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Chairman: Mr. Lelong . . . . . (Haiti)

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The meeting was called to order at 10.15 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Prandler** (Hungary) welcomed the results achieved by the International Law Commission in its discussions of the topic "International liability for injurious consequences arising out of acts not prohibited by international law", especially the adoption of the final text of a draft preamble and 19 articles on prevention of transboundary harm from hazardous activities, and the commentaries thereto.

2. His delegation endorsed the refinements made by the Commission during its second reading of the draft text. It agreed with the inclusion of a reference to "hazardous activities" in the title of article 1 and to the need to assess environmental impacts in article 7. It also welcomed the addition of the new paragraphs 3, 4 and 5 to article 19.

3. As to the structure of the draft articles, his delegation considered that the provision in article 11, paragraph 3, on the procedures applicable in the absence of notification, should be inserted between paragraphs 2 and 3 of article 9, on consultations on preventive measures. As noted in paragraph (7) of the commentary to article 9, that article might be invoked as a result of article 8, or in the course of the exchange of information under article 12, or in the context of article 11. Thus, in accordance with article 9, consultations might take place either before authorization and the commencement of a hazardous activity, or while it was being performed.

4. Although article 19 had been improved by the addition of new paragraphs 3, 4 and 5, providing for a compulsory procedure for the establishment of a fact-finding commission, the text of the article, as it stood, was not entirely satisfactory. His delegation would have preferred it to include, mutatis mutandis, all the provisions of article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, including paragraph 10, which envisaged the possibility of a compulsory settlement of disputes by the International Court of Justice or through arbitration if, at the time of ratification, acceptance or approval of the Convention, the parties made a declaration of acceptance of compulsory jurisdiction. Hungary had made such a declaration at that time.

5. Turning to the question of the final form of the draft articles, he said that his delegation did not object, in principle, to the recommendation of the International Law Commission that the General Assembly should elaborate and adopt a convention on the basis of the draft, since various national legislations and multilateral treaties concerning the environment and environmental protection clearly indicated the existence of a customary rule of international law on the prevention of transboundary harm. Hungary would therefore be prepared to work on refining the draft articles in an appropriate setting within the Sixth Committee.

6. On the question of an international regime of liability, his delegation wished to emphasize the tripartite relationship between hazardous activities, the duty to exercise due diligence in discharging the obligations relating to prevention, and the question of liability. The development of a clear set of rules on liability was a sine qua non for the establishment of an appropriate regime for transboundary harm. In accordance with paragraph 7 of General Assembly resolution 55/152, the Commission had a clear obligation and duty to resume its work on the question of liability, in order to facilitate the future adoption of a comprehensive convention in that field. He was disappointed that the report of the Commission did not say whether it intended to deal with that question in the future. If, as it seemed, some members of the Commission had doubts about developing an adequate regime of liability, his delegation would wish to know the reasons, in order to examine and discuss them.

7. With a view to contributing to the future work of the Commission, he said that his delegation fully endorsed the concept of liability as a duty to repair transboundary harm incurred by the operator or the State of origin without regard to the wrongfulness of its conduct under international law.

8. When industrial activities led to transboundary environmental risk and harm, the principle of sovereign equality of States called for an effective regime of liability, which should be based on an understanding that the affected State would be compensated for any harm arising from an activity carried out in the territory of the State of origin. If there existed in addition to a preventive regime, an adequate liability regime focusing on compensation for damage, States would more readily accept hazardous activities with possible transboundary harm in the States of origin.

9. The Government of Hungary had undertaken a comprehensive review of its bilateral agreements with neighbouring countries in the area of environmental protection and water management, with a view to revising and updating those agreements, where necessary, and to ensuring that the States parties assumed responsibility to compensate for all transboundary harm to the other Party. Likewise, in 1999 Hungary had launched a regional environmental initiative aimed at the elaboration and adoption by Central and Eastern European countries of a binding international legal instrument that would provide for State liability for environmental harm and guarantee greater protection of the environment at the regional level.

10. His delegation hoped that the "polluter pays" principle would be widely included in regional and international legal instruments on environmental protection. Hungary had incorporated into its domestic legal system recent conventions adopted under the auspices of the United Nations Economic Commission for Europe, including the Convention on the Transboundary Effects of Industrial Accidents, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, in which the above-mentioned principle had been acknowledged as a general principle of international environmental law. In that connection, States Parties to the latter Convention had agreed in 2000 on the elaboration of a protocol on the concepts of responsibility and liability, as proposed by Switzerland. In July, the Parties meeting in Geneva had decided to start negotiations on such a protocol, within the framework of the Economic Commission for Europe.

