United Nations A/C.6/61/SR.15

General Assembly
Sixty-first session

Official Records

Distr.: General
15 November 2006

Original: English

Sixth Committee

Summary record of the 15th meeting
Held at Headquarters, New York, on Monday, 30 October 2006, at 4.30 p.m.

Chairman: Mr. Onisii (Vice-Chairman) . . . . . (Romania)

Contents

Agenda item 78: Report of the International Law Commission on the Work of its fifty-eighth session (*continued*)

Agenda item 77: Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (*continued*)

06-59119 (E)

In the absence of Mr. Gómez Robledo (Mexico), Mr. Onisii (Romania), Vice-Chairman, took the Chair.

The meeting was called to order at 4.35 p.m.

Agenda item 78: Report of the International Law Commission on the Work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Lindenmann** (Switzerland), referring to the responsibility of international organizations, said that his delegation continued to have doubts about draft article 27, which provided that the coercing State would be held responsible only if the organization that was being coerced breached one of its obligations. His delegation continued to believe that there was a second hypothetical situation in which a State should be held responsible for coercion of another State or of an international organization, namely, when the act in question constituted an internationally wrongful act of the coercing State. A State could not be allowed to escape its international obligations by coercing another entity — in particular an organization which was not subject to the same international obligations as the State — to breach an international obligation on its behalf.

2. For Switzerland, that was a fundamental principle and was, moreover, recognized in draft article 28, paragraph 2, which stipulated that the provisions of paragraph 1 would apply to a State whether or not the act in question was internationally wrongful for the international organization. In his delegation's view, that principle should apply, *a fortiori*, to situations of coercion. His delegation therefore proposed that draft article 27, subparagraph (a), should be amended to read: "The act would, but for the coercion, be an internationally wrongful act of the international organization or of the coercing State; and". Draft article 14, concerning coercion by an international organization of a State or another international organization, should be similarly amended.

3. With regard to draft article 28, Switzerland endorsed the principle that a State could incur international responsibility by providing an international organization with competence. However, his delegation wondered whether the verb "circumvents" might better be replaced by a more neutral term. Draft article 28 envisaged a situation which was to a certain extent analogous to that covered by draft article 15, but the latter article was much broader in scope, providing that an international organization incurred responsibility not only for its binding decisions, but also for simple recommendations and authorizations. If the two articles were to be brought more into line with each other in the future, his delegation would favour a more restrictive wording of article 15, similar to that of article 28.

4. Draft article 29 was posited on the assumption that a State did not incur responsibility solely as a result of its membership in an international organization. His delegation accepted that hypothesis in principle, although there might be an exception, albeit a rather theoretical one, if the organization in question was a criminal one whose purpose and main activities were contrary to international law. In such a case, membership alone might well suffice to entail responsibility for a State.

5. Concerning the question posed in the report of the Commission in paragraph 28 (a) his delegation believed that the only possible answer was "no". An obligation to compensate could only arise from a prior finding that the State member was responsible for the internationally wrongful act of the organization. A more interesting question might be to what extent it was possible really to establish whether a member of an international organization was or was not responsible for the acts of that organization and, more specifically, whether draft articles 25 to 29, especially the saving clause in draft article 29, were sufficiently comprehensive to cover all situations. His delegation was not entirely sure, and perhaps the Commission's question indicated that it, too, had doubts.

6. His delegation wondered, in particular, whether there existed a more general but subsidiary responsibility of members of an international organization. Every member of an international organization had an ongoing general obligation to cooperate in good faith with the other members and with the organs of the organization in order to ensure that the acts of the organization were compatible with the law applicable to it. Of course, the extent of such a positive obligation would depend on factors such as the purpose of the organization, the risk that its activities might inherently be contrary to international law and the real influence of members in the decision-making processes of the organization. Nevertheless, his delegation was of the view that none of those factors altered the principle that a member State should incur

responsibility not only through the provision of competence, as envisaged in draft article 28, but also on the basis of a continuous obligation to cooperate so that the international organization would be in a position to comply with international law.

