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Chairman: Mr. Yáñez-Barnuevo . . . . . (Spain)
later: Mr. Hmoud (Vice-Chairman) . . . . . (Jordan)

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The meeting was called to order at 3.05 p.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Prandler** (Hungary), referring to the topic "Shared natural resources", said that his delegation agreed with the Special Rapporteur's approach, according to which the draft articles should follow the pattern of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses and should also cover activities which might have a negative impact on the aquifer system, such as above-ground pollution. As the Special Rapporteur had rightly pointed out, work on the international legal aspects should keep pace with overall development in that field, taking also into account the preparations for the Fourth World Water Forum, to be held in Mexico in 2006. Hungary had concluded agreements on transboundary underground water resources with some of its neighbours. The United Nations Economic Commission for Europe had played an important role in that field, and its experience should be taken into account in future consideration of the topic.

2. It was unfortunate that the 1997 Convention on the Law of Non-navigational Uses of International Watercourses, to which Hungary was a party, had not yet entered into force because of the high threshold established in that connection. That fact should be taken as a caveat concerning the final legal form of the draft articles.

3. With regard to the content of the draft articles, while his delegation agreed with most of article 7, on the obligation not to cause harm, it disagreed with the provision that the question of compensation should be discussed by the parties concerned. In view of recent developments in the field of international environmental law, consultation could not replace the requirement that adequate compensation should be provided in accordance with the "polluter pays" principle.

4. In draft article 14, on prevention, reduction and control of pollution, his delegation disagreed with the second sentence, the formulation of which was explained by the Special Rapporteur in paragraph 88 of the Commission's report. His delegation did not agree with the Special Rapporteur concerning the use of the expression "precautionary approach", since it believed that the precautionary principle had already been established as a rule of international customary law, as reflected in such instruments as the Rio Declaration on the Environment and Development and the International Law Association Helsinki and Berlin Rules on Water Uses and Management, as well as in various treaties. His delegation agreed with those members of the Commission who had stressed that the principle was well recognized as a general principle of international environmental law.

5. His delegation trusted that the Commission at its next session would be able to finalize the draft articles in second reading, taking into account the observations and proposals made during the current debate in the Sixth Committee.

6. **Mr. Panin** (Russian Federation) said that the topic "Shared natural resources" was to a large extent a continuation of the closely related topic of international watercourses, and his delegation commended the Special Rapporteur's approach to the draft articles. The report demonstrated that some transboundary aquifers and aquifer systems had their own specific features, making it necessary to adopt special regulations differing from those covering other international watercourses. The draft articles regulating the management of aquifers and aquifer systems therefore rightly emphasized bilateral and regional cooperation among the aquifer States and the establishment of joint mechanisms, commissions and monitoring. That had to be done taking due account of the sovereignty and territorial integrity of States.

7. Turning to draft article 3, he said that States must have sufficient flexibility and freedom of action in concluding bilateral and regional arrangements. As far as possible, account must be taken of the specific features of the aquifer or aquifer system concerned and the particular relations between the aquifer States, the level of their socio-economic development and related factors, priorities for the utilization of the aquifer for a specific period of time, and many other factors.

8. With further reference to draft article 3, his delegation had some doubts regarding the use of the term "arrangement", which might include both legally binding international legal agreements and legally non-binding political and administrative arrangements. In the first case, there was some duplication between draft articles 3 and 4. In the second case, the question arose as to the sense of including in the draft a provision

defining the correlation between an international legal instrument and non-international legal instruments. It would hardly be correct in that case to give priority to non-international treaties, as was done in draft article 3, paragraph 3. It might be sensible to adhere more closely to article 3 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

9. His delegation was in favour of retaining the criterion "significant" as applying to harm in article 7. The reference to "significant" harm should also be included in the title of the article. The concept of "significant harm" had already been used without any special problems in a number of international treaties aimed at protecting natural resources.

10. Turning to draft article 13, which contained the term "detrimental impacts", he noted that the term "impact" was used in draft article 1 (b), the term "adverse effects" was used in draft article 16, the term "significant adverse effect" was used in draft article 17 and the term "serious harm" was used in draft article 19. His delegation would welcome comments regarding the use of such a broad range of terms.

11. The future instrument should take the form of a draft framework convention containing the fundamental general principles on which aquifer States should base their conduct. The work on the draft was at a fairly advanced stage, thanks largely to the efforts of the Special Rapporteur, to whom his delegation was grateful. The Russian Federation hoped that the Commission would complete the first reading of the draft articles at its next session.

12. With regard to the topic "Unilateral acts of States" the discussion in the Commission had once again demonstrated the topic's complexity, and had called into question the feasibility of codifying international law in that area. His delegation doubted whether such codification was possible. Nevertheless, the Commission's work had been extremely useful, and he thanked the Special Rapporteur and the Chairman of the Working Group for their efforts, which had made it possible to reach some important conclusions. First, their work had confirmed that there were unilateral acts which produced legal obligations. Second, it had revealed the difficulty of determining any general rules that could be applied to unilateral acts, in particular regarding the persons authorized to formulate them, the time when they came into force and the possibility of modification or termination. As the study showed, a unilateral act could take both written and oral form and could also result from the conduct of a State. His delegation was inclined to believe that the Commission should not attempt to define such general rules.