11. Particular attention should also be given to efforts aimed at the establishment, within the European Union, of a community law regime on liability in the area of the environment, as envisaged by the white paper on environmental liability adopted by the European Commission the previous February. The regime on liability would serve to improve the application of the "polluter pays" principle and other environmental principles laid down in the relevant constituent treaties of the European Community.

12. **Mr. Wickremasinghe** (United Kingdom) said that the draft articles on the prevention of transboundary harm from hazardous activities represented a valuable contribution to that area of law. In particular, the core obligation on prevention contained in article 3 provided a sound foundation for the draft as a whole.

13. It remained unclear how the obligation of prevention related to the requirement for an equitable balancing of interests, as provided in articles 9 and 10. His delegation would be concerned if the concept was interpreted in such a way as to undermine that obligation. Fortunately, article 18 provided that those articles were without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

14. With regard to the Commission's recommendation that the General Assembly should elaborate and adopt a convention on the basis of the draft articles, he said that his delegation would be prepared to consider that possibility if broad support for a universal convention on the topic existed. However, in the light of the experience of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which was still far from its entry into force, the negotiation of a convention was not necessarily the most effective use to which the work of the Commission could be put. Instead, the General Assembly might adopt a resolution recommending that States should be guided by the draft articles in the conduct of their relations and in particular when negotiating relevant agreements at both the bilateral and multilateral levels.

15. The fact that the Commission had concluded its work on the prevention of harm vindicated the Commission's decision to focus on that aspect of the topic of international liability. His delegation recommended that before the Commission decided whether or not to return to liability issues, it might survey the various treaties which dealt with those issues and ongoing projects in other forums. Such a survey would provide an opportunity for the Commission to draw lessons from the successes and failures of those instruments and to consider what work of genuine value it could undertake.

16. Turning to the topic of reservations to treaties, he said that his delegation supported the progress made at the recent session and commended the Special Rapporteur for having reconsidered the need for additional guidelines on conditional interpretative declarations. On previous occasions, it had expressed real doubt as to whether a category of conditional interpretative declarations could truly be said to exist

independently of reservations, and it had urged the Special Rapporteur to consider the question of definition in substantive rather than formal terms.

17. The Special Rapporteur had taken a restrictive approach in draft guidelines 2.3.1 to 2.3.3 on the late formulation of reservations. As a general rule, late reservations were impermissible and the practice should not be encouraged.

18. The role of the depositary was an important but difficult area, and the guidelines, as a non-binding instrument, should encourage depositaries to adopt a uniform practice. The crux of the matter was the acceptance of reservations and objections to them, and his delegation looked forward to the Special Rapporteur's next report in that regard.

19. With respect to the topic of unilateral acts of States, the Special Rapporteur seemed to share his delegation's view that an attempt to develop a body of rules applicable to all unilateral acts was not well founded.

20. Lastly, on the subject of diplomatic protection, his delegation noted the steady progress made in relation to the rule of continuous nationality and the exhaustion of local remedies. It appreciated work on the topic done by the Special Rapporteur, both for the clarity of his analysis and his open-minded approach.

21. **Mr. Galicki** (Poland) said that his delegation attached great importance to the draft articles on prevention of transboundary harm from hazardous activities and fully associated itself both with the obligation of prevention, appearing in article 3, and with the principle expressed in the preamble that the freedom of States to carry out or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited.

22. The Commission had made the right choice four years previously in deciding to deal first with the issue of prevention, which should be the preferred policy, since, as the commentary to the draft articles stated, "prevention as a policy is better than cure". The scope and form of the draft articles could, however, be improved and strengthened and a decision on developing future articles on the general topic of liability should be reached.

23. His delegation was of the view that the territorial scope of the application of the draft articles should not be limited to the harm caused to areas within a national jurisdiction. The definition of "transboundary harm", contained in article 2, subparagraph (c), seemed too narrow, while failing to solve the question of harm caused to areas beyond a State's national jurisdiction or control. Bearing in mind that the definition of "harm" in article 2, subparagraph (b), also included harm caused to the environment, it seemed that it would be in the interests of the international community as a whole to extend the operation of preventive protection to the environment, without limit of State boundaries. It would also be useful to consider whether the obligations concerning prevention should be exclusively procedural in nature, as was currently proposed, or should — as had already been suggested — include substantive requirements to mitigate or prevent certain impacts. His delegation would favour the latter approach.

