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Held at Headquarters, New York, on Tuesday, 22 October 2013, at 10 a.m.

Chair: Mr. Kohona . . . . . (Sri Lanka)

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The meeting was called to order at 10.05 a.m.

Agenda item 83: Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm (A/68/94 and A/68/170)

1. **Mr. McIvor** (New Zealand), speaking on behalf of Canada, Australia and New Zealand (CANZ), said they were pleased to see that the International Law Commission's work on transboundary harm was already providing important reference points for international decision-making bodies such as the International Court of Justice and the International Tribunal for the Law of the Sea. The gravity of the risk associated with transboundary harm from hazardous activities reinforced the importance of developing and maintaining a coherent and fair framework and standards that enjoyed the support of the international community.

2. The best way to ensure the progressive development of international law in that context was for the draft articles on prevention of transboundary harm from hazardous activities and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities to remain in their current form. There was little to be gained and more to be lost from attempting to transform the articles and principles into the form of a convention. They currently established clear, comprehensive standards that every State that wished to be in good standing with the international community should follow.

3. **Mr. Joyini** (South Africa) said that the draft articles and principles were already playing an important role as authoritative guidance for States and judicial bodies and had been referred to in a number of international legal judgements and in the arbitral awards and decisions of the International Tribunal for the Law of the Sea. Given that the draft principles and articles created a coherent system on which international courts and tribunals could base their decisions, their translation into a convention would strengthen the system and contribute meaningfully to the progressive development and codification of international law, while having the added benefit of revitalizing the work of the Sixth Committee.

4. **Mr. Simonoff** (United States of America) said that the draft articles and principles marked a positive step in encouraging States to establish mechanisms to address such issues as notification in specific national and international contexts and to provide prompt, adequate compensation for victims of transboundary harm. His delegation, in support of the view taken by the International Law Commission, urged States to take national and international action to implement the principles, in particular by reaching State-to-State agreements in specific contexts.

5. He believed it was most appropriate for the draft articles and principles to be treated as non-binding standards to guide the conduct and practice of States, and for the work on prevention of transboundary harm to remain formulated as draft articles, thereby increasing the likelihood that they would gain widespread consideration and fulfil their intended purposes of providing a valuable resource for States.

6. **Mr. Kowalski** (Portugal) said that the General Assembly's adoption of the draft articles and principles was a positive step towards the creation of measures to minimize the transboundary harm and loss that might result from hazardous activities. The goal of elaborating a convention on the basis of the draft articles was still far from being reached.

7. The topic should be analysed in the light of its own history and the purposes of codification and progressive development of international law, which should be harmonious and coherent. Bearing in mind that both prevention of transboundary harm and international liability in case of loss were included under the same main topic ("International liability for injurious consequences arising out of acts not prohibited by international law"), the two should be dealt with together, giving them equal legal status and enforceability in a single convention, in which the State's responsibility was adequately established and a real system of compensation was put in place. For the time being, however, achieving a whole set of draft articles or principles would already be a significant step forward, in view of the above-mentioned need for coherence.

8. **Ms. Chigiyal** (Federated States of Micronesia) said that the draft articles and principles were the clearest iterations of the rule that each State had a due diligence obligation to take all necessary steps to prevent the probable infliction of significant physical harm by its hazardous activities on another State's environment, people and property. Her delegation

supported the adoption of a binding international convention incorporating those articles and principles, which must incorporate a mechanism to help developing States to deal with the consequences of such activities, in the light of the limited capacities of those States. If a binding convention could not be adopted, States should at least be encouraged to put the draft articles and principles into greater use in their domestic decision-making processes and international relations, cooperating with each other and exchanging important information on the transboundary risks of hazardous activities.

9. Of all the areas in which the prevention rule played an important role, climate change was the most pressing for her country. Its very existence was threatened by the harmful effects of excessive greenhouse gas emissions. Due diligence in the prevention of transboundary harm was part of the corpus of international law, and no exceptions could be made for harm arising from activities that contributed to climate change.