7. A member of an international organization should not be allowed simply to remain passive in the face of flagrant violations of international law by the organization. If a member consciously ignored such violations in circumstances in which it might reasonably be expected to try to stop them, that member might incur responsibility in situations other than those envisaged in draft articles 25 to 29. Even if an international organization had a separate legal personality, it remained a creation of its member States. His delegation hoped that the Commission would look further at that issue in its future work.

8. As to the Commission's second question, in paragraph 28 (b), concerning whether States and other international organizations had an obligation to cooperate to bring to an end a serious breach by an international organization of an obligation under a peremptory norm of general international law, his delegation's answer was "yes". As he had just said, for the members of an organization, there might be an obligation to cooperate that extended beyond the prevention of violations of *jus cogens* only. For non-member States or organizations, the obligation to cooperate with a view to bringing to an end the breach of a peremptory norm under general international law followed from the reasoning given by the Commission itself for article 41 of the articles on State responsibility. The content of paragraph 1 of that article should be reproduced mutatis mutandis in the draft articles on the responsibility of international organizations.

9. **Mr. Hmoud** (Jordan) welcomed the Commission's adoption of the draft articles on shared natural resources, which, until they were adopted in some final form by the international community, would serve as useful guiding principles for States in dealing with issues relating to transboundary waters. His delegation believed that the Commission should also eventually deal with oil and natural gas, either on second reading of the present draft articles or in a separate set of draft articles.

10. With regard to draft article 1, his delegation remained of the view that the qualification of activities as having or likely to have an impact on the aquifer or aquifer system was not necessary. Draft articles 6, 10 and 14, for example, all had different qualifications for activities other than utilization, ranging from "effect" to "significant harm". Such qualifications did not necessarily overlap with the "impact" threshold. It might therefore be appropriate to remove the terms "impact" and "likely impact" and refer simply to "other activities as described in the [draft] articles". As to draft article 3, his delegation welcomed the assertion that the aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, but felt that it might be important also to clarify that such aquifers were under the exclusive sovereignty of the aquifer States.

11. Concerning draft article 4, his delegation welcomed the clarification in the commentary on the sustainability of recharging aquifers. As such aquifers sometimes took hundreds or thousands of years to charge, it would be unrealistic to demand that the aquifer States sustain the aquifer's water levels. What constituted reasonable utilization of such aquifers had to be determined on a case-by-case basis. As long as no wasteful utilization or abuse took place and other obligations were met by the aquifer State(s), then utilization, even if it led to depletion, should be considered reasonable. With regard to the obligation to establish an overall utilization plan based on the agreed lifespan of the aquifer, his delegation would prefer to replace the term "agreed" by "predicted", as it was unclear who agreed on the aquifer's lifespan. On the issue of equitable utilization, his delegation reiterated its view that if an aquifer State did not exercise or gave up its right to utilization of the aquifer, then the standard for equitable use by the other aquifer State(s) would be different. Those States should be able to utilize the aquifer without their use being considered inequitable vis-à-vis a State which willingly was not exercising its right.

12. His delegation was pleased with the addition to draft article 5 of a provision concerning contributions to the formation and recharge of an aquifer or aquifer system. It also supported giving special regard to vital human needs in determining what constituted equitable utilization. With respect to draft article 6, his delegation was satisfied with the threshold of "significant harm", which would allow flexibility on a case-by-case basis. Regarding paragraph 2 of that article, it remained of the opinion that the reference to

impact was unnecessary and should be deleted. A State should take measures to prevent the causing of significant harm when undertaking any activity related to the aquifer. His delegation welcomed the removal of the reference to compensation in paragraph 3, believing that other bodies and instruments of international law could deal with the legal consequences of significant harm caused to an aquifer State.