24. His delegation's second observation related to the form that the draft articles would take. It fully endorsed the Commission's recommendation to the General Assembly that a convention should be elaborated on the basis of the draft articles. Although there already existed a number of regional environmental agreements, and others were being negotiated, there was a clear need for a universal instrument dealing with the problem on a global scale. The draft articles represented a notable attempt at the progressive development of international law and, as such, deserved to be reflected in the form of a universally binding treaty. That option, which was his delegation's preferred choice, did not preclude the possibility, in practice, of following the pattern applied in the case of nationality in relation to State succession, with the General Assembly taking note of the draft articles with a view to their further elaboration in the form of a convention. The draft articles would be annexed to the General Assembly resolution, together with a recommendation that the text should be widely disseminated. Such a solution would protect and preserve in the best possible way what had been done in the past and what could be done in the future in the field of international legal regulations concerning the prevention of transboundary harm from hazardous activities.

25. With regard to the possibility of continuing the general topic of international liability for injurious consequences arising out of acts not prohibited by international law, he recalled that the Commission had included the topic in its agenda in 1978, separately

from the topic of responsibility, and later, in 1992, had decided to continue the work in stages, first completing its work on prevention of transboundary harm and then proceeding with remedial measures. Although the first stage of the Commission's work seemed to have been successfully completed, his delegation questioned whether the Commission's work on the topic of liability should be discontinued. That approach hardly seemed the best solution. Poland was, like some other States, committed to the continuation of the Commission's work on the issue of liability for acts not prohibited by international law, since the General Assembly discussion on the elaboration of a convention on prevention simultaneously with the Commission's consideration of the issue of liability would be of great significance for the codification and progressive development of international law in what was a very important field of contemporary international relations.

26. **Mr. Grigg** (Australia) said that his delegation supported the Commission's recommendation to the General Assembly that work should commence on the elaboration of a convention on the basis of the draft articles, which, since they incorporated established principles of environmental protection, provided a sound foundation for the elaboration of a convention on the prevention of transboundary harm from hazardous activities. With regard to certain provisions of the draft articles, he noted that their application was not limited to situations of transboundary harm between States with common land boundaries, as article 2, subparagraph (c), clearly showed. Australia, as an island State, considered it particularly important that there should be a recognition that the articles applied also to transboundary harm across maritime boundaries, including adjacent exclusive economic zones, and to situations where harm was caused in the territory of one State by activities in another, where those States did not have any common boundaries. Accepting that transboundary harm was often regional in character, his delegation wished to record its understanding that the phrase "competent international organization" in article 4 should be interpreted as including relevant regional organizations. Similarly, his delegation believed that States should be encouraged to include regional organizations in their monitoring methods under article 5. He noted that the draft articles would require further work if a convention was to be drafted. In article 3 on prevention, for example, his delegation, while acknowledging the necessity of maintaining flexibility in the definition of preventive measures to be taken, considered that the concept of "appropriate measures" should be more precisely defined. Moreover, although the purpose and meaning of article 6 on authorization was clear from the commentary, it might be useful to clarify the language of the provision to reflect more precisely that it was the State of origin that granted authorization to an entity which intended to undertake or was undertaking a potentially hazardous activity. As for article 19, on the settlement of disputes, his delegation found it satisfactory, insofar as it provided for the choice of settlement by mutual agreement and, failing such agreement, provided recourse to an impartial fact-finding commission.

27. **Mr. Gómez Robledo** (Mexico), referring to the future work of the Commission, said that the Commission should begin a study of the second part of the topic, since the General Assembly could not limit itself to adopting an instrument on "international liability for injurious consequences arising out of acts not prohibited by international law" without including a set of rules specifically referring to the core of the topic. At its current session, the Assembly should simply take note of the draft articles and the Commission, in accordance with its mandate under paragraph 7 of General Assembly resolution 55/152 of 12 December 2000, should resume consideration of the liability aspects of the topic. Once a complete draft had been produced, the Committee could take the necessary measures to ensure that the fruit of the Commission's labour was transformed into a binding legal instrument. To that end, he urged States which had not yet done so to give the Commission written comments dealing specifically with the issue of liability. Although the obligations to prevent and to repair in cases of transboundary harm were different, the two were clearly interrelated. There were various arguments in favour of the Commission's continuing with the second part of the topic: principle 13 of the Rio Declaration mentioned the need to cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for environmental damage. The mere existence of a liability regime would serve as a preventive by discouraging activities that caused harm to individuals and to the environment; as the Commission had noted, the ecological unity of the planet did not correspond to political boundaries and therefore transboundary harm had consequences that went beyond the States directly

concerned. It was a question of justice and equity, since it would clearly be unfair to allow the burden of covering the costs of compensation to be transferred to the victims and affected States, and there were a variety of international regimes which dealt with different aspects of the attribution or channelling of liability for harm and should serve as a source of inspiration for the Commission's work. All those regimes referred, generally speaking, to civil liability and had chosen to channel strict liability to the operator of the activity in question. However, it was important to take into account the fact that some of those regimes envisaged the State's liability as residual or supplementary in cases where the operator did not cover the entire amount of the compensation. There were also alternative approaches under which States participated in compensation by contributing to indemnity funds created for those cases where the operator did not cover the entire amount. Another innovative source of inspiration was the work carried out within the framework of the Cartagena Protocol on Biosafety to the Convention on Biodiversity.