13. It would obviously also be counterproductive for the Commission to concentrate on elaborating a single definition of unilateral acts, since they were too varied in their legal nature and in the ways in which they were performed. His delegation therefore believed that the Commission should focus on unilateral obligations, whose existence had been confirmed more than once, in particular by the International Court of Justice, and which played a most important role in inter-State relations. It would be useful to formulate a number of "indications" of the existence of a unilateral obligation of a State, which could be grouped according to traditional criteria, such as the persons or organs authorized to enter into unilateral obligations on behalf of a State and, the context and circumstances in which the corresponding actions had been taken, or according to the degree of their plausibility, i.e. whether they were primary or secondary. If, for example, a statement were made by a country's president at an international forum there were greater grounds for believing that that State had undertaken an obligation than if a statement were adopted on behalf of a parliament sitting in closed session. The first case should be regarded as a primary indication and the latter as a secondary indication.

14. Such indications would help States — both author States and addressees — to "synchronize their watches" as to whether a unilateral obligation existed. If all the indications of a unilateral obligation were present, that would not automatically mean that such an obligation existed; it would simply create a presumption that it existed. That in turn would shift the burden of proof that a unilateral obligation existed on to the author State.

15. The topic "Reservations to treaties" was complex and required very thorough consideration; formulating final conclusions and detailed comments would require more time. The term "validity", at least in its Russian connotation, was not the most felicitous one for defining the nature of reservations that could be made in accordance with international law. In Russian, the term was not really neutral, being in fact quite closely connected with the idea of legal consequences. A more appropriate term would be "admissible", as used in the draft guidelines. The concepts of the "validity" and

"invalidity" of reservations should preferably be used only when the legal consequences of reservations were being evaluated by the subjects entitled to do so, in particular a State or a court. That would be consistent with the provisions on validity of international treaties contained in the Vienna Convention on the Law of Treaties.

16. The closely related question of the presumption of validity of reservations, gave rise to a number of queries. The concept was apparently based on article 19 of the Vienna Convention. However, that article referred rather to the right of States and international organizations to formulate reservations and to the limitations to that right. The purpose of introducing into the draft guidelines the concept of presumption of validity of a reservation, even if the word "validity" were replaced by "admissibility", was not entirely understandable. His delegation would like the word "freedom" in the title of draft guideline 3.1 to be replaced by the word "right".

17. Another equally important aspect concerned the legal consequences of the invalidity of reservations. The main problem was whether invalid reservations could be separated from a State's consent to be bound by the international treaty to which the reservation had been made, in other words whether a treaty was valid for a State which had entered an invalid reservation to it. Reservations to human rights treaties were of particular interest in that connection. Some considered that reservations to such treaties could be separated from consent to be bound by the treaty so that the latter might become binding for the author of the reservation without applying the reservation. It had also been observed that such separability could likewise be acknowledged in relation to reservations to international treaties in all other areas. The concept had its weaknesses however: its opponents held that it undermined the foundations of international treaty law, which was based on the equal treatment of treaties on all subjects. The issue raised many questions and needed further serious study.

18. With regard to the definition of the object and purpose of a treaty, his delegation supported the Commission's cautious approach. It might be difficult to define a treaty's object and purposes in an accurate or objective manner, but such a definition might be a useful guideline for the purpose of interpreting a specific international treaty in conjunction with the reservations made thereto.

19. **Mr. Braguglia** (Italy) said that owing to its geographical location, Italy had only a limited interest in the question of transboundary aquifers. The Convention of 20 April 1972 on the protection of Italian and Swiss waters from pollution covered underground waters, but only to the extent that they might contribute to polluting certain waters listed in the agreement. Should further protection be needed, his Government would certainly take into account the Commission's draft articles.

20. His delegation was concerned about the slow progress being made with the draft articles on reservations to treaties. Given the difficulty of determining when a reservation was incompatible with the object and purpose of the treaty, the Commission should focus on the consequences of objections to such reservations. Under article 19 (c) of the Vienna Convention on the Law of Treaties, such a reservation should be considered invalid by the objecting State, and the reserving State should be precluded from entering into contractual relations with the objecting State. In practice, however, some States, even while considering a reservation to be incompatible with the object and purpose of the treaty, declared their willingness to have contractual relations with the reserving State. That practice would appear to be contradictory. It might be interpreted to indicate that despite the wording of the objection, it should not be taken to mean that the reservation was not valid under article 19 of the Vienna Convention. To avoid the whole problem, the Commission would do well to encourage States to make more appropriate use of the formulas set forth in article 19 of the Vienna Convention.

21. **Mr. Henczel** (Poland) said that the study of unilateral acts of States required consideration of both theoretical and legal questions and a careful case study. His delegation therefore agreed with the decision to devote the Special Rapporteur's earlier reports to the definition of, and general rules concerning, unilateral acts of States, and the seventh and eighth reports to the examination of unilateral statements and acts of States. His delegation appreciated the Working Group's offer to assist the Special Rapporteur in the elaboration of the principles on unilateral acts of States to be submitted together with illustrative examples of practice drawn from the notes prepared by the members of the Group.

22. The topic was very broad in scope and the attempts made to limit the coverage of the draft articles were therefore understandable. In that connection, Poland had considered with great interest the idea of differentiating between "unilateral conduct" and "unilateral acts *sensu stricto*", referred to in the Special Rapporteur's eighth report (A/CN.4/557) and in the discussion in the Commission. However, such a differentiation required a very careful determination and explanation. Otherwise it might be used to circumvent statements containing unilateral obligations by qualifying them as resulting from "unilateral conduct" and not unilateral acts. It was a very peculiar aspect of the study of unilateral acts (in the broad meaning of the term) that their differentiation from other acts occupied such a preponderant place. There were many forms of conduct of States that gave rise to legal effects, either directly or indirectly. Some were identified as unilateral acts of States, while the status of others required further examination, without which their legal effects (if any) could not be determined.