13. Regarding draft article 7, the substitution of the term "appropriate protection" for "adequate protection" was welcome. It would be unrealistic to oblige aquifer States to cooperate for the purpose of providing adequate protection in the case of a non-recharging aquifer. With respect to draft article 9, his delegation was of the view that protection and preservation of ecosystems was better dealt with through bilateral and multilateral arrangements agreed by the aquifer States and third parties whose ecosystems might be affected. Draft article 9 should apply only in the absence of such arrangements. Similarly, the obligations under such arrangements in relation to monitoring, pollution control and management should prevail. However, the draft articles would be important in setting minimum standards for such activities in order to protect the rights of all aquifer States, minimize disputes and optimize effective utilization.

14. His delegation considered draft article 14 to be crucial for the protection of groundwaters against planned activities with potential significant adverse effects. The assessment of the effects of such activities should be based on objective grounds, and the affected State should have the right to consult with the State whose planned activity might affect it, even if the latter had not provided notification of its plans. With regard to the emergency situations covered by draft article 16, while the State within whose territory the emergency occurred might not be liable for it, failing to notify the affected States and to take the other measures envisaged under paragraph 2 might trigger its international responsibility under the draft articles.

15. Finally, with regard to draft article 19, the relationship between bilateral and regional agreements and arrangements and the draft articles would eventually have to be determined in the final form of the articles. Concerning the prohibition of agreements that would adversely affect excluded aquifer States, the article should expressly state that such States would negotiate in good faith with the other States regarding the latter's agreements and arrangements.

16. **Mr. Park** Hee-kwon (Republic of Korea), commenting on the draft articles on shared natural resources, noted that the Special Rapporteur intended to expand his work beyond aquifers to include oil and gas. He was concerned that such a move could face opposition from oil- and gas-producing States that recognized those resources as property under their sovereign rights. With respect to the final form of the draft articles, his delegation supported a binding instrument in the form of a framework convention, which should include provisions on the rights and obligations of non-aquifer States to encourage them to become parties to the instrument. His delegation also believed that the draft articles should include a dispute settlement mechanism similar to the one provided for under article 33 of the 1997 Watercourses Convention.

17. Turning to chapter VII of the Commission's report, he said that rules on responsibility of international organizations were essential to establishing a comprehensive framework for the law of international responsibility. The adoption of the draft articles would be an accomplishment for the Commission, comparable to the adoption of the Vienna Conventions on the Law of Treaties and the articles on State responsibility.

18. The responsibility of States and of international organizations for internationally wrongful acts should be determined within a uniform system, analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. A basic framework of common headings and provisions should be maintained, with revisions and additions reflecting the distinctive qualities of each international organization. The four reports of the Special Rapporteur had so far preserved that structure. The Commission should do its best to avoid any undermining of that uniformity in the future.

19. Given that international organizations possessed independent legal personalities, it was no easy task to determine international responsibility in connection with the act of an international organization — the subject matter of draft articles 25 to 30. The task was even more difficult if a State happened to be associated with a particular act by an international organization. If an act was attributed to an international organization and a State was associated with that act, there should be a fundamental review to determine whether the act

should be considered the responsibility of the organization or of the State.

20. Referring to the questions on the draft articles posed in paragraph 28 of the report, he said that two conflicting legal interests should be borne in mind in any discussion of the responsibility of a State member of an international organization for the internationally wrongful act of that organization, namely protection of the injured third party and protection of member States' interests. The current text of draft article 29 seemed to be inadequate in that respect.

21. To ensure the protection of the injured third party, especially when the victim was a person or an entity, draft article 29 should be complemented by other provisions on exhaustion of local remedies and the jurisdictional immunity of international organizations because, in most cases, intergovernmental organizations and their agents were immune from local jurisdiction. Consequently, the legal remedies available for bringing claims against an international organization were not available to persons or entities. Concerning the protection of member States' interests, the formulation of draft article 29, paragraph 1 (a), was vague and might result in a member State being obliged to provide compensation contrary to its own intention. Acceptance of obligations should always be explicit. The application of implied acceptance was too burdensome for member States.

22. There was a need for in-depth discussion of scenarios in which an international organization and a member State were both found internationally responsible for an internationally wrongful act, in order to determine whether the organization and the State were jointly or separately responsible and, in the latter case, which party had the primary and which the secondary responsibility.

