United Nations A/C.6/57/SR.23

General Assembly
Fifty-seventh session

Official Records

Distr.: General
2 December 2002

Original: English

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Friday, 1 November 2002, at 10 a.m.

Chairman: Mr. Prandler . . . . . (Hungary)

Contents

02-67262 (E)

0267262

The meeting was called to order at 10.10 a.m.

Agenda item 156: Report of the International Law Commission on the work of its fifty-fourth session (*continued*) (A/57/10 and A/57/10/Corr.1)

1. **Mr. Leanza** (Italy) said the Commission's draft guidelines on reservations to treaties were not intended to modify the reservations regime established by the 1978 and 1986 Vienna Conventions, but rather to remove any confusion with regard to its interpretation. They also constituted a source of codification and progressive development for aspects of the question which had not yet been regulated. Progressive development of the procedures involved in making reservations was an important means of encouraging wide accession to treaties. The time limits and conditions for reservations had been extended through State practice, and that made it necessary to have some reliable guidance.

2. It seemed obvious that the depositary could be required to play an important monitoring role in ensuring that the reservations regime was respected, without necessarily engaging in the kind of substantive evaluative process which must remain the prerogative of the States parties. That kind of monitoring role was exactly the one proposed for the depositary in draft guideline 2.1.8. In that respect, the guideline brought a new element to the framework laid down in the Vienna Conventions. However, even apparently quite formal evaluations could not be wholly detached from substantive considerations. His Government took the view that the depositary could well be required, in future, to carry out a substantive evaluation, provided that in the event of a disagreement about the depositary's performance of his duties, the matter was referred to the contracting States or international organizations concerned. It would be extremely useful for the depositary to draw the attention of a reserving party, where necessary, to the manifest impermissibility of its reservation. That function should not be confined to cases where the treaty prohibited certain reservations, or listed those which were admissible, while excluding it in cases where the reservation was incompatible with the object and purpose of the treaty. Even where certain reservations were expressly forbidden and those which were permissible were listed, questions of interpretation might arise which in turn raised issues of substance. An active role for the depositary, of the kind proposed in draft guideline 2.1.8, would not encroach upon the prerogatives of the parties. If the reservation was confirmed despite the depositary's observations, the latter would have no choice but to communicate it to the parties; however, by annexing the exchange of views to the communication, the depositary would encourage States to refrain from making any reservation contrary to the object and purpose of the treaty. The more active role envisaged for the depositary must be properly interpreted. In some cases, depositaries might prefer to engage in informal dialogue with a reserving State, or not to draw attention to reservations which they did not regard as manifestly impermissible. The States parties would in any case retain the right to object to a reservation which they themselves regarded as impermissible. Where there was a body responsible for monitoring the implementation of the treaty, it too could play a role in evaluating reservations. However, it was not yet common practice to establish such bodies, and it was difficult to see the purpose of proposing, as did draft guideline 2.5.X, a definition of the consequences of a finding on their part of the impermissibility of a reservation. As for the partial withdrawal of a reservation, it should be borne in mind that the resulting text might give rise to objections from States which had not objected to the original reservation. Draft guideline 2.5.12 should allow for that possibility.

3. He had no objection to the proposal, in draft guideline 2.1.6 (ii), that communications relating to reservations could be made by electronic mail or by facsimile, provided it was immediately followed by a formal communication and that reference was made to its receipt rather than its dispatch.

4. **Mr. Kazemi** (Islamic Republic of Iran) endorsed the Commission's decision not to undertake a major revision of the Vienna regime, which had functioned fairly well and had encouraged universal adherence to multilateral treaties. The Commission had moved in the right direction by preparing guidelines to remove discrepancies and clarify ambiguities. The guiding principles it had adopted should be assessed in the light of their compatibility with the Vienna regime.

5. Draft guideline 2.1.8 required further careful consideration. According to the Vienna regime, it was for States parties to a treaty to test the compatibility of a reservation with the treaty. They could raise objections and have them transmitted to other parties through the depositary. The right to do so could not be

delegated to the depositary. If the depositary were to intervene on the question of compatibility, such interference might prompt other States to react, which would not help to resolve the problem. His delegation would therefore prefer to delete the second sentence of draft guideline 2.1.8.

6. Draft guidelines 2.5.4 and 2.5.X also required further study, in the light of the requirement in the Vienna regime that the power to decide on the impermissibility of reservations should lie solely with States parties. Recent developments attributing to certain treaty monitoring bodies the role of assessing reservations to particular treaties should be regarded as exceptions to the general regime.

7. He hoped the Commission's work on the topic of reservations would be completed during its current quinquennium.

8. **Mr. Lammers** (Netherlands) expressed doubts with regard to draft guideline 2.1.3. It was framed as if authority to formulate a reservation lay with a particular functionary and thus appeared to diverge from the rule in the law of treaties that that authority lay with the State, as an element of its treaty-making power. The individuals concerned were merely messengers of the State, and in verifying that a reservation emanated from the proper source, the depositary was in fact verifying the authority of the State. If the reference to competence in draft guideline 2.1.3 was intended to refer to competence to present, rather than formulate, a reservation, the text would simply be describing ordinary diplomatic practice, and would be less contentious. Paragraph 2 of draft guideline 2.1.3 did not seem to be describing contemporary practice. He believed depositaries had already resorted to a less formal method of work, and suggested consulting in that regard the practice of the United Nations Office of Legal Affairs.

9. The existing text of draft guideline 2.1.5 was rather incomplete, since it did not state who was responsible for communicating the reservation. He suggested combining draft guidelines 2.1.5 and 2.1.6 to state clearly that reservations must be communicated and that depositaries had the chief responsibility in that respect. In draft guideline 2.1.6 the phrase "a communication relating to a reservation" was too vague, and should be redrafted to read "the communication of a reservation". Draft guidelines 2.1.5 to 2.1.8 could perhaps be rearranged so as to place the description of the role of the depositary at the beginning of the section dealing with the communication of reservations.

10. He supported the inclusion, in draft guideline 2.1.8, of a rule that the depositary should alert the author of a dubious reservation to its nature, and then transmit the communications exchanged with the author to the other parties involved. As for the date at which a reservation could be considered to have been received, thereby setting in motion the time limit under article 20 (5) of the Vienna Convention, he welcomed the flexible system proposed in the draft guidelines, which was based on the date of reception of the reservation by the State or international organization concerned. It might, however, result in some uncertainty regarding the date of entry into force of the treaty and the reservation.