28. The draft articles reflected the current rules of customary international law in that area and included a detailed set of substantive and procedural rules concerning the duty of all States to take appropriate measures to prevent significant transboundary harm and to cooperate in good faith to that end.

29. The Commission had rightly sought to balance the need to ensure that the State of origin was not prevented from carrying out its activities by potentially affected States; it had also recognized that States freedom to carry out and authorize activities within their territory was not unlimited. The Commission had been wise to make the obligations of prevention and cooperation of a continuous nature. He also welcomed article 11 (Procedures in the absence of notification).

30. However, several elements should be explicitly included in the draft while others should be dealt with in greater detail. The scope of the draft articles was limited in two respects: first, the title of the draft, which focused on hazardous activities; and, second, the content of article 1. It was important for the draft to apply to a broad range of activities, including, as a guide, those covered by the 1993 Lugano Convention. Those limitations should not prejudice the setting of future restrictions on other activities which were not covered by the draft but which might entail the threat of transboundary harm. The draft took a bilateral or purely inter-State approach linked to the concepts of territory and jurisdiction; it did not deal with potential harm to the environment as a whole, particularly in areas outside any national jurisdiction. Thus, there was a need for continued work in that area to ensure that the obligation of prevention was applied effectively to all hazardous activities, regardless of where they were carried out or of the geographical area on which they had an impact.

31. Another cause for concern was the relationship between the obligation of prevention and the precautionary principle, to which explicit reference should be made in the draft in order to demonstrate more clearly how it related to the obligation of prevention. The precautionary principle was also a relevant factor in implementing the definitions of "risk of causing significant transboundary harm" and "State likely to be affected", which appeared in article 2. In addition, that principle should be considered not only as part of the general context of implementation of articles 3 and 10, but also as relevant in the specific context of articles 6 and 7. His delegation would have liked article 10 to include specific mention, at least in the commentary, of the risks to vulnerable elements of biodiversity. It would also have preferred an explicit reference to the global impact on agriculture of risks affecting centres of origin and genetic diversity. However, the list contained in the article was not exhaustive, and the States concerned could take more factors into account. His delegation considered that the implementation of article 14 (National security and industrial secrets) did not affect the type of information to be provided under article 17 (Notification of an emergency). Lastly, the Commission had shown excessive caution in the case of article 19 (Settlement of disputes) by proposing an impartial fact-finding commission as the only mechanism in cases where the parties could not agree. While he was in favour of that as the convention's primary approach, he would have preferred the draft to include, as a second stage, other dispute-settlement mechanisms binding on the parties, which his delegation considered necessary, given the type of dispute which could trigger implementation of the draft articles.

32. **Ms. Geddis** (New Zealand) said that, in her delegation's view, the draft articles were valuable in focusing on the main aspect of the topic: the duty of a State to take preventive action where activities in areas within its jurisdiction risked causing adverse

consequences to another State. The text of the draft articles had been tightened up and improved during the Commission's deliberations at its fifty-third session and provided a valuable framework of key provisions governing the obligations that should apply to States in whose territory or in areas of whose jurisdiction hazardous activities were undertaken. Elements of the draft articles that her delegation considered particularly useful were: the clear statement of the obligation of States of origin to take all appropriate measures to prevent significant transboundary harm; the clear application of the articles to activities (not prohibited by international law) that involved a risk of causing significant transboundary harm through their physical consequences; the elaboration of a set of factors to be used in the equitable balancing of interests in finding solutions where problems arose; the establishment of notification and consultation procedures in respect of activities involving a risk of causing significant transboundary harm; and the elaboration of a dispute settlement mechanism for the resolution of disputes, including recourse to an independent fact-finding commission.

33. Her delegation saw scope for a further evolution of thinking in two key areas, however. First, it was important to recognize that transboundary harm could take a number of forms, including economic loss. If the scale of the possible physical consequences was large enough, even though the probability might be low, harm could result from the risk, even if no physical consequences occurred. In such a situation, harm could result from the perception of the potential physical consequences of a particular activity. It was for that reason that the draft articles on prevention necessarily emphasized the need for remedial measures to take account of the risk involved and prevent actual damage occurring.

34. Secondly, it was important not to restrict risk situations artificially to those where there was a high probability of significant transboundary harm or a low probability of disastrous transboundary harm. There could be medium-risk situations in which preventive action might be justified and the question was not whether such action was necessary so much as what action should reasonably be taken, and which equitable factors might be important.