10. The Federated States of Micronesia had been an active participant in climate change negotiations. Its Congress had recently ratified the Doha Amendment to the Kyoto Protocol, and was one of a handful of States that had endorsed the Protocol's second commitment period. It also had a nationwide integrated disaster risk management and climate change policy that mainstreamed climate change into governmental and economic decision-making processes. If a small, developing, historically low-emitting State like her own could take such significant steps towards minimizing the transboundary harm of greenhouse gas emissions, then all other States must shoulder the same obligation.

11. **Mr. Mangisi** (Tonga) said that the issue of transboundary harm was of critical importance to the Kingdom of Tonga and its Pacific small island developing State neighbours. The risk of harm to the oceanic environment from human activity carried with it the potential for devastating consequences. The international community must be proactive, not reactive, in addressing the issue; it had a responsibility to ensure that activity affecting the ocean was governed in a way that prevented harm to the extent possible and that provided adequate remedy in the event that such harm did occur.

12. Developing effective regulatory regimes to mitigate risk and ensure adequate remedy in the context of transboundary harm caused by deep seabed mining activity required clarity about parties' respective rights and obligations. Tonga was therefore playing a leading role in the development of a Pacific regional legislative and regulatory framework for that activity. The Advisory Opinion issued in 2011 by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the responsibility and liability of States sponsoring deep seabed mining activities in the Area provided useful guidance to sponsoring States. However, it also highlighted liability gaps and the question of residual State responsibility under general international law, issues that required the international community's attention.

13. Rising sea levels and ocean temperatures had a disproportionate impact on Pacific small island developing States. Those nations were therefore taking steps to strengthen oceans governance and to mitigate the effects of climate change, for example through the Majuro Declaration for Climate Leadership and the Pacific Oceanscape Framework, which called for clarification and formalization of States' jurisdictional rights and responsibilities in the Pacific Ocean. Tonga had also joined other small island developing States in calling for the inclusion of climate change and oceans governance as cross-cutting issues in sustainable development goals and the post-2015 development agenda.

14. At the domestic level, Tonga had set up a Joint National Action Plan on Climate Change Adaptation and Disaster Risk Management to promote good governance, enhanced technical capability and community resilience to climate change impacts. However, harm caused by greenhouse gas emissions in the developed world had transcended land, ocean and airspace boundaries and posed an immediate threat to survival in the Pacific and elsewhere. It was a global issue, and responsibility for such harm should be allocated accordingly.

15. Tonga had noted that some States had considered calling on the International Court of Justice to determine the question of State responsibility for transboundary harm caused by greenhouse gas emissions. Such an action might clarify State responsibility and spur action to address the profound effects of climate change. Meanwhile, the International Law Commission's draft articles and principles on

transboundary harm already provided authoritative guidance for States and judicial bodies in negotiating agreements and in taking domestic measures in that regard.

16. **Mr. Adeeb** (India) said that the draft articles provided enough flexibility to States to fashion specific liability regimes for particular sectors of activities under their jurisdiction. The thrust of the prevention aspect in those articles could be seen in the broader context of the right to development and the obligation to promote, preserve and protect the environment.

17. His delegation agreed with the basic purpose of the draft principles and supported the fundamental premise that in situations involving harm arising out of hazardous activities, the liability rested with the operator and, where appropriate, extended to other persons or entities also. As for response measures, he recognized that obligations to notify and consult were recognized in a number of international instruments governing hazardous activities. At the same time, the competent authorities of a State should have the power, under domestic laws, to require response measures from the operator towards mitigation/elimination of the damage. Any residual response measure from the State should be supplementary to the operator's liability, based on the State's capacity to undertake such measures.

18. He expressed concern about the expended definition of "damage" under draft principle 2(a), noting that a traditional civil liability regime such as the one in India provided for a definition of damage that included loss of life or property and loss resulting from "actual damage" to the environment. The cost of response measures for loss or damage by impairment of the environment would have an adverse impact on States' developmental efforts. The draft principles should therefore be complementary in nature, without prejudice to the regime on State responsibility under international law.

19. The draft articles and principles were a major step forward towards regulating the transboundary impact of hazardous activities and should serve as a useful guide to States in their efforts to incorporate relevant principles into their domestic laws and policies.