11. With regard to the formulation of interpretative declarations (draft guideline 2.4.1), he queried whether it was useful or necessary to focus on the authority of the persons involved in the formulation process. What mattered was that an interpretative declaration should be made by a State, in exercise of its treaty-making power. As for conditional interpretative declarations, he reiterated the view he had expressed in the Committee at its previous session, that to frame rules for them as a separate legal category would create confusion rather than transparency and would serve to condone a practice that had developed largely as a way of circumventing the rules of the law of treaties. He suggested deleting the draft guideline concerning such declarations and the related draft guidelines 2.4.5, 2.4.7 and 2.4.8.

12. **Mr. Lavalle-Valdés** (Guatemala) welcomed the appearance of the long-anticipated Guide to Practice. There appeared to be some confusion in the guidelines adopted thus far concerning the distinction between simple and conditional interpretative declarations. The former could of themselves produce legal effects, only in the circumstances mentioned in previous Commission reports, namely, that under the rules of estoppel, which did not form part of the law of treaties, a simple interpretative declaration could be invoked by a State against the State which had formulated it. The draft guidelines should therefore distinguish clearly between the two types of interpretative declaration, stating explicitly in each guideline on the subject whether both types were covered, or only one. That was not the case in the guidelines already adopted.

Ideally, they should disregard simple interpretative declarations, except in draft guidelines 1.2 and 1.2.1, which could be combined in a single text to be renumbered 1.2 and entitled "Interpretative declarations". He proposed that the text should then read:

> "'Conditional interpretative declaration' means a unilateral statement, however phrased or named, whereby a State or an international organization subjects its consent to be bound by a treaty to a specific interpretation of the treaty or of certain provisions thereof. It must be formulated by the State or international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty. 'Simple interpretative declaration' means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain provisions thereof, but without subjecting its consent to be bound by the treaty to that specific interpretation of the treaty. The following guidelines, which refer in general terms to interpretative declarations without distinguishing between the two categories into which they are divided, apply to both categories."

13. He also suggested that draft guideline 1.3 should apply only to conditional interpretative declarations. The commentary should explain that simple interpretative declarations could have legal effects only in the context of draft guideline 1.5.3, and that because of the marked differences between conditional interpretative declarations and reservations a distinction was drawn between them in draft guideline 1.3. Draft guideline 1.3.1 would then apply only to conditional interpretative declarations, and the commentary to it would point to the inadvisability of distinguishing between simple interpretative declarations and reservations. Draft guidelines 1.3.2 and 1.7.2 should apply to both categories of interpretative declarations, and did not require amendment. Since draft guideline 1.2.1 had been deleted, there was no need to refer to it in draft guideline 1.5.2.

14. It seemed obvious that draft guideline 1.5.3 should apply to both kinds of interpretative declarations. Moreover, it seemed reasonable that the interpretative declarations referred to in the draft guideline should be in writing. Lastly, there was no logical reason why the draft guideline should apply only to bilateral treaties. Accordingly, his delegation proposed that draft guideline 1.5.3 should read as follows: "The interpretation resulting from an interpretative declaration made in writing in respect of a bilateral or multilateral treaty or of certain provisions thereof by a State or an international organization party to the treaty and accepted in writing by all the other parties constitutes the authentic interpretation of the treaty".

15. With regard to draft guideline 2.4.1, there was no reason in principle why the draft guidelines should stipulate which persons were entitled to make simple interpretative declarations. Nevertheless, there was an exception to that: simple interpretative declarations to which draft guideline 1.5.3 applied. His delegation therefore proposed that draft guideline 2.4.1 should read as follows: "An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty. Fulfilment of this requirement is also necessary in order for a simple interpretative declaration to have the effects provided for in guideline 1.5.3."

16. In view of the effects that simple interpretative declarations could produce, pursuant to draft guideline 1.5.3, draft guideline 2.4.2 could remain unchanged.

17. Clearly, simple interpretative declarations did not require confirmation. For that reason, it did not make sense to apply draft guideline 2.4.4 to such declarations. Accordingly, the word "conditional" should be inserted before "interpretative" in the title and text of draft guideline 2.4.4. The commentary to draft guideline 2.4.4 should perhaps indicate that, except in the remote possibility that a treaty referring to them so stipulated, simple interpretative declarations never required confirmation.

18. His delegation wondered, moreover, whether draft guideline 2.1.8 should not apply, mutatis mutandis, to conditional interpretative declarations. It was in fact possible that the interpretation of the treaty contained in a declaration of that kind might be manifestly unfounded, in which case it would be

tantamount to a declaration purporting to exclude or modify the legal effects of the treaty, in other words, a reservation.

19. Such an application of draft guideline 2.1.8 was, of course, closely related to another problem that arose under the following circumstances. A State, in becoming party to a multilateral treaty, formulated an interpretative declaration, the terms of which could not be construed as implying that the declaration was conditional. However, the interpretation of the treaty contained in the declaration, which complied with all the formal requirements that must be met in order for it to constitute a valid reservation, was *manifestly* unfounded. Since the real purpose of the declaration was to exclude or modify the legal effects of the treaty, the question was whether the declaration actually constituted a reservation, in which case all the guidelines applicable to reservations would apply to it.

20. A final proposal concerned draft guideline 1.7.2. It would seem appropriate, in the first of the two paragraphs following the *chapeau*, to replace the expression "purporting to interpret the same treaty" by "purporting to specify or clarify its meaning". Since only the parties to a treaty were entitled to interpret it, it seemed strange for the interpretation to be contained in a provision of the treaty itself.

21. **Ms. Jonassen** (New Zealand) said that her delegation endorsed the Commission's choice of new topics for the remainder of the quinquennium. Work on the responsibility of international organizations should be limited to issues relating to responsibility for internationally wrongful acts under general international law and should be based on the same premises as the articles on State responsibility with a view to establishing general principles. Special rules relating to specific international organizations or types thereof would be helpful in establishing more general rules of international law. In its initial stages, the study should be limited to intergovernmental organizations in order not to further complicate the Commission's task.