35. With regard to the Commission's recommendation that a convention should be elaborated on the basis of the draft articles, her delegation considered that there was a need to weigh carefully the close relationship between the prevention and liability aspects of the topic. There could be little question that prevention should be a preferred policy, as noted in paragraph 2 of the general commentary. Risk assessment, prevention activities and response preparedness were of critical importance and the draft articles constituted a major step forward in that direction. It should be borne in mind, however, that where activities were intrinsically hazardous, harm — and serious harm — would on occasion result. A way must therefore be found of ensuring that the resulting loss did not fall entirely on the affected State. That required the elaboration of legal principles to provide both for the effective liability of the responsible operator and for the residual liability of States where there was no effective operator liability. That second aspect of the topic should also be covered by the draft articles.

36. Having regard to all those reasons, the Committee should welcome the conclusion of the draft articles but reserve further action for the time being, both to allow some reflection on the issue and, more important, to allow work on the question of liability to be taken forward. The Commission's work on liability could then be informed by the work on the draft articles on prevention, and vice versa. Furthermore, the interdependence of the two topics constituted a strong case for the negotiation of a single convention dealing with both prevention and liability, which were two parts of a single whole.

37. **Mr. Estévez-López** (Guatemala) supported the recommendation by the representative of the Netherlands concerning the future treatment of the draft articles under consideration. With regard to article 1, he suggested that the last of the recommendations submitted by the United Kingdom in document A/CN.4/509 should be adopted. As for article 2, subparagraph (a), his preference was for the wording formulated the previous year, which had shown more clearly that a continuous scale of risks was at issue.

38. With regard to article 3, his delegation considered that the addition of the words "at any event" was not sufficient to negate what seemed to be an alternative to compliance with the obligation to prevent harm or minimize the risk of such harm. It would be easy to resolve the problem by replacing the words "at any event" by the words "where prevention is not

possible". The same amendment would have to be made in the first sentence of article 9, paragraph 1.

39. Article 9 might apply in two instances, one of which arose when a State of origin spontaneously provided another State with notification in accordance with article 8, paragraph 1. In that event, the notified State was recognized by the State of origin as being a "State likely to be affected" within the meaning of article 2, subparagraph (e). In order for the article to apply in the second case, it was essential that, if a State of origin had failed to notify the other State, the latter State, fearing that the activity in question might involve a risk of causing significant transboundary harm to it, should present the State of origin with a request in accordance with article 11, paragraph 1. If the State of origin acceded to the wish of the requesting State, it would have to apply article 8 and, from then on, the situation would be that of the first case. The second case arose if the State of origin did not recognize the requesting State as a State likely to be affected. That meant that if the State of origin did not succeed in convincing the other State that that conclusion was valid, the consultations into which the two States should enter in pursuance of article 9 would not be entirely consonant with the provisions of that article because, first, article 9 stated that the consultations should take place between the "States concerned" a term, which according to article 2 (f) signified "the State of origin and the State likely to be affected" and, secondly, it was doubtful whether, for the purposes of interpreting and applying the draft articles, it would be appropriate to regard the requesting State as the State likely to be affected, given that, unlike the situation in the first case in which article 9 applied, the State of origin did not acknowledge that the other State could be affected.

40. Consequently, the State of origin could contend, both during and after consultations, that, until it had granted such recognition, it was not obliged to apply articles 12 to 17, each of which referred either to the "States concerned" or to the "State likely to be affected". Furthermore, the State of origin could hold that, since it did not recognize the other State as a State likely to be affected, it was not bound to comply with the provisions of article 9, paragraph 3, in respect of the interests of that State, which interests did not exist for the State of origin insofar as it had not acknowledged that the other State was likely to be affected. Admittedly, in order to avoid disputes arising from claims of this type on the part of the State of origin, it might be appropriate for the draft articles to provide that a request made in pursuance of article 11, paragraph 1, would oblige the planning State to recognize the requesting State as a State likely to be affected. That would, however, be unreasonable, because it would give one State precedence over another. The only way out was to adopt the opposite solution, in other words to include in the draft articles a provision to the effect that the making of such a request did not oblige the planning State to recognize the requesting State as a State likely to be affected. If that solution was chosen, a dispute between the two States as to whether the requesting State should be regarded as a State likely to be affected, unless it could be resolved through the consultations referred to in article 9, or in subsequent negotiations, would have to be settled in accordance with article 19. That was very important because, if such a dispute was not resolved, the application of the articles would remain in abeyance.