20. **Ms. Pham** Thi Thu Huong (Viet Nam) said that she supported the International Law Commission's recommendations on the elaboration of a convention on the basis of the draft articles in order to set up a legal framework for effective cooperation on the topic. It should cover not only the prevention of transboundary harm but also the liability aspects, including the allocation of loss, since the two issues were interrelated. Given that the elaboration of such a convention could take a long time, her delegation welcomed further comments on relevant State practice and looked forward to working with other States in that regard.

21. **Ms. Abdul Rahman** (Malaysia) said that the draft articles and principles should be retained in their recommendatory form pending further study of developments in State practice. The global effort to enhance the regulatory regime against transboundary harm from hazardous activities could be further advanced through a preventive code and principles for the allocation of loss and the creation of a harmonized compensatory scheme at the national level.

22. She highlighted several concerns pertaining to articles 1 to 3 of the draft principles. The scope and threshold of the term "significant" would require further clarification and a more precise definition. With regard to article 9, in particular, Malaysia was concerned that, without a compliance mechanism, it remained unclear how States would comply with the proposed mandatory requirement for preventive consultations. Establishing cooperative networks and joint response measures at the regional level was the key to achieving workable solutions, especially between bordering States that would be most affected by hazardous activities.

23. **Ms. Tomlinson** (United Kingdom) said that there had not been any developments in the past three years that would necessitate a change in her delegation's position that there was no need for a convention on the prevention of transboundary harm or the allocation of loss. Those topics were already covered by a number of binding, sector-specific and regional instruments, such as the European Union's Environmental Impact and Liability Directive.

24. Her delegation also questioned the benefit of adopting a convention that took a "one-size-fits-all" approach to all categories of transboundary harm. There was an obvious advantage in subject-specific initiatives tailored to address different activities and potential harms. In that context, the articles and principles should remain as non-binding guidance.

25. **Mr. Gonzalez** (Chile), drawing particular attention to draft article 1 and draft principle 8, noted

that prevention of transboundary harm and the allocation of loss principles were two sides of the same coin. A single instrument containing both the articles and the principles, which would unify the two sets of regulations, was therefore needed. Recognizing that delegations held differing views on the elaboration of a convention, he suggested that a working group of the Sixth Committee should be established to consider State practice in relation to the application of the articles and principles and to harmonize the texts into a single instrument.

26. **Mr. Zemet** (Israel) said that the draft articles on the prevention of transboundary harm and the draft principles on the allocation of loss represented the culmination of extensive work by the Commission. Israel's position was that it was most appropriate for the draft principles and articles to remain in their current recommendatory form; it saw no added benefit in attempting to transform them into the more binding form of a convention.

27. **Mr. Leonidchenko** (Russian Federation) said that the draft articles and principles represented a good balance between the codification and the progressive development of international law. Their importance could not be overstated, even though they were not in the form of a binding instrument, as they represented an authoritative source and guideline for harmonizing State practice in that area. Although it was premature to elaborate a convention, such a step could be considered in future. To that end, it would be important to determine to what extent States were prepared to be guided in their bilateral and multilateral relations by the draft articles and principles, particularly those that represented the progressive development of international law.

Agenda item 87: The law of transboundary aquifers (A/68/172)

28. **Mr. Cancela** (Uruguay) speaking on behalf of Argentina, Brazil, Paraguay and Uruguay, said that the draft articles on the law of transboundary aquifers were the first systematic formulation of international law at the global level on that topic. The four delegations endorsed the Commission's approach of formulating general rules on the topic of transboundary aquifers as normative propositions. The draft articles recognized that each aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, and that it should exercise its sovereignty in accordance with international law and, in particular, with the principles and rules contained in the draft articles. They also set out the obligation for States not to cause significant harm to other aquifer States, to prevent or control the pollution thereof and to protect and preserve ecosystems. Moreover, they provided for the possibility of international technical cooperation with developing States in managing a transboundary aquifer or aquifer system.