23. His delegation wished to emphasize that the idea of providing that States might create obligations for other States would be contrary to the sovereign equality of States. The Commission appeared to share that view. There were several acts by which States determined the scope of their territorial sovereignty or territorial jurisdiction. Some acts, either in the form of internal legislation or of an international act or international communication, were confirmed by the subsequent practice of States and might give rise to customary norms. Others were strongly opposed by other States. It would be too artificial to say that acts that were accepted by subsequent practice had been legal at the very moment of their inception. More caution was necessary in that respect.

24. It was doubtful whether the articles on unilateral acts of States were the best place to deal with acts and statements which formulated claims and determined the territorial scope of State jurisdiction. His delegation understood that the Special Rapporteur's intention had been to exclude from the scope of his reports acts giving rise to customary norms of international law, a position with which Poland agreed. The draft articles should concentrate on acts which created obligations for the author-State, meaning that they would not cover international protest or a number of other acts that might be identified in future work on the topic. A thorough study was needed to establish if all the rules on acts creating obligations for the author-State and on protests were exactly the same. In fact, the scope of the draft articles would be much narrower owing to the exclusion by the Special Rapporteur from his reports of acts connected with acquiescence and estoppel. Only some acts leading to obligation would actually be covered.

25. There could be no doubt about the binding effect some acts, such as recognition and renunciation, to which the principle *acta sunt servanda* clearly applied. It might be wondered whether their effects might not be too complex to be reflected in that principle alone. Nevertheless, bearing in mind the differences between various types of act and their legal effects, it was useful to draw attention to the common characteristic reflected in the principle *acta sunt servanda*, which was general enough to accommodate all acts giving rise to obligations on the part of the author-State. In that respect, the draft articles were of considerable value.

26. Referring to the matter of promise, he said that the principle *acta sunt servanda* seemed to be the most exact description of its legal effects. What was usually at stake and what might be an object of dispute was not the decision regarding the legal effects of a promise as such, but the determination as to whether a given statement was really a promise or a political statement (political act). The Commission would have to deal with that situation. States might and often did incur obligations by means of a unilateral promise, but, access to those promises was much more difficult than to international agreements. More stress should be put on the examination of cases relating to unilateral promises. An analysis of the views of author-States and beneficiary-States on the binding force of a given statement would be of great help. The case study undertaken in the seventh and eighth reports should be continued, with special emphasis on the question of unilateral promise. The seventh report referred to several statements of States and qualified them as binding. It would be useful if States could confirm or deny those qualifications.

27. Another subject that required examination was the influence of an objection by the beneficiary-State on the legal effects of a unilateral act giving rise to obligations of the author-State. The very idea that promise did not require approval or confirmation did not solve the problem of unequivocal rejection by the State which should normally welcome the promise.

State practice and doctrine in that area should be carefully examined.

28. Turning to the question of reservations to treaties, particularly draft guidelines 2.6.1 and 2.6.2, he said that a reservation, as such, had no proper legal effects. Only reservations established in accordance with article 20 of the Vienna Convention on the Law of Treaties exerted such effects. An objection to a reservation was an element (together with acts of acceptance of the reservation) of the process of giving the reservation its legal effects. That being so, the objection preceded the moment at which the reservation exerted its legal effects. In the light of the foregoing considerations, his delegation would like to propose that the draft guideline 2.6.1, on definition of objections to reservations, should be amended to read: "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or organization purports to prevent the reservation from exerting its [potential] legal effects, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

29. Draft guideline 2.6.2 was acceptable if the idea of the late formulation or widening of the scope of the reservation itself was to be maintained.

30. Referring to the Special Rapporteur's tenth report (A/CN.4/558 and Add.1), he noted that the idea of the validity of reservations was applied in the context of the admissibility/permissibility of reservations. If that concept was generally acceptable to the Commission and to States, his delegation would not oppose it, although as pointed out by the Commission, it had certain disadvantages.

31. The draft guidelines proposed by the Special Rapporteur in his tenth report went in the right direction and were generally convincing. The draft guidelines could be supplemented by draft guidelines concerning the effect of the formulation of a reservation prohibited by the treaty and the effect of the formulation of a reservation incompatible with the object and purpose of the treaty. In general, such reservations should be considered null and void and would invalidate the consent of a State to be bound by the treaty. The question remained, however, whether in some instances the acceptance by all contracting States of the reservation prohibited by the treaty could validate the reservation in question. That question and many others should be answered by the Special Rapporteur and the Commission in the near future.

32. *Mr. Hmoud (Jordan), Vice-Chairman, took the Chair.*

33. **Ms. Galvão Teles** (Portugal) said that her Government was still analysing the draft articles on shared natural resources and determining whether there was any relevant national practice to report in its reply to the Special Rapporteur's questionnaire. It therefore reserved the option of making further comments on the draft articles at a later stage. Portugal had followed the Commission's discussions concerning the threshold of "significant" harm included in key provisions of draft articles 7 and 14, and the potential relation of those draft articles to general international law and specifically to the law of international responsibility and liability. Portugal was also interested in the discussion of draft article 3, particularly with regard to the words "to a significant extent" in paragraph 1 and the interconnection between the several agreements that might come into play. Another interesting issue was the final form of the work on the topic; without taking a position on the matter at the current stage, her delegation felt that there must be correspondence between the instrument's form and content.