23. **Ms. Williams** (United Kingdom) said that, although the United Kingdom was not directly affected by the Commission's work on transboundary aquifers and aquifer systems, it recognized the importance to the international community of the draft articles on that topic. The Commission should, however, exercise caution by not over-generalizing the issues raised by the topic of shared natural resources. Guidelines formulated for one natural resource might not be suitable for application to other types of natural resource. Moreover, the Commission should consider the context of the resource in question. In some cases, the sharing of natural resources was complex or sensitive. Bilateral or regional arrangements might be more appropriate in such cases than general articles or principles.

24. Her delegation appreciated the Commission's work on the difficult topic of responsibility of international organizations. However, it remained concerned about the wholesale application of the articles on State responsibility to international organizations without proper consideration of the important differences between States and organizations and with no allowance for the diversity of types of international organization and of their functions. It urged the Commission to explore existing practice and to consider carefully the different issues involved. The two questions posed by the Commission touched on complex matters, and there existed limited State practice in those areas. Her Government would respond to the questions in writing at a later date.

25. With regard to the draft articles on circumstances precluding wrongfulness, available practice was limited, and the Commission was right to conclude that there should not be a presumption that the conditions under which an international organization might invoke a certain circumstance precluding wrongfulness were the same as those applicable to States. However, despite that conclusion, draft articles 17 to 24 largely adopted the corresponding provisions of the articles on State responsibility. Her delegation urged the Commission to reconsider its decision not to depart from the general approach adopted for States.

26. Regarding draft article 18, there was a need for further discussion as to how self-defence would apply in relation to an international organization. Much of the discussion in the commentary was based on the use of self-defence in peacekeeping operations, but the right of self-defence arose in many cases from the terms of the mandate of a peacekeeping force. It was difficult to extrapolate from those specific mandates to a wider right that would exist in different circumstances. The considerations that applied to self-defence in the context of international organizations were different from those that applied to the exercise of the right of self-defence by a State. Moreover, as a practical matter, only certain international organizations would ever be in a position to exercise the right of self-defence.

27. Concerning draft article 21, her delegation had similar questions as to how distress would apply to an

international organization, if at all. What kind of situation might allow an international organization to rely on distress as a circumstance precluding wrongfulness? Would distress ever extend to an international organization performing its normal humanitarian functions in respect of persons entrusted to its care?

28. With regard to draft article 22, her delegation recognized the Commission's efforts to accommodate the different views expressed by States in the new formulation of the article. It agreed that, if necessity was to be applied to international organizations as well as States, the scope of that exception must be clearly defined, and the circumstances in which it could be invoked must be more limited than for States. The Commission had attempted to achieve that aim by limiting the exception to the protection of "an essential interest of the international community as a whole". However, further clarification was needed as to what constituted an "essential interest" and when an international organization would have the "function to protect" that interest. More generally, the United Kingdom questioned whether it would ever be appropriate for an international organization to rely on necessity to violate its international obligations.

29. With regard to draft articles 25 to 27, which largely duplicated the corresponding provisions of the articles on State responsibility, there was again little or no State practice available, and the commentary provided no concrete examples of when or how those articles would apply. There were grounds for taking a different approach in the context of international organizations. Moreover, the draft articles did not adequately address the different nature of the relationship between States and international organizations in that context. The Commission should provide greater clarification with regard to the application of those draft articles, in particular the definition of "aid or assistance" by a State in the context of an international organization, the circumstances in which a State would "direct and control" the act of an international organization, and the types of act that would constitute coercion of an international organization by a State. It should also delineate more clearly the relationship between the draft articles in question and draft article 29, which offered several possible bases of responsibility for the State.

30. Welcoming the new draft articles 28 and 29 and endorsing the Commission's comments on them, she said that her observations would be of a provisional nature, given that only limited time had been available to consider the text. Her delegation appreciated the general principle behind draft article 28 — that a State should not be able to avoid international responsibility by transferring its functions to an international organization — but considered that the current formulation was too broad and questioned whether the provision accurately reflected the available judicial authorities and whether those authorities, which had a limited application, could support a wider rule. The Commission should consider reformulating draft article 28 in order to recognize the general rule that a State did not incur international responsibility merely by transferring competence to an international organization. Any exception to that general rule must apply only in the narrowest of circumstances. In particular, the notion of "circumvention" required further definition. As had been suggested by other delegations, the Commission might also wish to consider the introduction of some element of bad faith, specific knowledge or deliberate intent, and whether the nature or content of the obligation in question was relevant.

