of all it was recommended that the Special Rapporteur's next report should consist of as complete a presentation as possible of the practice of States in respect of unilateral acts, including information originating with the author of the act or conduct and the reactions of the other States or other actors concerned. Secondly, the material assembled on an empirical basis should also include elements making it possible to identify not only the rules applicable to unilateral acts *stricto sensu*, with a view to the preparation of draft articles accompanied by commentaries, but also the rules that might apply to State conduct producing similar effects. Thirdly, an orderly classification of State practice should make it possible to determine the reasons for the unilateral act or conduct of the State; the criteria for the validity or express or implied commitment of the State and, in particular but not exclusively, the criteria relating to the competence of the organ responsible for the act or conduct; and the circumstances and conditions under which the unilateral commitment could be modified or withdrawn. Lastly, it was recommended that the Special Rapporteur in his next report should not specify the legal rules to be deduced from the material submitted; such rules should be dealt with in later reports so that draft articles or recommendations could be prepared.

48. The Commission would continue to focus on unilateral acts *stricto sensu*, but it was also contemplating the possibility of formulating guidelines or recommendations with regard to other conduct of States which might produce legal effects similar to those of unilateral acts *stricto sensu*. In that regard, the lack of information on State practice had been one of the main obstacles to progress in the study of the topic of unilateral acts. Governments were requested once again to provide information on general practice relating to unilateral acts and the unilateral conduct of States.

49. On the topic of reservations to treaties, the Commission had adopted 11 draft guidelines (with three model clauses) dealing with withdrawal and modification of reservations. It had also examined the Special Rapporteur's eighth report, dealing with the withdrawal and modification of reservations and interpretative declarations. The Commission had referred five draft guidelines on those topics to the Drafting Committee. Before introducing the 11 new draft guidelines adopted by the Commission, he would like to draw attention to the explanatory note to the Guide to Practice contained in paragraph 367 of the Commission's report referring to the use of model clauses. Such clauses were intended to give States and international organizations examples of provisions that it might be useful to include in the text of a treaty, in order to avoid uncertainties that might result from silence about a specific problem relating to reservations.

50. The 11 guidelines adopted by the Commission at its recent session pertained to the withdrawal and modification of reservations and interpretative declarations. Draft guideline 2.5.1, "Withdrawal of reservations", stated that a reservation might be withdrawn at any time, and the consent of a State or of an international organization which had accepted the reservation was not required for its withdrawal. The guideline reproduced the text of article 22, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Accordingly, the withdrawal of a reservation was a unilateral act which had never given rise to any particular difficulty. Some members of the Commission had expressed concerns about the difficulties that might arise from the sudden withdrawal of a reservation and had suggested that it might be prudent to include a provision in a treaty limiting the timing of the right to withdraw reservations.

51. Draft guidelines 2.5.2, "Form of withdrawal", reproduced the text of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions on the Law of Treaties. The withdrawal of a reservation could never be implicit. A withdrawal occurred only if the author of the reservation declared formally and in writing that it intended to revoke it. Likewise, the non-confirmation of a reservation upon signature, when a State expressed its consent to be bound, could not be interpreted as being a withdrawal of the reservation, which might well have been formulated but, for lack of formal confirmation, had not been "made" or "established".

52. Draft guideline 2.5.3, "Periodic review of the usefulness of reservations", recommended that States or international organizations should undertake a periodic review of the reservations that they had made and consider withdrawing those which no longer served their purpose.

53. Draft guideline 2.5.4 was entitled "Formulation of the withdrawal of a reservation at the international level". The 1969 and 1986 Vienna Conventions were silent as to the procedure for the withdrawal of reservations, and the purpose of the guideline was to repair that omission. In that regard, the Commission had closely followed the provisions of article 7 of the Vienna Conventions. Any of the authorities competent to formulate a reservation on behalf of a State could also withdraw it. The text of draft guideline 2.5.4 transposed to the withdrawal of a reservation the wording of guideline 2.1.3, "Formulation of a reservation at the international level", and maintained the customary practices of international organizations as depositaries of treaties.