34. The Special Rapporteur had noted that there were many similarities between groundwaters and oil and gas, and that the elaboration of draft articles on groundwaters would have implications for oil and gas, and that conversely State practice with regard to oil and gas had a bearing on groundwaters. Her Government was still considering whether, given the different characteristics of those natural resources, the principles being developed with regard to aquifers would apply in their entirety to oil and gas. It was necessary to keep an open mind in that regard.

35. Turning to the topic "Unilateral acts of States", her Government continued to believe that such acts had many varied effects, in order to meet the needs of States and of the international community. Portugal welcomed the Commission's declared intention to conclude its study soon, and encouraged it to present any results at the next session.

36. With regard to the topic "Reservations to treaties", she noted with satisfaction that the Commission had achieved significant progress on some of the most important issues. Concerning the draft guidelines proposed by the Special Rapporteur, her

delegation understood why he wished to qualify reservations as valid or invalid, but felt that such qualification was premature and that the issue should not be taken up until the legal effects of reservations had been discussed. The only distinction that seemed to constitute a good starting point was the one made in paragraph 355 of the Commission's report, namely the distinction between the position that reservations were intrinsically prohibited because they were incompatible with the object and purpose of the treaty and the position that the effect of reservations depended only on the reactions of other States. Such a distinction would avoid terminological and translation difficulties, and, being more neutral, would facilitate the analysis of State practice and the eventual intervention of independent judicial or quasi-judicial bodies, such as courts, tribunals or treaty-monitoring bodies. By following that path, the Special Rapporteur would be in a better position to qualify the effect of a reservation that was not acceptable in the context of a given treaty.

37. In any event, her delegation questioned whether there was any added value in having a qualification such as that of the "validity" and "invalidity" of reservations. Practice seemed to show that the Vienna Convention regime was sufficient in that regard, and that emphasis should be placed on the scope of a reservation's effects rather than on the qualification issue. The Vienna Convention was silent in that respect, whereas it provided clear provisions regarding the validity and invalidity of treaties.

38. There was also the specific and contractual nature of reservations and the central role which the Vienna Convention conferred upon States that were parties to the treaty to monitor the system in the absence, in most instances, of a third party independent body. The fact that a State did not object to a reservation did not necessarily mean that it considered that reservation to be valid. If no State objected to a reservation that did not necessarily mean that the reservation was valid, whereas the converse was also true. Silence on the part of States could not be transformed into an implicit system of validation of reservations.

39. Her delegation agreed with the general thrust of the proposed draft guidelines, but felt that guideline 3.1.5 would be improved by incorporating the idea expressed in paragraph 375 of the Commission's report, namely that in order better to define the object and purpose of the treaty in an objective rather than a subjective way, room had to be left for case law and doctrine. Draft guideline 3.1.6 could be merged with draft guideline 3.1.5, or might be considered superfluous, as the discussions in the Commission had seemed to indicate.

40. With regard to draft guideline 3.1.13, it would be preferable to keep the issues of reservations and dispute settlement separate or to treat the reservations in question like other reservations. On many occasions States agreed to become parties to a treaty if they could exclude the dispute settlement or implementation mechanism, and sometimes a State that had formulated a reservation to such a mechanism accepted it in practice on a case-by-case basis, without revoking the reservation. Her delegation feared that if the guideline were retained, many States would hesitate to participate in a treaty because they could not make a reservation excluding the dispute settlement or implementation mechanism, and that could jeopardize the quest for universality in multilateral conventions.

41. As for guideline 3.1.7, her delegation considered that the practice of formulating vague, general reservations should be discouraged, but felt that the automatic qualification of such reservations as incompatible with the object and purpose of the treaty seemed at first sight too severe.

42. While her delegation agreed with the proposals set out in guideline 3.1.8, it felt that it would be interesting to see if and how such a guideline would encompass future practice.

43. With regard to the Commission's request for comments, on the practice of objecting to reservations without opposing the entry into force of the treaty concerned, she said that Portugal normally objected under article 20, paragraph 4 (c), and not under article 20, paragraph 4 (a), of the Vienna Convention. The expected legal effects were those resulting from article 21, paragraph 3, of the Convention, namely that the provision subject to a reservation did not apply in the relations between the reserving State and the objecting State.

44. Presenting a "simple" objection to a reservation, invoking its incompatibility with the object and purpose of the treaty, might seem to be a contradiction in terms. It was the Vienna Convention that had opened up the possibility of such an outcome, which resulted from the combined regime of article 19 (c), article 20, paragraph 4 (c), and article 21, paragraph 3. On the face of it, that scenario seemed to be incoherent: only

article 19 provided the legal ground for it in its paragraph (c). The Special Rapporteur seemed to have opened a door that most States had overlooked: the one that allowed States to object to reservations for reasons other than the one provided in article 19 (c). That could be a path to explore in future, since the Vienna Convention was silent on the possible grounds for objections. Nevertheless, the practice could in some way and on some occasions be useful for States. First, "simple" objections to reservations grounded in incompatibility with the object and purpose of the treaty did not mean necessarily that the two States were automatically left with a non-treaty, since the object and purpose of a treaty might be a sum of different, equally important parts. Second, a State might consider that the reservation was incompatible with the object and purpose of the treaty but preferred to present a "simple" objection in order to maintain the reserving State within the treaty with respect to itself. Third, the use of "simple" objections grounded in article 19 (c) might also serve a political purpose, for example dramatizing the objection, especially if it were formulated simultaneously by a significant group of States, in order to lead the reserving State to modify or withdraw the reservation. A careful approach to the issue was required. It was essential to have sufficient flexibility to enable the same multilateral treaty to shelter within it several bilateral relationships between States parties. Otherwise, the different legal and political approaches of States would keep them from ratifying it.