41. The Fact-finding Commission mentioned in article 19 should also have conciliation powers, since a dispute might not turn solely on facts. Furthermore, as article 19, paragraph 6, allowed the Commission to make "recommendations", something that went beyond the powers of a merely investigative organ, and as fact-finding commissions were entitled to carry out investigations, his delegation considered that the commission was in fact a conciliation commission. In article 19, paragraphs 2 and 3, the words "and conciliation" should therefore be added immediately after the word "fact-finding".

42. Lastly, Guatemala supported the recommendation made by Sweden on behalf of the Scandinavian countries that, in article 19, more emphasis should be placed on arbitration and judicial settlement.

43. **Mr. Lobach** (Russian Federation) said that the chief merit of the draft articles on prevention lay in the fact that they developed the notion of prevention in the context of hazardous activities involving a risk of transboundary harm and established a cooperation mechanism which might pave the way to the formulation of the principles governing an equitable balance between the interests of the State carrying out hazardous activities and the interests of the States likely to be affected by them. A recommendation could be made to the General Assembly that it should elaborate the framework convention on the basis of the

draft articles on prevention. The embodying of the relevant provisions in a legally binding instrument would constitute an important step forward towards the creation of an international legal regime for the prevention of transboundary harm.

44. His delegation wished to submit some comments with a view to securing full compliance with the principles established in the draft articles. First, article 8, paragraph 2, departed from the 1991 Convention on Environmental Impact Assessment in a Transboundary Context with respect to the response to notification, by the State of origin, of the risk of significant transboundary harm. It was not clear whether, in that case, the response of the State likely to be affected had to be definitive or whether provisional notification would serve as a response. Furthermore, it was questionable whether the State likely to be affected had to agree to the carrying out of the activity or whether, at its own discretion, it could suggest to the State of origin that consultations should be held under article 9. That issue was insufficiently elucidated in the commentary.

45. As for article 9, paragraph 3, it would be advisable to define more precisely the extent to which the State of origin had to take account of the interests of the State likely to be affected, if no commonly agreed solution had been reached in consultations. In that case, the sole guide should be an equitable balance of interests.

46. Paragraph 3 of article 11 stated that during the consultations the State of origin must, if so requested by the other State, introduce appropriate and feasible measures and, where appropriate, suspend the activity in question for a reasonable period. That obligation might prove excessively onerous for the State of origin, for various reasons. In the first place, article 9, which provided for the holding of consultations at the request of any of the States concerned, did not contain any provision on the need to suspend the activity during the consultation period or any other period. Secondly, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, referred to in paragraph 6 of the commentary to article 11, provided that the State of origin could be requested to refrain from carrying out the activity (bearing in mind that it would be a planned activity, not one already in course of execution). He suggested that article 9, paragraph 3, could establish a similar regime, requesting the State of origin to refrain from carrying out the planned activity for a period not exceeding six months (as provided in article 8, paragraph 2).

47. The language of article 18 was non-traditional, in that its terms would apply only in cases where no other rules of international law existed. While the rule that the articles would not affect the obligations of States under other relevant treaties to which they were parties was appropriate, the provision that rules of customary international law took priority could reduce the scope of the article and cast doubt on the need to prepare and adopt a convention which ensured both the codification and the progressive development of the relevant area of international law.

48. Concerning article 19, he doubted whether paragraph 1 should list the peaceful means of settlement which might be chosen by the parties to settle disputes concerning the interpretation or application of the articles, given that Article 33 of the Charter of the United Nations contained a more comprehensive list.

49. **Mr. Singh** (India) expressed his satisfaction that the words “activities not prohibited by international law” had not been deleted from article 1, as those words were essential to indicate that further work remained to be done on the subject of liability following the adoption of the articles on prevention. After drawing attention to paragraphs (10), (13) and (15) of the commentary on article 3, he proceeded to a general review of various articles of the draft. Article 19 was a compromise proposal between those seeking a compulsory dispute settlement mechanism, and those who objected to any reference to a compulsory procedure, including a compulsory fact-finding mechanism. The commentaries to the draft articles explained their scope of application and provided guidance to the relevant case law and to general principles of international law, including environmental law. Reliance on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses provided for the continuity and stability of the legal principles involved. The preamble to the draft articles attempted to strike a balance between the development needs of States and the obligation to preserve and promote environmental security, bearing in mind the principle of permanent sovereignty of States over their natural resources and the Rio Declaration on Environment and Development. It also emphasized that the freedom of States to authorize the carrying out of hazardous activities within their

territories was not unlimited, and it required that interested States should be able to resort to international cooperation. The work of the Commission in that respect contributed to the progressive development of international law, particularly with regard to the obligations relating to the management of risk and engagement between States of origin and States likely to be affected. Articles 13, 15 and 19 were examples of such progressive development.