22. A series of studies on the fragmentation of international law would promote general awareness of international law and its fundamental organizational role in international activity and assist international courts and practitioners of international law in dealing with the conflicts between rules and jurisdictions that had arisen in many fields. Her delegation hoped that the Commission would deal substantively with practical problems and provide guidelines for practitioners.

23. The draft articles on diplomatic protection should be confined to the issues of nationality of claims and exhaustion of local remedies so that the topic could be concluded within the current quinquennium.

24. Further thought must be given to the question whether the flag State of a ship or aircraft had the right to exercise diplomatic protection on behalf of crew members holding the nationality of a third State. In the case of problems which could not be resolved under article 292 of the Convention on the Law of the Sea, it would be open to the State of nationality to exercise diplomatic protection. However, if the flag State was already dealing with the port State in the context of article 292, it might make sense for the other States of nationality to defer to the flag State if the latter was willing to bring a claim on behalf of all the crew members; such a solution would ensure equal treatment rather than relying on the willingness or ability of the various States of nationality to exercise diplomatic protection.

25. However, article 292 and other specific legal grounds for allowing protection to be exercised in the absence of a nationality link should also be examined in order to determine whether more general grounds applicable to the crews of ships, and perhaps, aircraft, could be formulated. The Commission would need to consider whether the right of protection existed only for the flag State, or for other States with interests in the vessel as well, particularly where the ship was flying a flag of convenience. It must be borne in mind that no State was obliged to exercise diplomatic protection on behalf of its citizens or legal persons and that exercise of the right to do so should be viewed as a last resort.

26. The report of the Special Rapporteur on reservations to treaties (A/CN.4/526) provided a useful summary of the history of the topic and would be helpful in assessing the specific elements contained in the draft guidelines. Her delegation was concerned that conditional interpretative declarations might create legal effects similar to those of reservations. Where a treaty had been negotiated as a balance of interests and, for that reason, deliberately prohibited reservations, careful thought must be given as to whether States should be able to become parties subject to a particular interpretation of that instrument. Even where a treaty

did permit reservations, they should be kept to a minimum in number and length of time maintained; she therefore endorsed the recommendation that States should review their reservations periodically (draft guideline 2.5.3).

27. She appreciated the Special Rapporteur's efforts to address the varied concerns expressed with regard to manifestly impermissible reservations (draft guideline 2.1.8). The dialogue between the reserving party and the depositary was likely to be a useful process for all concerned, to be carried out with sensitivity on both sides and, in most cases, to resolve the issue. Moreover, the depositary was already empowered to make a judgement on the due and proper form of reservations under draft guideline 2.1.7. Many foreign ministries, particularly those of small countries, would not have the resources to verify the permissibility of every reservation of which they were notified, but a note from the depositary would draw attention to the possible need to take a position on the reservation in question.

28. Her delegation was pleased that the difficult question raised by draft guideline 2.5.X would be given further consideration by the Special Rapporteur, perhaps through discussions with monitoring bodies. However, the topic might be better included under the category of inadmissibility of reservations rather than withdrawals.

29. Lastly, while the communication of reservations by facsimile or electronic mail would be in line with modern means of communication, draft guideline 2.1.6 did not seem to reflect the usual practice and might not be appropriate in the context of a formal treaty action; it raised issues of authentication and verification that should be considered before it was included in the draft guidelines. In any case, the requirement that reservations must be confirmed by diplomatic note should be retained.

30. **Mr. Wood** (United Kingdom), referring to chapter V of the report, welcomed the fact that the Commission had limited its work on the topic to issues relating to nationality of claims and the exhaustion of local remedies. His delegation continued to have doubts concerning the provisions of draft article 7 (Stateless persons and refugees), as representations might be made on behalf of such persons only in exceptional cases.

31. With regard to the protection of ships' crews, the International Tribunal for the Law of the Sea had found in the *M/V "Saiga" (No. 2)* case that under the United Nations Convention on the Law of the Sea, the ship was to be seen as a unit, so that the nationalities of those involved in its operations were not relevant. While that might be true in a particular context, general conclusions could not be drawn from it. Even if the claims in question were to be regarded as cases of diplomatic protection, they were a *lex specialis*. Since there might be other such areas, he suggested that the draft articles should include a *lex specialis* saving clause, similar to that in article 55 of the draft articles on State responsibility.

32. Turning to chapter IV of the report, he noted the progress made on the topic, and welcomed the Commission's intention to deal in the following year with questions concerning the permissibility of reservations under the Vienna Convention regime.

33. He noted the suggestion by the Special Rapporteur that where a monitoring body found that a particular reservation was impermissible, the reserving State "must take action accordingly" and "fulfil its obligations in that respect by totally or partially withdrawing the reservation". In his delegation's view, that suggestion was misconceived. His delegation welcomed the Special Rapporteur's decision, following discussions in the Commission, to withdraw those proposals. The correct position was that which his delegation and others had set out when commenting on General Comment No. 24 of the Human Rights Committee, namely, that the conclusions of a monitoring body as to the status or consequences of a particular reservation were not "determinative", unless the treaty provided otherwise.

34. His delegation did not believe that there was a distinct category of conditional interpretative declarations separate from reservations and welcomed the Special Rapporteur's endorsement of that view. There were clear dangers in suggesting that there could be such a category, since it might enable States to evade the limitations placed on the making of reservations by general international law or even by specific treaties.

35. Provision was made for a role of the depositary in the case of manifestly impermissible reservations. It should be clarified what was meant in that context by "manifestly impermissible". Especially if, as suggested

in the commentary, the role would apply to all three categories of impermissibility under article 19 of the Vienna Convention, it might go too far. It was not obvious that the depositary, rather than the States parties, was in a position to determine whether a reservation was incompatible with the object and purpose of the treaty.

36. His delegation welcomed the intention to complete the work on reservations during the current term of office of the Commission. The Commission would, of course, take account of the practical difficulties that States faced in considering and, where appropriate, taking action in respect of the large number of reservations made to multilateral treaties. What was needed was something that would be of practical help to States in that field. With that in mind, the Commission might consider reviewing some of its commentaries with a view to shortening and sharpening them. Lengthy commentaries on largely non-controversial matters (for example, that reservations must be made in writing) might give the impression that the law was less clear or more complex than it really was.