45. Her delegation supported the Special Rapporteur's desire to organize a meeting at the next session with all the human rights treaty bodies and looked forward to hearing about its results.

46. **Mr. Troncoso** (Chile), referring to the topic "Unilateral acts of States", noted that the Special Rapporteur had succeeded in drawing from his study of a number of particular acts a series of elements that illustrated the great variety of their content, forms, authors and addressees. His delegation regarded unilateral acts of States as one of the sources of international obligations. In that connection, international practice was not only a factor of relevance for international customary law but also an element of analysis that was of undeniable importance and that, from the viewpoint of methodology, could contribute to the clarification of complex legal phenomena such as unilateral acts and conduct by States. His Government welcomed the work of compilation and systematization undertaken by the Special Rapporteur, and to a large degree shared the conclusions reached.

47. It disagreed, however, with the notion that the rules on the formulation of unilateral acts should be more flexible than those contained in the Vienna Convention on the Law of Treaties. In his eighth report (A/CN.4/557), the Special Rapporteur had put forward the view that, in addition to the persons authorized under that Convention to commit the State that they represented at the international level, there might be other persons who were in effect empowered to do so. His delegation thought that the criterion of flexibility was dangerous and could lead to abuses, since it was left to the addressee State to determine whether the person who had formulated a given declaration without being formally empowered to do so was actually authorized to bind the State that person claimed to represent. Under article 7, paragraph 1 (b), of the Vienna Convention, "flexibility" in the matter of representing the State was limited to the "practice of the States concerned", so that the decision was not left to one State alone.

48. On the other hand, his delegation agreed with the clear distinction drawn between unilateral acts in the strict sense of the term and conduct that might have similar effects. It seemed better to consolidate the progress achieved with respect to unilateral acts *stricto sensu* before embarking on a detailed study of conduct. The Commission could consider adopting a general definition of a unilateral act *stricto sensu* and then examining the draft articles already submitted to the Drafting Committee. The efforts of the Special Rapporteur and the Working Group on the topic should not be abandoned, and his delegation expected results from their active collaboration at the fifty-eighth session of the Commission. If a draft convention could not be agreed upon, the work done should at least enable the Commission to formulate guidelines.

49. **Ms. Matsuo de Claverol** (Paraguay) said that her delegation welcomed the substantial progress made by the Commission on the topic "Shared natural resources". Paraguay viewed the subject of transboundary aquifers with particular interest, since it shared the Guaraní aquifer with Argentina, Brazil and Uruguay. Her delegation agreed with the view of some members of the Commission that the principle of permanent sovereignty over natural resources in

accordance with General Assembly resolution 1803 (XVII) should be given full treatment in a separate draft article, in order to avoid speculation and dispel doubts about interpretation.

50. Her delegation agreed with the Special Rapporteur that the principle of equitable utilization was viable only in the context of a shared resource, and that acceptance of the shared character of a transboundary aquifer among the aquifer States was not intended to internationalize or universalize transboundary aquifers. Paraguay particularly endorsed the view that a specific transboundary aquifer was the business of the aquifer States and that third States had no role in that regard.

51. Paraguay considered that a draft convention on the subject of aquifers should rest on three basic principles: sovereignty, use and environmental protection of the aquifer. Those were the pillars on which the Guaraní aquifer States based their collaboration, with priority emphasis on protecting the aquifer from pollution, especially in the recharge process. Since the topic was a new one, not well-defined in international law apart from the principle of sovereignty over natural resources, it was not appropriate to elaborate provisions on the basis of analogy.

52. **Mr. Lavalle-Valdés** (Guatemala) said that his delegation was convinced of the usefulness of codifying or developing the law on unilateral acts of States and was therefore seriously concerned about the minimal progress made on the topic. The Commission had been considering it for eight years and had not adopted, even provisionally, a single article, owing not only to the extraordinary complex nature of the topic, but also to the lack of a suitable and consistent approach.

53. As a solution, his delegation continued to recommend a minimalist approach, in which, rather than formulating an abstract definition of a unilateral act, the Commission would focus on the four basic types of unilateral act: promise, protest, recognition and waiver. Moreover, it would limit consideration of those four acts from a formal standpoint as well, dealing only with explicit declarations and not with implicit or tacit manifestations, hence leaving aside unilateral acts that might produce legal effects independently of the intention of the States from which they emanated, including such State conduct as silence and acquiescence. The narrowed scope proposed had the additional justification that the four types of act mentioned were most amenable to codification, since they had the greatest similarity to treaties. It should be noted that of the four acts mentioned, only one raised problems with respect to the intention of its author to produce legal effects. A promise was often ambiguous on that point or was in fact made with the clear intention of not producing legal effects.

54. Although a definition covering specifically those four types of unilateral act might not be possible, a draft article applicable to all four and containing some of the elements of a general definition of a unilateral act could be drafted on the basis of paragraph 81 of the Special Rapporteur's fifth report (A/CN.4/525). In addition, many of the draft articles already formulated by the Special Rapporteur on the basis of the Vienna Convention could be used, and work could proceed on the basis of the structure and article headings outlined in paragraph 186 of the fifth report (A/CN.4/525/Add.2). The set of draft articles should include one inspired by article 3 of the Vienna Convention providing that the fact that the articles did not apply to other unilateral acts or conduct of States should not affect the legal force of such acts or conduct or the application to them of any of the rules set forth in the draft articles.