31. Similarly, draft article 29 had too broad a potential application and should reflect the presumption that a State did not as a general rule incur international responsibility for the act of an international organization of which it was a member. That presumption flowed from the general principle of the separate and distinct legal personality of the international organization. In particular, responsibility should not be incurred merely by virtue of such membership. A provision to that effect would be more consistent with the existing judicial authorities. The exceptions set out in draft article 29, particularly the notion of acts leading to reliance, must be more precisely drafted so as to avoid uncertainty as to their interpretation. In addition, more detailed consideration should be given to the issue of whether such responsibility was restricted to third States and to the role of the constituent instrument in determining questions of responsibility. With those points in mind, the Commission should revisit the text of draft article 29.

32. **Ms. Daskalopoulou-Livada** (Greece), welcoming the progress made with regard to the draft articles on the law of transboundary aquifers, noted that no solution had yet been proposed regarding the relationship between the draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. Her delegation took the view that the draft articles should be on an equal footing with the Convention, since they were materially and conceptually tied to it.

33. She welcomed the addition in draft article 1 of subparagraph (b), which took account of the need to cover all activities that might put an aquifer or aquifer system at risk. In article 2, subparagraph (g), the sea should be explicitly included in the list of potential outlets of an aquifer, given its importance and vulnerability. Reliance on the illustrative character of the list was not enough.

34. With regard to draft article 5, the textual innovations introduced were welcome, but the meaning of subparagraph (d) was unclear without the help of the commentary. It might therefore be better to use the wording of the commentary itself, which read "the comparative size of the aquifer in each aquifer State and the comparative importance of the recharge process in each State where the recharge zone is located".

35. In connection with draft article 6, the Commission had recognized the fragility of aquifers but had failed to lower the threshold of harm that aquifers could sustain. Instead, it had maintained the threshold of "significant harm" which had been used in the 1997 Convention with regard to surface waters. Rather than inventing far-fetched meanings for the word "significant", the term "harm" should simply not be qualified at all. Not qualifying harm did not of course mean that even inconsequential harm would constitute a violation of the relevant provision, and the Commission could so indicate if it saw fit.

36. In draft article 7 and subsequent draft articles, the text refrained from imposing an obligation on States to cooperate through joint mechanisms. However, joint mechanisms were so widely used in cooperation between States with regard to transboundary surface waters that the Commission should not hesitate to adopt a mandatory provision on cooperation with regard to groundwaters. Her delegation had no major objections to draft articles 14 to 19 but had not yet had enough time to consider them in detail, given the speed of the Commission's work in that regard. It therefore suggested that the period set for comments by States should be extended to two years.

37. After welcoming the adoption of chapters V and (x) of the draft articles on responsibility of international organizations, she suggested, with regard to draft article 25, that a clarification was needed in the commentary to the effect that relevant intention would be required, as had been specified in the commentary to the corresponding article on State responsibility. Such a clarification was proposed, not only for reasons of consistency with the articles on State responsibility, but also to explain that mere involvement of a member State in the day-to-day functioning of an international organization could not amount to "aid or assistance" giving rise to the responsibility of the State for an act of the organization within the meaning of draft article 25.

38. Draft article 28 was acceptable in principle, but was too wide in its current formulation. Her delegation agreed with paragraph (2) of the commentary, which stated that responsibility could not be avoided by showing the absence of an intention to circumvent the international obligation in question. If, however, intention was irrelevant in that context, States became exposed to responsibility for any act of the organization for which they had transferred competence to that organization. A serious possible consequence was that States might become reluctant to transfer competences to international organizations, fearing that they would be more likely to become liable for wrongful acts of the organization, even if they had not been involved in the commission of the act. To rectify the problem, the scope of application of the article could be limited to cases where the international organization was not itself bound by the obligation breached. Paragraph 2 of the draft article should then be redrafted accordingly.