37. With regard to chapter VI of the report, his delegation remained of the view that the approach to the topic was misconceived. Consideration of the matter in 2002 and, in particular, the proposed programme for dealing with the topic, had not led to any different conclusion.

38. As to chapter VII of the report, work on the topic was at a very preliminary stage. Care should be taken not to seek to deal in a single study with very diverse material.

39. Concerning chapter VIII of the report, his delegation believed that the topic should be confined to responsibility under general international law, at least at the outset, and to intergovernmental organizations. That would be challenging, for unlike States, each intergovernmental organization was a unique legal person, based upon the terms of its own constituent instrument and practices. It would not be possible simply to apply the rules of State responsibility mutatis mutandis.

40. Lastly, his delegation welcomed the Commission's decision to take up the question of fragmentation of international law (A/57/10, chap. IX). It was to be hoped that the Commission would not approach the subject from too negative a standpoint. The title of the topic might suggest that diversity was a bad thing; that was not necessarily the case. Specialization in certain areas was inevitable. The Commission should not simply duplicate the kind of work that could equally well be done in academic institutions.

41. **Mr. Aurescu** (Romania) said that the Commission's work on the topic of diplomatic protection adequately reflected customary international law while containing elements of the progressive development thereof. He welcomed the fact that the existence of a genuine or effective link between the State and its national was not required and the decision to set a higher threshold for diplomatic protection on behalf of refugees and stateless persons by requiring lawful and habitual residence.

42. While the exercise of diplomatic protection was a discretionary right of States, based on the principle of citizenship, functional protection by international organizations of their officials was an obligation of such organizations, based on their contractual link with their staff members. In exercising diplomatic protection, the State adopted its national's cause as its own; functional protection was exercised solely in the interests of the organization concerned. Since the Commission had excluded protection of diplomatic and consular officials from the scope of the topic, the same logic should apply to officials of international organizations.

43. Protection of the crews and passengers of ships was regulated by a *lex specialis*; however, that did not preclude the exercise of diplomatic protection by the State of nationality of a crew member or passenger. Consequently, there was no need to expand the scope of the draft articles to include such cases.

44. The exercise of diplomatic protection by a State or international organization which administered or controlled a territory merited further discussion, taking into consideration the existing precedents and the risk that the territory's inhabitants might otherwise be left without any diplomatic protection at all.

45. The question of the exercise of diplomatic protection by the State of nationality of shareholders in a company under the circumstances described in paragraph 28 of the report should be dealt with in the context of Part III of the draft articles, concerning legal persons.

46. With regard to the Calvo clause, his delegation shared the view that the individual's choice to waive the right to request diplomatic protection was irrelevant since the exercise of such protection was a discretionary right of the State.

47. Turning to the topic of reservations to treaties, he endorsed the Special Rapporteur's view that in order to facilitate the task of future users of the Guide to Practice, each subject should be treated separately and comprehensively therein. He hoped that all the new draft guidelines which had been referred to the Drafting Committee would be adopted at the next session of the Commission. In particular, he welcomed draft guideline 2.5.9 on the effective date of withdrawal of a reservation; the three model clauses proposed for inclusion in the Guide to Practice; and draft guideline 2.5.11 on partial withdrawal of a reservation, which made it clear that such withdrawal modified the reservation for the purpose of limiting its legal effects without enlarging its scope.

48. His delegation was in favour of expanding the role of the depositary in the case of manifestly impermissible reservations, as envisaged in draft guideline 2.1.8, on the understanding that it was directed primarily at reservations that were potentially incompatible with the object and purpose of the treaty. The depositary should signal to the author State the aspects of the reservation that appeared manifestly impermissible; if the State refused to withdraw the reservation, the depositary would receive it and transmit it to all signatory and contracting States, providing them with all relevant information so that they could decide whether or not to object to it.

49. He did not consider that States were obliged to withdraw a reservation held to be impermissible by a body monitoring the implementation of the treaty (draft guideline 2.5.4). The wording of the draft guideline should be clarified so as to indicate which bodies were envisaged, what the legal basis for their judgement of impermissibility was and what the reserving State or international organization "must" do. Since the Vienna Convention gave States the sole power to decide on the permissibility of reservations, the Commission should consider whether there was a legal basis in international law for obliging States to act on the findings of monitoring bodies and whether there was any relationship between such a body's finding that a reservation was impermissible and a depositary's opinion that a reservation was manifestly impermissible. For those reasons, he endorsed the Special Rapporteur's decision to withdraw draft guidelines 2.5.4, 2.5.11 bis and 2.5.X at the current stage.

50. **Mr. Rosand** (United States of America) said that the Commission's timetable for completion of the draft guidelines on reservations to treaties seemed longer than expected; he hoped that the topic would be concluded during the current quinquennium.

51. His delegation did not support draft guideline 2.1.8, which would alter the neutral "post office" concept of the depositary enshrined in the Vienna Convention; reservations should be circulated to the parties for whatever action they deemed appropriate. Furthermore, in the light of the substantive rules regarding the timing of reservations, there was no need to allow them to be made by electronic mail or facsimile; his Government, in its depositary capacity, had never received a reservation in either medium. His delegation found the areas suggested for exploration by the Study Group on the Fragmentation of International Law interesting and particularly welcomed the inclusion of the three treaty law topics figuring in the Group's revised list.

52. Customary international law recognized the State's discretionary right to exercise diplomatic protection on behalf of a corporation registered or incorporated therein, irrespective of the nationality of the corporation's shareholders and in the absence of evidence of misuse of the privileges of legal personality; the draft articles should reflect that rule. His Government took the nationality of shareholders into consideration in deciding whether to extend diplomatic protection to a corporation and believed that States could do so in respect of unrecovered losses to shareholders' interests in a corporation which was registered or incorporated in another State and was expropriated or liquidated by the State of registration or incorporation, or of other unrecovered direct losses.

53. Draft article 4 was not consistent with the well-established customary international law rule on continuous nationality, which had received strong support from States in the Committee's discussions at the fifty-sixth session of the General Assembly. The draft article was *lex ferenda*; it jettisoned the requisite link of nationality beyond the date on which the claim was presented and dispensed with any continuity requirement whatsoever; the text should be revised.