55. **Ms. Kaplan** (Israel) referring to the topic "Responsibility of international organizations", said that the Commission was seeking comments on the inclusion in the draft articles of a provision, similar to that found in article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, concerning aid and assistance provided by a State to an international organization in the commission of an internationally wrongful act. As a general principle, her delegation considered that the rule had potential relevance. At the time article 16 on State responsibility had been considered, Israel had questioned whether it was appropriate to limit a State's responsibility in situations of aid or assistance only to cases in which the act would be internationally wrongful if committed by that State. Similarly, it questioned whether the same limiting condition should be included in draft articles 12 and 13 concerning, respectively, an international organization aiding or assisting, or directing and controlling, a State or another international organization in the commission of an internationally wrongful act.

56. That observation appeared to be of equal relevance in the case of State assistance to an international organization. Nevertheless, it might be necessary to ensure that such a principle did not provide States with a pretext to avoid implementing properly adopted and lawful decisions of an international organization.

57. That said, the question of State assistance to an international organization, or State direction, control or coercion of an international organization, in the commission of an internationally wrongful act appeared to raise questions relating to State responsibility rather than to the responsibility of international organizations, which was the subject of the draft articles currently under consideration. Her delegation was therefore persuaded that it was not appropriate to include specific provisions on those issues in the draft articles. However, it might be appropriate to make some reference to them in the commentary.

58. On the topic "Expulsion of aliens", her delegation had concerns about the intended scope of the study and was not yet persuaded that the topic should be addressed by the Commission. If consideration of the topic were to proceed, it should be limited to the examination of the expulsion of individual aliens, whether present legally or illegally in the territory of a State, with due regard for the right to expel under international law and the possible limitations to that right. Any discussion of such issues as refugee status, refoulement, decolonization, self-determination and the movement of populations would clearly exceed the scope of the topic. Nor should it touch upon issues of State responsibility or diplomatic protection, which had been or were still being examined by the Commission. If the topic were thus narrowly defined, Israel would be able to share information regarding its procedures and legal mechanisms of examination and review in that field.

59. On the topic "Shared natural resources", any principles must be general and flexible in nature. Each transboundary aquifer or aquifer system was different, in both the scientific and social aspects, and there was no one solution for proper sharing of the resource. Accordingly, her delegation supported the general approach of the draft articles, which emphasized the importance of bilateral and regional arrangements and their precedence over the provisions of the draft articles.

60. The draft articles had usefully identified some important principles that had already gained recognition, namely, the principle of equitable and reasonable utilization; the obligation not to cause significant harm; and the obligation of aquifer States to cooperate to attain reasonable utilization and adequate protection of a transboundary aquifer or aquifer system. Many of the same essential principles were already reflected in instruments on the use of surface water resources, such as the International Law Association's Helsinki Rules of 1968, updated by the Berlin Rules of 2004, and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. However, since the 1997 Convention dealt with a subject matter of lesser complexity with a longer history of State practice and still had limited ratification, consideration should be given to alternative final forms for the draft articles other than a convention.

61. **Ms. Dascalopoulou-Livada** (Greece) said that her delegation welcomed the complete set of articles proposed by the Special Rapporteur on the topic "Shared natural resources" and believed that, in order to fulfil their full potential, they should take the form of a convention. Regulation of the use of transboundary aquifers would satisfy a need that would become even more evident in the future and would also influence regulation of the use of other natural resources. Of course, many of the draft articles drew their inspiration from the 1997 Convention; there was a close connection between the two types of water sources, which favoured a holistic legal approach.

62. Draft article 3 encouraged aquifer States to enter into bilateral or regional arrangements. Her delegation felt that the term "arrangement" was vague and could refer to "soft-law" instruments. States should also be encouraged to adopt agreements; since the subject matter was new, there was a clear need for regulation, and agreements tended to be a better means to do so. Furthermore, it was hard to see how arrangements such as those envisaged in the draft could override a convention, if the draft articles ultimately took that form. Moreover, it was important that such arrangements or agreements should be compatible with such a convention.

63. In that regard, there was some overlap between draft article 3, paragraph 2, and draft article 4, paragraph 2. It was unclear whether the agreements referred to in article 4 regulated matters other than

groundwaters, and no distinction was made between present and future agreements. In addition, there appeared to be a contradiction between paragraphs 2 and 3 of article 3; if an eventual convention applied, in accordance with paragraph 3, only to the extent that its provisions were compatible with an arrangement, there would be no room for the harmonization called for in paragraph 2. It would be more logical to restrict the application of paragraph 3 to existing agreements and provide clearly for the harmonization of future ones.

64. Her delegation supported two innovative draft articles: draft article 18, which dealt with scientific and technical assistance to developing States, and draft article 10, which provided for harmonized standards and methodology for monitoring a transboundary aquifer. Another provision of cardinal importance was draft article 5 on equitable and reasonable utilization. However, with regard to its paragraph 2 (b), since the unilateral use of a non-recharging aquifer entailed the risk of diminishing the potential benefits for the other aquifer States, her delegation considered that the conclusion of an agreement between the aquifer States should be a prerequisite for any use of a non-recharging aquifer.

65. Draft article 7, paragraph 1, by referring to "significant harm", set too high a threshold, especially with regard to non-recharging aquifers, damage to which by definition could not be restored. Her delegation believed that the draft should depart from precedent and lower the threshold to "harm". With regard to draft article 7, paragraph 3, on compensation, the Special Rapporteur explained that the provision applied only to cases where the obligation of due diligence had been fulfilled and there was thus no question of State responsibility. Her delegation thought that the clarification should be made in the text of the provision.