29. He recalled the Guaraní Aquifer Agreement, which aimed to expand the scope of concerted action for the conservation and sustainable use of the transboundary resources of the Guaraní Aquifer System. Recognizing that several delegations had deemed the elaboration of a draft convention on the topic premature, he expressed support for the adoption of the draft articles in the form of a declaration of principles, to be taken into account in bilateral or regional agreements on the proper management of transboundary aquifers.

30. **Mr. Shubber** (Bahrain), speaking on behalf of the Group of Arab States, stressed the importance of the item on transboundary aquifers to the members of the Group, in view of the scarcity of water in the region. Although the Commission's efforts had resulted in a flexible set of articles on the use and protection of aquifers, more scientific information was needed, bearing in mind that State practice in that regard varied greatly. States' experience in negotiating bilateral arrangements on the sound management of shared aquifers demonstrated the importance of taking into account hydrological and climate conditions, together with the economic, social and cultural situation of the countries involved.

31. He reiterated the view expressed by the League of Arab States in the Secretary-General's report (A/66/116) that the title should read "Law on shared international aquifers". There should also be an article on dispute settlement and an additional article on the need to take into account the special situation of developing countries and territories under occupation; article 18 should include a reference to the applicable rules and principles of international law relating to armed conflict, non-international conflicts, and territories under occupation; and article 4(c) should take into consideration States' current and future needs with regard to aquifers. Moreover, in order to maintain previously acquired rights, the law of shared international aquifers should not apply to projects

already undertaken. He hoped that the relevant draft resolution on the topic would take into consideration the comments made by the League of Arab States on behalf of its member States.

32. **Mr. Aoyama** (Japan) said that the need to establish a legal framework in the field of transboundary aquifers had significantly increased in the two years since the Sixth Committee had considered the topic, given the growing demand for fresh water and the overexploitation and pollution of a number of such aquifers. The draft articles provided a valuable platform for countries concerned with establishing bilateral or regional legal frameworks to manage their aquifer systems. They reflected a wide range of State practices, were well supported by scientific evidence and could serve as a common basis for negotiation.

33. His delegation was proposing that the Sixth Committee should hold a discussion on the topic on the basis of the draft resolution on the law of transboundary aquifers because of the importance and urgency of the issue. The resolution had been drafted with a view to seeking a wide range of support from Member States. His delegation did not intend to hold meetings on negotiations for a possible convention because delegations had voiced some concerns about the draft resolution. That resolution had been crafted to incorporate every possible concern from Member States, and he expressed the hope that it would be positively considered by delegations.

34. **Mr. Al-Hajri** (Qatar) said that the comments from Member States contained in the Secretary-General's report (A/68/172) indicated how vital it was to protect aquifers. To that end, a balance must be struck between countries' right to the fair and equitable use of aquifers and their obligation to prevent harm to other countries. It was important that any international instrument should contain provisions concerning equitable and reasonable use and ensure a commitment to international cooperation and the protection and maintenance of aquifers. With a view to achieving a binding instrument, General Assembly resolution 66/104 had encouraged States to develop bilateral and regional arrangements and had also encouraged the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to offer further scientific and technical assistance to the States concerned.

35. The strengthening of cooperation on the proper management of water resources was a long-term process, but its beneficial aspects were significant. Qatar was participating in the drafting of an Arab agreement concerning shared water resources, including aquifers. Countries currently engaged in aquifer-related activities should set them aside until an acceptable agreement could be reached by the affected States.

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

37. Numerous factors might be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer, present and future uses, climate conditions and economic, social and cultural considerations. Maintaining the articles as a resource in draft form would be the best way of ensuring that they would be a useful resource for States in all circumstances. Given the possibility of overlap with existing framework conventions on the topic, his delegation remained unconvinced that a global convention or principles based on the draft articles would garner sufficient support. Instead, he encouraged States to make appropriate bilateral or regional agreements or arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles.