54. He supported the Commission's efforts to gather further information on State practice in the area of unilateral acts of States before deciding how to proceed; however, he was somewhat sceptical of the utility of pursuing work on the topic in the absence of evidence of such practice.

55. International regulation in the area of international liability for injurious consequences arising out of acts not prohibited by international law should proceed through careful negotiation on specific topics or regions; such negotiations were proceeding on issues such as environmental impact assessment, prevention and notification. He did not perceive a desire among States to develop a global liability regime, but further efforts to support regional and sectoral efforts were welcome.

56. With regard to the topic of shared natural resources, his delegation could support the Commission's work on the issue of groundwater as a complement to its past work on transboundary watercourses; however, other areas of transboundary resources were not ripe for its consideration. Apart from the area of transboundary watercourses, real conflicts rarely arose between States and, when they did, practical accommodations suitable to the specific situation had been reached. An effort to extrapolate customary international law from that divergent practice would not be a productive exercise.

57. **Mr. Kolodkin** (Russian Federation), referring to chapter V of the report, said that the topic was all the more relevant since for his Government, in accordance with the Constitution, the protection of its citizens abroad was an obligation, not a right.

58. With regard to the question posed by the Commission as to the right of the State of nationality of a ship to exercise protection on behalf of its crew and passengers who held the nationality of a third State, that right, which was embodied in international maritime law, constituted a *lex specialis* and should not be covered by the draft articles under consideration. Such a rule should, however, not preclude the right of the State of nationality of the crew and passengers to exercise diplomatic protection on their behalf. It was important to keep that in mind, especially in view of the widespread practice of sailing under flags of convenience, where the flag State often did nothing to protect the crew of the vessel flying that flag.

59. It would seem hardly appropriate to seek to formulate in the draft articles provisions on protection by international organizations of their officials. That was a separate and specific topic which pertained to the privileges and immunities of international organizations and their staff.

60. Likewise, his delegation did not believe that the topic of diplomatic protection encompassed the question of protection by an international organization of persons residing in territory under its jurisdiction.

61. With regard to the exhaustion of local remedies, the Commission might have been correct in deciding not to include in the draft text articles 12 and 13 as proposed by the Special Rapporteur. Nevertheless, the draft articles and their commentaries, and the discussion in the Commission, had provided much food for thought.

62. It was of no practical significance to his delegation whether the provision in question was defined as substantive or procedural. Nevertheless, it would be very important to have a general understanding that State responsibility arose following the commission of an internationally wrongful act, irrespective of whether local remedies had been exhausted. There could be no disagreement that the exhaustion of local remedies was a prerequisite for diplomatic protection in cases where State responsibility arose. Nevertheless, judging from the definition of diplomatic protection contained in article 1 adopted by the Commission, diplomatic protection was not limited to the invoking of State responsibility. That was confirmed by State practice, which also included other diplomatic measures to protect the interests of a State's citizens and legal entities when they were injured. It was clear that such steps, which were not related to the invoking of responsibility, were often implemented in practice before local remedies were exhausted. His delegation was not certain that diplomatic protection measures of that type could be legally disputed by referring to the exhaustion of local remedies rule.

63. His delegation noted, moreover, that the exhaustion of local remedies rule had its exceptions, and it was important that those exceptions should be formulated clearly in the draft articles. That related also to the question of waiver of the exhaustion of local remedies rule. It should be noted, in particular, that estoppel was one of the forms of implied waiver.

64. Turning to the topic of reservations to treaties (A/57/10, chap. IV), he said that the formulation in the Guide to Practice of guidelines on the functions of depositaries and the prerogatives of bodies monitoring the implementation of a treaty must be approached with great caution. It was necessary to start from the assumption that unless the parties to an international treaty had agreed otherwise, neither the depositary nor the monitoring bodies should make judgements concerning reservations to that treaty. Taking that into consideration, his delegation had certain doubts regarding draft guidelines 2.5.4, 2.5.X and 2.1.8.

65. The question of the date on which the withdrawal of a reservation produced legal effects merited further consideration. His delegation had questions concerning the right of the State to declare the retroactive effect of such withdrawal. Retroactivity could cause problems if the treaty was designed to be applied to economic and commercial actors, for whom what was most important was the stability and predictability of the legal regime.

66. Similar considerations applied to the question posed by the Commission concerning the possibility of using electronic mail and facsimile for communication of reservations and their withdrawal. On the one hand, the recipient of the communication could not be certain of its authenticity prior to receiving confirmation by means of a diplomatic note. On the other hand, such communications would begin to produce legal effects before their confirmation was received. While his delegation welcomed the use of modern means of communication in international relations, the Commission must evince great caution in addressing those issues in the Guide to Practice. It would be important to draw attention to the need to ensure the authenticity of the facsimiles and electronic mail received by the depositary and by States.

67. His delegation welcomed the draft guidelines proposed by the Special Rapporteur on the partial withdrawal of reservations. Such innovations would not contravene the Vienna Conventions and would provide a further element of flexibility in relations between States. In many cases, a State might not be prepared to wholly withdraw a reservation, but might be interested in attenuating it.

68. His delegation also welcomed the inclusion in the Guide to Practice of a provision recommending to States that they undertake a periodic review of their reservations.

69. With regard to chapter VI of the report, it was obvious that the topic was the most controversial of those considered by the Commission. It was not surprising that each year's debate on the topic began with a discussion of its suitability for codification; his delegation, too, had doubts in that area. If consideration of the topic was to be continued, rather than examining general questions, it might make sense to begin by analysing a specific category of unilateral acts, namely, recognition.

70. His delegation also believed that the interesting and timely topic of responsibility of international organizations (A/57/10, chap. VIII) should focus on intergovernmental organizations; in that connection, it would be worthwhile to consider the definition of the term "intergovernmental organizations".

71. **Ms. Taylor** (Australia) said that she agreed with the Special Rapporteur on reservations to treaties that the Guide to Practice, though not a set of binding rules, should be drafted carefully and should incorporate the relevant customary and treaty-based rules.

72. It was her Government's practice to send the text of its reservations to treaties by electronic mail or facsimile with confirmation provided subsequently in hard copy; it therefore supported the current wording of draft guideline 2.1.6.