50. His delegation, along with a number of others, had emphasized the need to pay due attention to issues relating to development and the transfer of technology and resources, with a view to capacity-building in the developing countries. It had also pointed to the importance of differentiating between developing and developed countries in the application of standards and to the need to establish international funds. The draft articles were satisfactory, but the initiatives for managing risk from hazardous activities which were indispensable for development should be placed in the overall context of the right to development, with due regard for the environment and the interests of States and peoples likely to be affected. His delegation appreciated the efforts of the Commission to accommodate in the preamble its opinion that the subject of prevention could only be seen in the broader context of the right to development and the obligation to preserve the environment. The principles of "precaution" and "polluter pays" which, according to article 10, had to be taken into account when authorizing any hazardous activity, should be adopted in the interest of States and their populations and should not be invoked as strict legal obligations. In that connection, the States concerned would be guided by their economic policies and priorities, the funds made available by the operator and the overall benefits which they wished to maximize. Lastly, his delegation supported the Commission's recommendation that the draft articles should be adopted as a framework convention, and it proposed that the same procedure should be followed as for the draft articles on non-navigational uses of international watercourses.

51. **Mr. Bocalandro** (Argentina) said that the draft articles adequately covered the general norms of international law concerning the prevention of the risk of significant transboundary harm from hazardous activities. The Commission had adopted a balanced approach, taking into account both the interests of the States in which those activities originated and the interests of the States likely to be affected. His delegation therefore supported the draft articles, which could serve as the basis for a future convention of codification and progressive development in that area. The formulation of norms on liability remained pending, and the Commission should take up that important aspect, starting by clarifying the variety of terms and concepts. It was clear that, insofar as a State was bound by the obligations of prevention laid down in the draft articles, non-fulfilment of such obligations would trigger its international responsibility. In that case, the general norms on responsibility for internationally wrongful acts would apply. However, when, despite the fulfilment of all the obligations of prevention, significant transboundary harm occurred and, a fortiori, when those obligations were not fulfilled and harm occurred, it would be necessary to determine what liability would arise for the State of origin for the harm caused in the territory and other places under the jurisdiction of other States, and to what extent, in such circumstances, the State of origin should contribute to the cessation of the harm, and restitution and compensation for the damage, the amount of which, particularly in the case of environmental damage, could be substantial. It was also desirable to continue to develop general norms to regulate the liability of operators of hazardous activities in the State of origin when those activities actually caused significant transboundary harm to persons, property and the environment of other States. In that respect, it was important to bear in mind the polluter-pays principle.

52. The General Assembly, in resolution 55/152, had requested the Commission to resume consideration of the liability aspects of the topic as soon as the second reading of the draft articles had been completed, taking into account developments in international law and the comments by Governments. In that respect, Argentina wished to know how the Commission intended to approach the second stage in order to complete the study of the topic. Since the question of liability was extremely complex and significant differences of opinion had emerged, it was important for the General Assembly to receive whatever advice and proposals the Commission deemed appropriate. In that way, it would be able to decide on the best way of embodying the resultant norms in a binding instrument, namely, a convention; his delegation was prepared to contribute to negotiations in that respect.

53. **Mr. Jacovides** (Cyprus) said that article 19 provided a basic rule for the settlement of disputes concerning the interpretation or application of the regime of prevention, inspired by the provisions of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses. His delegation was pleased that paragraph 6 indicated that the parties to a dispute should consider "in good faith" the report of the findings and recommendations of the fact-finding commission. While it was necessary to find a balance, his delegation fully agreed with the view expressed by the representative of Sweden on behalf of the Nordic countries and supported in varying degrees by other delegations that the dispute settlement provisions should be strengthened by giving a bigger role to arbitration and judicial settlement. That would be more in line with his delegation's position of principle in favour of the inclusion of third party dispute settlement provisions in all multilateral conventions concluded under the auspices of the United Nations.

54. **Mr. Aurescu** (Romania) said that the topic of State responsibility was of the highest importance; the draft articles represented a compromise between the different views and interests of States, and reflected customary international law. An example of that compromise was the replacement of the notion of "international crimes" by the concept of "serious breaches of obligations under peremptory norms of general international law", although the concept of peremptory norms would have to be carefully analysed in the future. With regard to the controversial issue of countermeasures, the Commission was trying to ensure a fair balance between the legitimate interest of a State to defend its rights and the interest of the responsible State to be protected against abuse of those measures. One of the Commission's significant achievements had been to establish certain limitations on recourse to countermeasures, especially by prohibiting the use of force and limiting their purpose to inducing the wrongdoing State to comply with its obligations to cease the act and to make full reparation for the injury caused, thereby excluding any punitive purpose.