39. With regard to draft article 29, paragraph 1 (a), the commentary made it clear that a State had to accept responsibility for the act of the organization vis-à-vis the victim of the act and not vis-à-vis the organization itself. That distinction should be reflected in the wording of the draft article. In addition, the applicability of draft article 29, paragraph 1 (b), in the event of a violation of a mixed agreement by the European Community and not its member States was unclear. Lastly, a negative drafting of paragraph 1

would be better, as it would make it clear that no residual responsibility could arise for a State.

40. Chapter (x) should contain a provision on the responsibility of member States in cases where they committed a wrongful act by implementing a binding decision of the organization. Draft article 15 addressed that issue, but only from the point of view of the responsibility of the organization. As far as States were concerned, the articles on State responsibility did not provide sufficient guidance on the matter, because, in the type of case in question, the State was acting as an executing agent of the organization, especially when the addressees of the organization's decision were not afforded any discretion as to the modalities of its implementation. A specific provision to cover that situation was therefore required.

41. **Ms. McIver** (New Zealand) commended the completion of the first reading of the draft articles on shared natural resources, a topic of ever-increasing importance. The Special Rapporteur's approach in seeking assistance from hydrogeologists and other experts had ensured that the text benefited from the best available scientific knowledge and also that the legal norms developed were more understandable to those who worked with aquifers. The way in which a given transboundary aquifer was managed should take account of its specific features and each State's relationship with it. Management arrangements must be worked out in detail by the aquifer States at the regional or subregional level.

42. In view of the fact that the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses was still not in force and that, for similar reasons, an insufficient number of States would be motivated to become parties to a convention on shared natural resources, it might be more effective to cast the final text as recommendatory principles or articles rather than as a convention. An authoritative statement describing international standards and best practice would be immediately influential at the bilateral and regional level.

43. With regard to the draft articles on responsibility of international organizations, her delegation continued to support the Commission's approach of following the scheme of the articles on responsibility of States for internationally wrongful acts unless there was a compelling reason not to do so. It endorsed the principle contained in draft article 28 ("International responsibility in case of provision of competence to an international organization"). A State should not be able to make use of an international organization's separate legal personality to avoid an international obligation. The principle was not in doubt; the challenge lay in finding the most appropriate language in which to express it. That the Commission had done.

44. Her delegation supported the Commission's careful formulation of the principle contained in draft article 29 ("Responsibility of a State member of an international organization for the internationally wrongful act of that organization"). The analysis in the commentary led inevitably to the conclusion that member States could not, as a rule, be responsible for the internationally wrongful act of an international organization. To conclude otherwise would work against the established notion that an international organization had a legal personality separate from that of its members and would thus also have serious consequences for management and effective decision-making within such an organization. In some circumstances, however, member States should have international responsibility, although, as provided for in draft article 29, such circumstances should be restricted to situations in which a State had accepted responsibility or had led an injured party to rely on its responsibility.

45. **Mr. Mohd Radzi** (Malaysia) commended the Commission's successful conclusion of its first reading of the draft articles on shared natural resources. In that connection, he noted that the term "draft articles" was used without prejudice as to the final form of the text and that the text did not include provisions on dispute settlement, final clauses or any article that might prejudice the final form.

46. His delegation welcomed the change made to draft article 12, paragraph 2. Following representations by his delegation at the sixtieth session, the phrase "Aquifer States shall agree on harmonized standards and methodology" had been replaced by the phrase "Aquifer States shall use agreed or harmonized standards and methodology". The previous wording had imposed too heavy an obligation on aquifer States to establish standards and methodologies that were applicable across the board. The new wording meant that certain standards and methodology could be agreed by aquifer States, as required, without a prior need to harmonize existing standards or methodology.