73. However, her delegation could not support the proposal that a reservation which a treaty monitoring body found impermissible must be withdrawn in whole or in part by the reserving State or international organization. The Vienna Convention on the Law of Treaties left such decisions to States; moreover, it was uncertain whether any or all treaty monitoring bodies had the power to decide whether a reservation was permissible and whether such findings or recommendations were binding on States. At the very least, the proposal should not be included in the Guide to Practice as it would be inconsistent with the Guide's stated aim and purpose.

74. Lastly, the role of the depositary in relation to manifestly impermissible reservations should be consistent with the provisions of the Vienna Convention and, in particular, article 77 thereof; the depositary should be impartial and neutral in the exercise of its functions and its role should be limited to the transmission of reservations to the parties to the treaty.

75. **Mr. Rosenstock** (Chairman of the International Law Commission), introducing chapters VI to X of the report of the International Law Commission on the work of its fifty-fourth session (A/57/10), said that the Commission had debated the best means to proceed with its work on unilateral acts of States (chapter VI). Although some members had reiterated that the topic lent itself to codification and progressive development, the view had also been expressed that the Commission was attempting to codify something that did not exist as a legal institution. But others had argued against a view that treaties were the only means of regulating the world of diplomacy, since there were clearly some international obligations stemming from unilateral acts of States, an obvious example being recognition.

76. With regard to the classification of unilateral acts, some had maintained that it should be possible to arrive at a common legal regime and minimum general rules governing all categories, which need not necessarily involve obligations. A general theory on unilateral acts should not be restricted to the four categories referred to by the Special Rapporteur (promise, waiver, recognition and protest). The Commission should try to complete the task initiated of formulating the general part of the draft articles as quickly as possible, ending with the question of interpretation. Subsequently, the Commission might turn to specific types of unilateral acts, and finally go back and revisit the whole range of principles in the light of particular cases. Only three States had replied to the questionnaire addressed to Governments in 2001, and to compensate for the lack of input from Governments, a research project had been proposed, possibly with funding from a foundation, to do an analysis of practice based on specific examples of the four classic categories of unilateral acts. He urged States to reply to the questionnaire, since any information provided would be most useful for the Commission's work.

77. The point had been made that the effects of the definition of unilateral acts contained in draft article 1 should be extended not only to States and international organizations but also to other entities such as movements, peoples, territories and the International Committee of the Red Cross. In that connection, there was a need to analyse the effects of unilateral acts formulated by a political entity that was recognized by some but not all Governments or that represented a State in the process of being created. The point had been made that a definition should not be adopted until the study of State practice had been completed.

78. Some members had welcomed the draft articles on the validity of unilateral acts proposed by the Special Rapporteur, which were based on the 1969 Vienna Convention on the Law of Treaties, though the degree to which its provisions could be transposed to unilateral acts had also been questioned. Several suggestions had been made regarding both the subject matter and the need to take into account relevant State practice.

79. The view had been expressed that capacity to formulate a unilateral act should be limited to the persons mentioned in article 7, paragraph 2 (a), of the 1969 Vienna Convention, but the need to look at State practice had also been mentioned.

80. With regard to the interpretation of unilateral acts, some members had said that the essential criterion was the author State's intention and that it might be useful to consult the preparatory work, although doubts were raised about the feasibility of access to it. It had been suggested that, in light of the diversity of State practice, it might be preferable to proceed on a case-by-case basis rather than to try to establish a uniform rule of interpretation.

81. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission, having completed in 2001 its work on prevention of transboundary damage from hazardous activities, had proceeded to take up the aspect of international liability in case of loss from transboundary harm arising out of hazardous activities by appointing a Special Rapporteur and establishing a Working Group, which had later in the session submitted a report. In its report the Working Group had recognized that, while failure by a State to perform duties of prevention entailed State responsibility, harm could occur despite faithful implementation of those duties, and in such circumstances international liability would arise. The Working Group had felt that the best approach would be to allocate loss among the different actors. The activities covered would be the same as those addressed in the articles on prevention; the loss considered would include loss to persons, property and the environment; and a threshold would have to be determined to trigger the application of the loss allocation regime. Although there had been some

support for retaining the threshold of "significant harm" used in the prevention regime, some had preferred a higher threshold. The Commission required guidance from States on that point. The problem was that "significant harm" was a term of art in other legal contexts, where it might have a different meaning.

82. With regard to models and rationales for allocating loss, it had been agreed that the innocent victim should not, in principle, be left to bear the loss; there should be effective incentives for all involved in a hazardous activity to follow best practice in prevention and response; the allocation regime should cover not only States but also operators, insurance companies and pooled industry funds; and States played an important role in devising and participating in loss-sharing schemes. It had been generally thought that the operator should bear the primary responsibility, but other considerations, such as third-party involvement, force majeure, non-foreseeability and non-traceability of harm to the source would also need to be kept in mind.

83. It had been noted that the State often provided national funding or incentives for insurance to be made available for hazardous activities. It had been agreed that the State played a crucial role in designing appropriate liability schemes. Some had envisaged the State being liable for the remainder of the loss for which private liability proved insufficient, while others had felt that residual State liability should arise only in exceptional circumstances. Nor was it clear which State should participate in loss-sharing: the State of origin, the State of nationality of the operator or the State that had authorized or benefited from the activity.

84. He hoped that States would reply to the questions related to the topic that were contained in chapter III, section D, of the Commission's report. Any guidance would be greatly appreciated.

85. Responsibility of international organizations, one of three new topics the Commission had decided to include in its programme of work, had been seen as the logical continuation of its completed work on the responsibility of States for internationally wrongful acts. The Commission had appointed a Special Rapporteur and established a Working Group on the topic, which had submitted a report later in the session. In terms of scope, the Working Group had proposed that the concept of responsibility should encompass the responsibility that international organizations incurred for their wrongful acts and that the concept of international organizations should be limited, at least provisionally, to intergovernmental organizations. It had decided that the articles on State responsibility should be regarded as a source of inspiration. It had also considered the questions of attribution; responsibility of member States for conduct that was attributed to an international organization; the arising of responsibility for an international organization; content and implementation of international responsibility; settlement of disputes; and practice to be taken into consideration. The Commission had approved the Working Group's recommendation that the Secretariat should approach international organizations with a view to collecting relevant materials.