38 **Ms. Rodríguez Pineda** (Guatemala), noting that Guatemala was an upstream country, 74 per cent of whose national territory was composed of river basins with water flowing naturally towards other countries, said that, pursuant to General Assembly resolution 66/288, all cooperation with regard to water resources must be carried out with full respect for national sovereignty. Guatemala had put in place a State policy on international watercourses and had prepared a report in 2012 on the country's official interest in the topic of

water in the framework of its international relations, a topic of extreme sensitivity to her Government.

39. In the relationship between two or more States, rights and obligations with respect to water resources existed for both of them. The economic cost of conserving water, which had been borne in the past by the upstream countries alone, must be shared by the downstream countries as well, through payment for environmental services, among other things.

40. In the light of the differing views expressed by States on a series of terms used in the draft articles on the law of transboundary aquifers and the fact that international practice was still evolving, it would be premature to take a decision on the final form of the articles. They should continue to be thoroughly studied by States, in view of the complex nature of the topic and the underlying scientific issues involved. She suggested, therefore, that the topic should be considered by the Sixth Committee at intervals of no less than three years.

41. **Mr. Kowalski** (Portugal), noting that aquifers contained about 96 per cent of the world's fresh water, said that there was a growing awareness of the relevance of transboundary aquifers to political and economic implications and to development in general, as witnessed by the inclusion in the Millennium Development Goals of access to safe drinking water. The sustainable governance of such aquifers was essential in order to reduce pressures from pollution and overexploitation.

42. His delegation believed that the draft articles could make a positive contribution to the sound and equitable management of transboundary aquifers and hence to the promotion of peace. In that context, he underlined the inclusion of a reference to the right to water and to the principles of international environmental law in the draft articles.

43. That there were some similarities between the draft articles and other conventions pertaining to international watercourses merely served to demonstrate that the articles were in line with existing legal regimes. His delegation therefore reaffirmed its belief that they should evolve into an international framework convention that would neither go beyond bilateral or regional agreements nor restrict States' capacities to elaborate specific regimes suitable to their own circumstances. Meanwhile, the adoption of the draft articles as guiding principles would be a consensual solution.

44. **Ms. Abdul Rahman** (Malaysia) reiterated her delegation's position that the decision on the final form of the draft articles should be taken at a later stage, after sufficient evidence on State practice was available. The draft articles would continue to serve as a valuable reference for States to further develop their legal frameworks for the proper management of transboundary aquifers and their cooperative arrangements with their neighbouring or regional partners in that regard, subject to the States' capacity and resources to implement such frameworks and arrangements.

45. **Mr. Seoane** (Peru) said that the draft articles contained a series of general principles of great use in the progressive development of the topic, including State sovereignty, equitable and reasonable use of aquifers, the general obligation to cooperate and, in particular, the promotion of technical cooperation with developing States. However, his delegation had some concerns about certain concepts and definitions contained in the draft articles relating to the features of its own hydrological situation and the implications of the articles for current regulations in Peru. Therefore, in line with the views of other Member States, his delegation felt that further study of State practice was necessary before adopting a binding decision.

46. **Mr. Gonzalez** (Chile) said that although Chile had not made any specific bilateral or regional arrangements with regard to transboundary aquifers, it considered the General Assembly's progress in its discussion of the topic to be very useful; however, more technical knowledge was needed in order to provide a foundation for studies on the legal aspects of the use of such aquifers.

47. Further discussion of the draft articles should be based on the general principles of international law, especially the sovereign right of each State to promote the management, supervision and sustainable use of an aquifer in its own territory, the use of water resources using reasonable and sustainable criteria and respect for States' obligation not to harm other States or the environment.

48. **Mr. Puzyrko** (Ukraine) noted that Ukraine was not a party to any bilateral or regional agreements concerning transboundary aquifers; however, it had no objection to initiating a negotiation process on

concluding a convention based on the draft articles presented by the International Law Commission. As established by the draft articles, relations between aquifer States were founded on the joint management of dynamic aquifer resources. Meanwhile, in most cases the exploitation of confined aquifers was accompanied by a reduction in storage capacity associated with layer compression, which could lead to reduced water levels in aquifers in other States. Given that it was practically impossible to reverse that process using technological means, it was noteworthy that the draft articles did not provide a mechanism to offset the resulting financial losses.