66. **Mr. Pecsteen** (Belgium), noting the Special Rapporteur's view that the incompatibility of a reservation with the object and purpose of a treaty raised a question about the validity of the reservation, said that his delegation welcomed the use of the term "validity". The Commission had asked about State practice in cases when a State objected to a reservation it considered incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between itself and the author of the reservation. Specifically, the Commission wished to know what effects the author expected such objections to have.

67. It was Belgium's view that the only possible effect of such an objection was the public denunciation of the alleged invalidity of the reservation. Since the validity of a reservation did not depend on whether an objection was raised, the objection had no effect other than to manifest a disagreement between the reserving State and the objecting State as to the validity of the reservation. An objection as to the validity of a reservation could not produce the same effects as an objection to a valid reservation, and in itself it did not demonstrate the invalidity of the reservation, which could only be assessed on the basis of the treaty itself.

68. Nonetheless, a series of similar objections to the same reservation might be considered an element of subsequent practice within the meaning of article 31, paragraph 3 (b), of the Vienna Convention, providing a basis for deciding the issue of validity. Most importantly, the accumulation of such objections might induce the reserving State to withdraw the reservation. Conversely, the absence or scarcity of objections as to the validity of a reservation might be an element to be taken into account in assessing its validity, although it was by no means the deciding factor.

69. Moreover, the issue of whether the State that had formulated an invalid reservation was bound to observe the provisions to which the reservation related, as well as the rest of the treaty, or whether it was released from the entire treaty obligation, depended on the sanction for invalid reservations and was not an effect of objections to invalid reservations. As it had pointed out the year before, his delegation wished to stress that when it objected to a reservation because it believed it to be contrary to the object and purpose of the treaty, while not opposing the entry into force of that treaty in its relations with the reserving State, its intent was to manifest that it considered itself bound by the treaty as a whole vis-à-vis the reserving State and would not take into account a reservation incompatible with the object and purpose of the treaty, considering that the solution provided in article 21, paragraph 3, of the Vienna Convention did not apply to the case.

70. **Mr. Kiboino** (Kenya) said that Kenya recognized the need for an international legal instrument on transboundary aquifers and aquifer systems and therefore welcomed the draft articles on shared natural resources. It hoped that the current focus on

transboundary groundwaters would be expanded to include other shared natural resources such as oil and gas. The Special Rapporteur was right to consult States and international organizations dealing with hydrogeological systems but might also consult bodies such as the United Nations Environment Programme.

71. His delegation noted with satisfaction the emphasis given to bilateral and regional arrangements in draft article 3 but thought that the existing wording might be interpreted as an "opt out" clause. It therefore proposed deleting "consider" from paragraph 2 so as to ensure that all regional arrangements were concluded within the framework of the convention, which should include guiding principles for more specific bilateral and regional arrangements. It also noted the paucity of State practice on the topic, especially in developing countries, and therefore appreciated the inclusion of draft article 18 on scientific and technical assistance to developing States.

72. Turning to the topic "Unilateral acts of States", he said that it was regrettable that little progress had been made over the past nine years. The slow progress was no doubt due to the complexity of the topic, and the Commission should redouble its efforts.

73. Some of the examples of State practice highlighted in the Special Rapporteur's eighth report (A/CN.4/557) might not fall within the definition of unilateral acts, especially in the light of the grid established by the Commission. The examination of State practice could greatly assist the quest to develop important concepts on unilateral acts. It was indeed vital to have a clear definition of unilateral acts of States capable of creating legal obligations and to distinguish such acts from acts creating political obligations. The definition should be sufficiently narrow not to infringe on the right of States to make political pronouncements and should reflect a deliberate intention to create a legally binding obligation. The person performing the act on behalf of the State must have the requisite capacity and authority. It would be preferable to restrict that category to the persons defined in article 7 of the 1969 Vienna Convention on the Law of Treaties. The Commission should continue to focus on draft articles for a legal instrument while keeping the guidelines or principles option open.

74. On the topic "Reservations to treaties", his delegation endorsed the approach of developing a guide to practice; such a guide and its commentary would reduce uncertainty and facilitate the operation of treaties. It noted with interest the discussion in the Commission on the complex questions of validity of reservations and compatibility of reservations with the object and purpose of the treaty. It saw merit in the use of "validity" instead of "admissibility" or "permissibility" in respect of reservations running counter to the object and purpose of the treaty. "Validity" was a broad enough term to cover both form and substance. However, the guidelines must remain within the context of articles 19 to 23 of the 1969 Vienna Convention. Since the definition of core terms would alleviate interpretation problems, his delegation welcomed the Special Rapporteur's efforts to define such nebulous concepts as "object and purpose".

75. **Ms. Gavrilescu** (Romania) said that because of the complexity of the topic "Reservations to treaties" it was difficult to draw any final conclusions on the concepts of the validity of reservations and the object and purpose of the treaty. The first concept was indeed necessary but required more precise definition, for an invalid reservation would be null and void. The notion of opposability was essential to the relationship between the State formulating the reservation and the other contracting parties. On the question of the admissibility of reservations, a distinction must be made between reservations compatible and reservations incompatible with the object and purpose of the treaty, for in the latter case the State formulating the reservation was not bound by the treaty.

76. The approach taken in draft guideline 3.1.11, which stated that a reservation designed to preserve the integrity of a State's domestic law might be formulated only if it was not compatible with the object and purpose of the treaty, gave rise to problems relating to the commitment of the formulating State and should be worded more clearly.