86. The Commission had established a Study Group on another new topic, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", even though it did not lend itself to codification, in response to growing concern about the possible negative implications of such developments. The full title had been changed from "Risks ensuing from fragmentation of international law", because some members of the Study Group had felt it cast the phenomenon in too negative a light. The Commission had approved the Study Group's recommendation that a series of studies should be undertaken on a non-exhaustive list of topics given in paragraph 512 of the report, aimed at providing a "toolbox" designed to assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes. The first study was to be undertaken, by the Chairman of the Study Group, on the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

87. The Commission had established a work programme for the next four years, although it was somewhat tentative in view of the complexities of the topics under consideration. It had also considered proposals for improving the procedural aspects of its work to make it more efficient and cost-effective.

88. The Codification Division of the Office of Legal Affairs had always served as the secretariat of the Commission. It did research for the Commission and its Special Rapporteurs and assisted with the organization of its plenary meetings, the work of its subcommittees, the redrafting of texts in the Drafting

Committee and the preparation of the Commission's annual report, all with extraordinary quality and speed. The importance of the Codification Division to the work of the Commission rested not only on the high quality, hard work and commitment of its staff, but also on the fact that they were involved in both the content and substance of the work as well as the procedural and technical aspects of servicing, providing a continuous interaction and feedback between the Commission and its secretariat. That the Codification Division also served as the secretariat of the Sixth Committee provided an invaluable and irreplaceable link between two bodies, a source of information and expertise mutually beneficial for both bodies. That quality of servicing must be preserved, and any change would be irresponsible.

89. With regard to the documentation of the Commission, he wished to stress the importance of maintaining the current practice of preparing summary records to provide an accurate recording of the discussions in the Commission for future reference. It was also necessary to maintain the existing exemption from limitation on the length of the documents of the Commission if it was to perform its functions with the required standard of quality. Extensive legal research and analysis was an integral part of the method of work of the Commission, as mandated by its Statute, in particular articles 20 and 24.

90. The small honorariums traditionally paid to Commission members had been helpful in defraying expenses incurred in connection with activities undertaken strictly for the work of the Commission. General Assembly resolution 56/272, which virtually abolished honorariums payable to members of the Commission and some other bodies, had been adopted in the teeth of the Secretary-General's recommendation to increase the honorariums (A/56/643), without consultation with the Commission and with no regard to its consequences. The cuts particularly affected the work of Special Rapporteurs from developing countries. The members of the Commission had decided that they would not collect the current symbolic honorarium of one dollar, being concerned about the administrative costs involved, and hoped that Member States would carefully reconsider the resolution. As recommended by the Commission, he had sent a letter expressing its concerns to the appropriate authorities.

91. As in the past, the Commission had cooperated with other bodies and had held the annual International Law Seminar, enabling 24 young lawyers, most from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations located in Geneva. The Commission was grateful to the Governments that had helped to fund the seminar and urged further contributions for that important cause.

92. **Mr. Ascencio** (Mexico), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that a legal regime governing the topic would be in line with Principle 13 of the Rio Declaration on Environment and Development, and furthermore, its very existence would, by encouraging operators to act with care, constitute a preventive measure in its own right.

93. In paragraph 30 of the report, the Commission had invited comments on a number of points relating to the topic. In view of the latter's importance, his delegation would attempt to provide some general responses, pending its more detailed submission. With regard to the degree to which the innocent victim should participate, if at all, in a loss, he said that it would be manifestly unjust for victims, whether individuals or States, to bear the costs involved, except in exceptional circumstances where some blame or negligence might be attributable to them. Those costs should be paid by those who have the primary liability for the harm. The primary liability should be assumed essentially by the operator, as indeed current practice generally provided. As for the question of the role of the State in sharing a loss, a distinction should be drawn between situations in which the State itself was the operator, in which case it should be liable for all harm, and those in which it monitored the activities of private operators. In that case, it should bear a residual liability if the operator could not afford full compensation or if it proved impossible to identify the operator concerned. States should also participate in compensation through contributions to compensation funds. As for the question whether particular regimes should be established for ultra-hazardous activities, his delegation believed that the Commission should advance on a broad front rather than restricting itself to dealing with hazardous or ultra-hazardous activities. Specific regimes already existed, after all, in such fields as nuclear energy. On the other hand, some

activities that were not hazardous per se but could nevertheless cause transboundary harm should be included in the study of the topic. That would be in line with the "precautionary approach" and the "polluter pays" principle reflected in the Rio Declaration.

94. With regard to whether the threshold for triggering the application of the regime should be "significant harm", his delegation believed that any other approach could cause difficulty in obtaining compensation for transboundary harm. The "significant harm" definition should be retained, particularly since it was widely reflected in State practice and in various treaties. As for whether harm caused to the global commons should be included, his delegation firmly believed that harm caused to areas beyond national jurisdictions should be included. The Commission itself had, in its commentaries to the articles on prevention, acknowledged that the environmental unity of the planet was not a matter of political borders. That approach was supported by Principle 2 of the Rio Declaration. He recognized that inclusion of that complex concept would increase the workload of the Commission, but the latter had a responsibility to present and future generations.

95. With regard to models which could be used to allocate loss among the relevant actors, he said that the operator should bear the primary liability. Where a number of operators were involved, they should be jointly liable but should also have the opportunity to claim against third parties. A number of civil liability instruments adopted that approach. The definition of the term "operator" should be as broad as possible in order to include all those engaging in a given activity. Where compensation was inadequate, or the operator could not be identified, the State should assume a residual liability. Alternatively, a compensation fund could be established, along the lines of the International Fund for Compensation for Oil Pollution Damage.

96. On the subject of procedures for processing and settling claims of restitution and compensation, he said that claims for transboundary harm should be brought before the national jurisdiction of the claimant's choice: that of the State of origin, the affected State or the respondent's State of habitual residence. All States should therefore provide in their internal law for domestic judicial remedies, applied fairly and without discrimination as to nationality, as well as prompt and adequate compensation for victims and restoration of the environment. Moreover, when a competent court pronounced a final judgement which was enforceable under the law applied by that court, that judgement should be recognized in the territory of all other States. The role to be played by national courts should not preclude the possibility of establishing dispute settlement mechanisms at the international level on disputes between States, including joint arbitration. Consideration must also be given to environmental harm and how to assess the cost of restoration. There was no point in changing the title of the topic until the nature and content of the Commission's work had been determined, otherwise the results of that work might be prejudged. Lastly, the Commission should be guided in its work by the need to maximize the opportunity for victims to receive adequate compensation and for the environment which had been harmed to be restored.