49. Although draft article 6 concerned the "obligation not to cause significant harm", the concept of "harm" was not defined. The drafting of a convention would require such a definition, separating the concepts of "harm caused by aquifer depletion" and "harm caused by aquifer pollution". The criteria for what constituted significant or insignificant harm would also need to be defined.

50. **Mr. Zemet** (Israel) said that water was a rare commodity, especially in the Middle East, and therefore its sound use, management and protection constituted a shared interest of States and peoples. By combining technologies, innovation and goodwill, water scarcity could be transformed from a catalyst for conflict to a key for cooperation. Israel had become a leading actor in water management and stood at the international front of water technology, having more than doubled its available water resources by the development of seven large-scale desalination plants and the reclamation of almost 80 per cent of its urban waste water for agricultural reuse. Israel had also created a government authority responsible for all aspects of water and had become a world leader in agricultural innovation, sophisticated irrigation methods and combating desertification.

51. Although the draft articles were useful guidelines that States could consider when negotiating bilateral or regional agreements, his delegation was not convinced that it was appropriate to codify the articles formally in an international convention. Specific facts and circumstances, including the geophysical nature of the relevant area, the relationship between the States in question and the economic, cultural and political context, must always be taken into account. The international community should continue to learn from States' best practices, analyse case studies and deepen scientific research and cooperation in that field.

52. **Mr. Leonidchenko** (Russian Federation) said that the draft articles struck the right balance between the sovereign rights of States and the equitable and reasonable use of transboundary aquifers. He stressed the importance of the provision enshrining the obligation for aquifer States to establish joint cooperation mechanisms.

53. Rather than prematurely discussing the drafting of a convention, it would be more appropriate to continue the approach set out in General Assembly resolutions 63/124 and 66/104, whereby States were encouraged to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles. In any future work on the drafting of a convention, it would be important to consider existing international agreements referring to transboundary aquifers, including the Convention on the Law of the Non-Navigational Uses of International Watercourses and the Helsinki Convention.

54. **Mr. Zappalà** (Italy) welcomed the fact that several States were resorting to the articles in their treaty relationships. In that regard, he drew attention to the draft Model Provisions on Transboundary Groundwaters, adopted in 2012 by the Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, as another important case of application at the multilateral level of the basic principles enshrined in the draft articles on the law of transboundary aquifers.

55. He also noted the positive contribution at the scientific and technical level by the UNESCO International Hydrological Programme and said that his delegation stood ready to cooperate with the delegation of Japan and all Member States in the drafting of the resolution on the important topic of transboundary aquifers.

56. **Mr. Sharma** (India) said that the draft articles contained a number of useful provisions, such as those on the utilization, protection and preservation of aquifer systems and the recognition of the sovereignty of an aquifer State over the portion of the aquifer system located in its territory. He stressed the need for more scientific knowledge about the management and protection of aquifers and for additional technical assistance to States in understanding the complex

issues associated with the management and protection of aquifer systems.

57. The time was not ripe to develop a legally binding instrument on the basis of the draft articles; they should continue to serve as a useful guide for States in concluding their bilateral or regional arrangements on the topic. In that regard, he commended the efforts of the delegation of Japan in introducing the current draft resolution.

58. **Mr. Zeidan** (Observer for the State of Palestine), aligning his statement with that of the Group of Arab States, said that although the draft articles could not be considered for the purposes of formulating a convention, they could be used as a voluntary guide for bilateral or regional agreements for the management of transboundary aquifers. Draft article 3, on the sovereignty of aquifer States, would take the international community back nearly 118 years to the Harmon Doctrine of 1895, which encouraged States to use the guise of sovereignty over transboundary non-navigational watercourses to justify harmful practices towards neighbouring States. His delegation considered article 3 to be in contradiction with the principle of equitable and reasonable utilization and participation enshrined in the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, which should remain the universally applicable, authoritative legal instrument with regard to shared freshwater resources. Only on the basis of that principle could his region truly resolve the water crisis as part of a just two-State solution based on pre-1967 borders.

The meeting rose at 12.25 p.m.