55. With regard to the form of the draft articles, Romania fully supported the Commission's recommendation that the General Assembly should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and annex them to the resolution, and consider at a later stage the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic. The formulation of the draft articles constituted a compromise between a binding legal instrument in the form of a multilateral convention and a non-binding solution, and would allow States to study the draft articles in depth and test their adequacy in practice. As to the future form of the draft articles, they should include provisions on the settlement of disputes only in the event that a convention was adopted.

56. The issue of international liability for injurious consequences arising out of acts not prohibited by international law was of increasing relevance in the area of the environment, and hence, the draft articles could be characterized as progressive development rather than codification. He was pleased that the Commission had attributed greater significance to the concept of prevention. On the question of reservations to treaties, the concept of conditional interpretative declarations as defined in draft guideline 1.2.1 deserved further consideration by the Commission, on the understanding that if the effects of such declarations were identical to those of reservations, the guidelines relating to reservations should apply mutatis mutandis to conditional declarations, as suggested in paragraph 123 of the report. With regard to late reservations, according to guidelines 2.3.1 and 2.3.2, the formulation by a State or an international organization of a reservation to a treaty after having expressed consent to be bound by that treaty should be possible if none of the other contracting parties objected to it within a period of 12 months. That idea raised no problem in principle, but the guideline might encourage States to make use of it, thereby exerting a destabilizing effect on the regime established by the Vienna Convention with regard to reservations.

57. On the topic of diplomatic protection, two questions stood out. First, the rule of continuous nationality or citizenship, if nationality was understood in its civic sense, was based on practice as well as doctrine. There were cases where the change of citizenship was caused, for instance, by marriage, adoption or succession of States, and was therefore involuntary. Second, the text on exhaustion of local remedies should include a reference to available "and effective" local remedies. Lastly, in order to make progress in dealing with issues related to unilateral acts of States, the Commission should base its work on the

practice of States and international organizations. Because of their peculiarities, unilateral acts of States should be made subject to certain clear conditions in order to produce legal effects. For example, unilateral acts in the form of domestic laws of a State should not address their effects to foreign citizens in the territory of another State, thereby creating extraterritorial consequences and seeking to establish a quasi-legal relationship between one State and the citizens of another.

58. **Mr. Lindenmann** (Observer for Switzerland) said that his Government attached special importance to the concept of "equitable balance of interests", as set forth in draft articles 9 and 10. As far as future work was concerned, his delegation had always been in favour of proceeding in stages, since prevention was only one aspect of international liability for injurious consequences arising out of acts not prohibited by international law. In that regard, he welcomed the adoption of resolution 55/152, in which the General Assembly requested the Commission to resume consideration of the liability aspects of the topic as soon as the second reading of the draft articles on the prevention of transboundary damage from hazardous activities was completed, bearing in mind the interrelationship between the prevention and the liability aspects of the topic and taking into account developments in international law and comments by Governments.

59. In its future work, the Commission should address the obligation of States to include in their domestic legislation a civil liability regime whereby the author of the harm would be required to take remedial action and make reparation under the "polluter-pays" principle. States should also be required to allow anyone who might suffer harm from hazardous activities to have access to the courts. For the time being, his delegation would not rule out the establishment of a regime providing for residual liability of the State in whose territory hazardous activities were carried out. The time had come to resume the work on liability and reparation with a view to drawing up an instrument that would deal in a comprehensive and exhaustive manner with all aspects of international liability for injurious consequences arising out of acts not prohibited by international law.

60. **Mr. Rao** (Special Rapporteur), referring to the comments made on the scope of the draft articles and the view of some delegations that he should have covered areas outside national jurisdiction, said that some of the issues omitted were equally important, but because of their particular characteristics, they needed to be considered separately in greater depth.

61. The precautionary principle and other principles were also important and certainly had a place in the draft; however, they could not be elaborated in greater detail because there was insufficient legal certainty concerning their content and scope in State practice. There was no question that those principles should be taken into account in connection with the question of authorization, but it had seemed advisable to leave it to States to exercise discretion in considering and coordinating their application.

62. On the question of dispute settlement, some delegations had commented that arbitration and judicial settlement should be given a greater role. Careful consideration must be given to the matter, on which a delicate balance was needed. The Commission had confined itself to the recent consensus on the non-navigational uses of international watercourses. If there was enough interest, the question could be taken up again when the time came to adopt the articles. If they were to be considered in a context other than that of a convention, the rules for dispute settlement could not be elaborated any further, given their limited scope. The parties would therefore have to reach consensus or agreement in each specific context.

63. With regard to the possibility of examining the question of liability at a later date, the Commission would, as usual, comply with the wishes of the General Assembly and the mandate given it by the Sixth Committee.

The meeting rose at 12.25 p.m.