97. Turning to the question of reservations to treaties, he reiterated his delegation's view that the Guide to Practice should not simply reproduce the provisions of the Vienna Convention; it should be designed to be read and applied on its own. It should develop and clarify only those provisions of the Convention which required such an approach. He expressed concern that the Sub-Commission on the Promotion and Protection of Human Rights had, according to paragraphs 54 and 67 of the report, initiated work on reservations to human rights treaties: not only was the Commission already engaged in work on the topic but the topic itself was a highly sensitive one. The Commission had correctly advocated close cooperation between itself and the human rights treaty bodies, but it was also important to avoid duplication, with the added danger of fragmentation and contradictory results. The Commission was undoubtedly the appropriate forum for consideration of the topic.

98. With reference to the Special Rapporteur's comment in paragraph 53 of the report that the human rights treaty bodies were more inclined to encourage States to withdraw certain reservations than to appreciate their validity, he said that, although there was no reason why they should not express an opinion on a given reservation, to which States could react as they wished, the treaty monitoring bodies could not determine the validity of a reservation or compel a State to take action. His delegation therefore had serious doubts about draft guideline 2.5.X, which seemed to impose on States a duty of action, to the extent of totally or partially withdrawing a reservation.

He urged the Commission to reconsider the draft in the light of the provisions of the Vienna Convention, the practice of the treaty monitoring bodies and State practice.

99. **Mr. Kourula** (Finland), speaking on behalf of the Nordic countries, commended the Commission for its progress with the topics of international liability and diplomatic protection, which had filled the void that seemed to have been left by the completion of the monumental work on State responsibility. The question of the responsibility of international organizations was also of great practical interest, since such organizations had become increasingly autonomous actors on the international stage. A considerable amount of relevant national jurisprudence could be usefully studied in that context.

100. The topic of the fragmentation of international law was of particular interest, since it marked a departure from the Commission's traditional approach. Whereas in the past the Commission had almost invariably produced draft articles, to be adopted in the form of a convention, a declaration or model rules, the more wide-ranging scope of the question of the fragmentation of international law — including the expansion of legal regulation to new areas and the autonomy of certain legal regimes and forms of cooperation, as well as the possibility of both substantive and procedural conflicts between various fields of law — would, while challenging, be a most appropriate subject for the Commission to undertake. Although it was not entirely new, there had been little academic research on the phenomenon. The Commission's work would therefore be more of a study than an exercise in codification or progressive development in the traditional sense. At the same time, there were aspects of the phenomenon on which the Commission could provide useful guidance to States. The Nordic countries welcomed the fact that the negative tone in which the phenomenon had been presented in the Commission's report on its fifty-second session had given way to a more positive approach, which recognized that fragmentation was a natural consequence of the adaptation of traditional systems of public international law to the increasing diversification of international activities. The word "risks" in the title had been replaced by the word "difficulties" and reference had been made to diversification, as the Nordic countries had originally proposed. More importantly, the Commission's decision to approach the phenomenon from the point of view of the law of treaties was well-founded: tensions and practical problems were likely to appear in situations where different treaty regimes — such as World Trade Organization rules and environmental treaty obligations — overlapped. Clarification in such areas would therefore be of practical value.

101. Although it was a wise decision to choose the Vienna Convention on the Law of Treaties as the starting point for the deliberations, the Nordic countries recommended that the study should also include customary law, which was closely related to the law of treaties in many respects. Apart from that, the proposed work plan was to be commended. The function and scope of the *lex specialis* rule and the question of self-contained regimes were at the heart of the problems to be studied. Increasing specialization and "topic autonomy" created uncertainty as to the standards to be applied in any given case. It would be useful to provide clarification of article 31, paragraph 3, article 30 and article 41 of the Vienna Convention. Lastly, hierarchy in international law was not only of considerable theoretical interest but also of practical value, as recent problems relating to the compatibility of counter-terrorism measures with human rights law had demonstrated. The issues involved — *jus cogens*, *erga omnes* obligations and Article 103 of the Charter of the United Nations — would broaden the focus of the study, but the extra work involved would be worthwhile. In any event, the Nordic countries shared the view that the final outcome of the study should not be a text with direct formal force; the aim should be to gain an insight into the problems associated with the topic. The proposed seminar would therefore seem useful.

102. The Nordic countries looked forward to the first report of the Special Rapporteur on shared natural resources: close cooperation between States in that regard, which was crucial in order to ensure efficient and sustainable exploitation, could best be promoted by establishing clear jurisdictional lines in accordance with the law of the sea. Potential offshore investors and other users needed predictability and clarity with regard to licences, taxation, the environment or workers' protection. The Working Group could usefully analyse State practice, as well as bilateral agreements such as the "unitization agreements" appearing in a number of maritime delimitation agreements, which provided modalities for the

exploitation of petroleum deposits situated in border areas. In that context, he urged States to ratify the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which constituted a good example of a balanced international legal instrument regulating shared natural resources.

103. He expressed the concern of the Nordic countries about the general direction of the Commission's work regarding unilateral acts of States. The Special Rapporteur had not fully taken into account the constructive criticism and comments made by Governments. The need for a comprehensive set of rules on unilateral acts was doubtful; a study limited to general rules and some particular situations would be preferable. At the same time, the Nordic countries welcomed the Commission's decision to carry out a study of State practice; such a study could help the Special Rapporteur proceed with the topic and, it was to be hoped, make the necessary adjustments to the scope of the study.

104. Lastly, he endorsed the remarks made by the Chairman of the Commission regarding the high standard of work of the secretariat. The quality of support received must not be allowed to deteriorate.

Other matters

105. **The Chairman** said that, according to the Legal Counsel, the reorganization of the Committee's technical secretariat would involve the transfer of one Professional P-5 post and two General Service posts from the Office of Legal Affairs to the Department for General Assembly and Conference Management. There had, however, been no indication as to how the Department intended to service the Committee. The Bureau had therefore invited the Under-Secretary-General for General Assembly and Conference Management to brief the Committee. No reply had yet been received.

The meeting rose at 1.05 p.m.