47. His delegation regretted that, in draft article 11, the language had been strengthened to impose an obligation on aquifer States to take a precautionary approach. In his delegation's view, such an obligation must be subject to the capabilities of the States concerned, in line with principle 15 of the Rio Declaration on Environment and Development. With regard to draft article 18, which protected an aquifer State from being compelled to provide data or information the confidentiality of which was essential to its national defence or security, his delegation would like to reiterate its position that protection under the draft article should be extended to industrial secrets and intellectual property.

48. In draft article 5, paragraph 2, the phrase "vital human needs" should be defined in order to avoid uncertainty of interpretation. To that end, his delegation would favour inserting in the draft article the statement of understanding reached during the elaboration of the 1997 Watercourses Convention, which read: "In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation."

49. His delegation welcomed the expansion of the scope of draft article 14 to cover any State, including a non-aquifer State, that had reasonable grounds for believing that an activity planned in its territory might affect a transboundary aquifer or aquifer system and thereby have a significant adverse effect on another State, including a non-aquifer State. His delegation supported the Commission's decision not to address in the draft articles the issue of compensation in circumstances where harm resulted despite efforts to prevent such harm, since the issue was covered by other rules of international law, including the draft principles of liability and the polluter-pays principle.

50. Under the Malaysian Constitution, legislative powers were divided between the Federal Government and state governments with regard to shared natural resources, particularly land and water. He wondered how the principles set out in the draft articles would apply in such a federal system.

51. **Mr. Panahi Azar** (Islamic Republic of Iran) said that, although there were some similarities between the responsibility of States for internationally wrongful acts and that of international organizations, there were marked differences in the functions and position of international organizations and States. It was therefore important to differentiate the circumstances precluding wrongfulness in the case of acts by States or by international organizations. With regard to draft article 17 ("Consent"), he stressed that validity of consent was dependent on the will of the State or international organization concerned and should not involve any pressure and/or violation of its sovereignty or independence. On principle, every consent should be taken as valid. The limits of consent should also be determined objectively.

52. There were some inconsistencies in the draft articles. For example, draft article 18 ("Self-defence") did not fully reflect paragraphs 15 to 17 of the Special Rapporteur's report (A/CN.4/564). A clear distinction should be drawn between self-defence and the lawful use of force in reasonable implementation of the purposes of a given mission. Furthermore, the draft article appeared to use the term "self-defence" as used in Article 51 of the Charter of the United Nations, even though that Article referred exclusively to States. In other words, the draft article appeared to contain elements of the progressive development of international law, since no one had ever suggested that customary law related in any way to the activities of international organizations. Even an implied reference to Article 51 of the Charter was therefore unnecessary.

53. In draft article 22 ("Necessity"), the terms "essential interest" and "international community" were ambiguous, and the discussion in paragraphs 35 to 42 of the Special Rapporteur's report did not set out any objective definition of either concept.

54. His delegation concurred with the Commission's view, as expressed in draft article 23 ("Compliance with peremptory norms"). Having accepted peremptory norms as obligatory, international organizations should comply with them. With regard to the question posed by the Commission in paragraph 28 (a) of its report as to whether members of an international organization that were not responsible for the internationally wrongful act of that organization had an obligation to provide compensation to the injured party, his delegation believed that member States should try to offer due compensation, taking into account the organization's rules and regulations.

Agenda item 77: Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (*continued*) (A/C.6/61/L.7 and L.8)

55. **Mr. Bühler** (Austria), introducing the draft resolution on the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (A/C.6/61/L.7), of which Morocco had become a sponsor, said that the draft resolution was very similar to the one adopted in 2005. After a review of its content, he expressed his confidence that the Committee would adopt it without a vote. The order of paragraphs 8 and 9 should, for the sake of logical argument, be reversed.

56. *Draft resolution A/C.6/61/L.7, as orally revised, was adopted.*

57. **Mr. Ganeson** (Malaysia) introduced the draft resolution on the revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (A/C.6/61/L.8). Adoption of the draft resolution would significantly enhance the operation of the Model Law.

58. *Draft resolution A/C.6/61/L.8 was adopted.*

The meeting rose at 6 p.m.