54. Draft guideline 2.5.5, "Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations", was the counterpart to draft guideline 2.1.4, "Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations". It was useful to indicate in the Guide to Practice whether and to what extent a State could claim that the withdrawal of a reservation was not valid because it violated internal law. Such rules were seldom spelled out in formal texts of an institutional or even a legislative nature. Hence the draft guideline specifically provided that the violation of internal rules regarding the withdrawal of reservations had no consequences.

55. Draft guideline 2.5.6, "Communication of withdrawal of a reservation", stated that the procedure for communicating the withdrawal of a reservation followed the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7. Although the Vienna Conventions did not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention suggested that notification of withdrawal must be made by the depositary and that the recipients of the notification must be "every State which is or is entitled to become a party to the treaty" and "interested States". The Commission had preferred simply to refer to draft guidelines 2.1.5 to 2.1.7 instead of reproducing them.

56. Draft guideline 2.5.7, "Effect of withdrawal of a reservation", stated that the withdrawal of a reservation entailed the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdrew the reservation and all the other parties. The withdrawal of a reservation also brought into force the treaty in question between the State or international organization withdrawing the reservation and a State or international organization which had objected to that reservation and had opposed the entry into force of the treaty between itself and the author of the reservation because of the reservation.

57. Draft guideline 2.5.8, “Effective date of withdrawal of a reservation”, reproduced the text of the “chapeau” and article 22, paragraph 3 (a), of the 1986 Vienna Convention and stated that the withdrawal of a reservation would become operative in relation to a contracting State or a contracting international organization only when notice of it had been received by that State or organization. In order to assist the negotiators of treaties, the Commission had decided to include in the Guide to Practice model clauses which they could use as a basis, if necessary. There were three such clauses in relation to guideline 2.5.8. Model clause A dealt with deferment of the effective date of the withdrawal of a reservation; model clause B dealt with an earlier effective date of withdrawal of a reservation; and model clause C dealt with freedom to set the effective date of withdrawal of a reservation.

58. Draft guideline 2.5.9, “Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation”, specified the cases in which article 22, paragraph 3 (a), of the Vienna Conventions did not apply, not because there was an exemption to it, but because it was not designed for that purpose.

59. According to draft guideline 2.5.10, “Partial withdrawal of a reservation”, partial withdrawal limited the legal effect of the reservation and achieved a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization. The guideline reflected long-standing practice, which had also been incorporated in various provisions of many international treaties. The modification of a reservation the effect of which was to reduce its scope must be subject to the same rules of form and procedure as a total withdrawal and take effect under the same conditions.

60. Draft guideline 2.5.11, “Effect of a partial withdrawal of a reservation”, stipulated that any objection made to the reservation continued to have effect as long as the author did not withdraw it, to the extent that the objection did not apply exclusively to the part of the reservation which had been withdrawn. Moreover, an objection could not be made to the reservation resulting from a partial withdrawal, unless the partial withdrawal had a discriminatory effect.

61. He would like to encourage Governments to submit comments on the issue of the proposed definition of objections to reservations (draft guideline 2.6.1). Another issue related to the position taken by the arbitral tribunal in the *Mer d’Iroise* case in 1977 in a dispute between France and the United Kingdom concerning the delimitation of the continental shelf. In its decision, the tribunal stated that whether the negative reaction of a State to a reservation amounted to a mere comment, a reservation of position, a rejection of the particular reservation or a rejection of any relations with the reserving State under the treaty depended on the intention of the State concerned. It would be helpful to receive comments from Governments as to whether the decision in question reflected practice and, if so, whether there were clear-cut examples of critical reactions to reservations which could nonetheless not be characterized as objections. It would also be useful to receive comments on the advantages and disadvantages of clearly stating the grounds for objections to reservations formulated by States or international organizations, as well as on draft guideline 2.3.5, “Enlargement of the scope of a reservation”.

The meeting rose at 11.45 a.m.