77. Her delegation agreed that article 19 of the 1986 Vienna Convention should be reproduced as it stood in draft guideline 3.1. It noted that the question of the effects which States attached to an objection to a reservation formulated by another State party to the same treaty was of particular interest in practice. When a State considered that such a reservation was not compatible with the object and purpose of the treaty the effect of the objection would be equivalent to the non-application of the treaty between the two parties: when the consent of the reserving State had been

expressed in terms regarded as unacceptable by the first State, the treaty itself could not have any legal effects between the two parties.

78. The analysis of the effects of the practice whereby a State objected to a reservation which it regarded as incompatible with the object and purpose without opposing the entry into force of the treaty between the objecting State and the reserving State should take into account several elements which formed a bridge between the legal and political aspects: the need to allow as many States as possible to become parties to international conventions; the wish of the parties that an objecting State might still want to maintain a link with the reserving State under the convention; the possibility of basing such an approach on legal and/or political arguments; the importance of leaving the door open to cooperation which might result in the reserving State reconsidering its position; the positive role of a collective opposition to a reservation with regard to achieving a legal effect (the withdrawal of the reservation) by political means (objection to the reservation and dialogue); and the undesirability of settling the problem without detailed study.

79. It must never be forgotten that the principles of free consent and good faith and the rule *pacta sunt servanda* were universally recognized, that the very purpose of the United Nations was to maintain international peace and security and that cooperation under treaties was the key to achieving that purpose.

80. **Ms. Rivero** (Uruguay) said that the assistance obtained from the scientific community had facilitated a much clearer understanding of the technical and geological aspects of the topic "Shared natural resources". Uruguay had a direct interest in the topic because it shared the Guaraní aquifer, which extended beneath the territory of the four other members of the Southern Common Market (MERCOSUR). It was glad that the Guaraní aquifer had in fact been studied by the Commission and could endorse many of the principles established in the Commission's work. Since 2003 the members of MERCOSUR had been working on an environmental protection and sustainable development project for the Guaraní aquifer system in an effort to agree on fundamental principles for future regulations and activities.

81. It would be better if the topic was entitled "Transboundary natural resources", and her delegation noted in that connection the reference in draft article 3, on bilateral and regional arrangements, to "aquifer States". Uruguay endorsed the importance attached to the principles set out in draft article 5 (Equitable and reasonable utilization), draft article 7 (Obligation not to cause harm), draft article 8 (General obligation to cooperate) and draft article 9 (Regular exchange of data and information). A topic involving such an important resource as water and such a fundamental principle as the sovereignty of States could be dealt with only on the basis of good faith, cooperation and the application of international law. Uruguay further endorsed the treatment of the concept of "significant harm" in draft article 7 and the arguments underlying draft article 16 (Assessment of potential effects of activities) and draft article 17 (Planned activities). It was in favour of recourse to arbitration when the parties could not agree.

82. **Mr. Currie** (Canada) said that Canada agreed that the objectives of the proposed framework for a draft convention or protocol on transboundary aquifer systems (protection of aquifers, bilateral cooperation, and shared information) were important. The principle of not causing harm, *sic utere*, had in fact underpinned Canada's relationship with the United States with respect to transboundary environmental issues involving shared water resources. Existing bilateral instruments of Canada and the United States, such as the Boundary Waters Treaty, did not apply to groundwaters, but the Joint Commission established by that treaty had conducted studies on groundwater issues, and any further consideration of groundwaters would borrow from its principles.

83. In the current case, reliance on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses as a framework for a new convention should be balanced by other approaches: since the 1997 Convention lacked international support and was not yet in force it would be preferable to explore other approaches which might generate consensus. In particular, the existing provisions, which would allocate water resources located in aquifers between States on the basis of "equitable and reasonable utilization", might run counter to other pre-existing formulas. However, it was useful that draft article 3 provided that bilateral and regional arrangements would prevail over the general provisions of the instrument. The approach of not creating a hierarchy of uses would run counter to Canada's

relationship with the United States, for the Boundary Waters Treaty had established a useful regime for uses.

Agenda item 158: Observer status for the Hague Conference on Private International Law in the General Assembly (A/60/232, A/C.6/60/1/Add.1 and A/C.6/60/L.9)

84. **Mr. Hamburger** (Netherlands), introducing draft resolution A/C.6/60/L.9 on behalf of the sponsors, said that Austria, Belarus, Belgium, Canada, the Czech Republic, Germany, Jordan, Morocco, the Republic of Korea, the Russian Federation, Slovenia, Turkey and the United Kingdom had joined the sponsors.

85. The Hague Conference currently had 65 member States from all continents, and 60 other States were parties to one or more of the Hague conventions. The Conference's statutory mission was to work for the progressive unification of the rules of private international law. Its work covered a wide range of areas such as commercial and banking law, international civil procedure, and family law. Thirty-six multilateral treaties had been adopted between 1951 and 2005. The Conference also provided legal services and technical assistance for member States and States parties to the Conventions.

86. The Conference cooperated with the United Nations system in all areas of its work: for example, it worked with the United Nations Commission on International Trade Law and the International Institute for the Unification of Private Law on a tripartite basis. It also worked with the United Nations Children's Fund, the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees, with the focus very much on the Hague Conventions on international child abduction, on adoption and on protection of children. It had also cooperated with the United Nations Conference on Trade and Development on such issues as the transfer of technology and the law applicable to licensing agreements and know-how. A fuller account of cooperation with the United Nations system would be found in the explanatory memorandum annexed to the letter requesting the inclusion of the item in the agenda (A/60/232).

87. There was scope for extending the Conference's cooperation with the United Nations system and therefore a need to formalize the relationship. The granting of observer status for the Hague Conference in the General Assembly would facilitate such cooperation, to the benefit of all Member States.

The meeting rose at 5.50 p.m.