AALCO/43/BALI/2004/SD/S 1

For Official use only

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-FIFTH SESSION

Prepared by:

The AALCO Secretariat
E-66, Vasant Marg, Vasant Vihar
New Delhi– 110057
(INDIA)

CONTENTS

		Page Nos.
	Introduction	**1-2**
I.	**Reservations to Treaties**	**3-14**
II.	**Diplomatic Protection**	**15-23**
III.	**Unilateral Acts of States**	**24-28**
IV.	**International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law**	**29-33**
V.	**Responsibility of International Organizations**	**34-39**
VI.	**Fragmentation of International Law**	**40-43**
VII.	**Shared Natural Resources**	**44-46**
	Concluding Remarks	**47-48**

REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-FIFTH SESSION

INTRODUCTION

1. The International Law Commission (hereafter called the "ILC" or the "Commission") established by General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The 34-member ILC held its fifty-fifth session in Geneva from 5 May to 6 June and 7 July to 8 August 2003. The Commission elected Mr. Enrique Candioti (Argentina) as its Chairman, for the fifty-fifth session. The AALCO was represented at the session by the Secretary-General, Amb. Dr. Wafik Z. Kamil.

2. There were as many as seven topics on the agenda of the aforementioned session of the ILC. These were:

I. Reservations to Treaties

II. Diplomatic Protection

III. Unilateral Acts of States

IV. International Liability For Injurious Consequences Arising Out of Acts not Prohibited by International Law

V. Responsibility of International Organizations

VI. Fragmentation of Intentional Law: Difficulties Arising From the Diversification and Expansion of International Law; and

VII. Shared Natural Resources

3. Concerning the topic **"Reservations to treaties"**, the Commission adopted 11 draft guidelines (with 3 model clauses) dealing with withdrawal and modification of reservations. The Commission also considered the Special Rapporteur's eighth report[1] and referred five draft guidelines dealing with withdrawal and modification of reservations and interpretative declarations to the Drafting Committee.

---

[1]. A/CN.4/535 and Add.1

4. As regards the topic **"Diplomatic Protection"**, the Commission considered the Special Rapporteur's fourth report[2] covering draft articles 17 to 20 on the diplomatic protection of corporations and shareholders and of other legal persons. The Commission considered and referred draft articles 17 to 20 to the Drafting Committee. It further adopted draft articles 8 [10], 9 [11] and 10 [14], with commentaries, on the recommendation of the Drafting Committee.

5. As regards the topic **"Unilateral Acts of States"**, the Commission considered the sixth report[3] of the Special Rapporteur, which focused on the unilateral act of recognition. The Commission also established an open ended Working Group on Unilateral Acts of States.

6. Concerning the topic **"International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)"**, the Commission considered the Special Rapporteur's first report[4] concerning the legal regime for the allocation of loss. The Commission established a Working Group to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission.

7. With regard to the topic of **"Responsibility of international organizations"**, the Commission considered the Special Rapporteur's first report[5] dealing with the scope of the work and general principles concerning responsibility of international organizations. The report proposed three draft articles, which were considered by the Commission and were referred to the Drafting Committee. The Commission adopted articles 1 to 3 as recommended by the Drafting Committee together with commentaries.

8. In relation to the topic **"Fragmentation of international law: difficulties arising from the diversification and expansion of international law"**, the Study Group of the Commission established a schedule of work for the remaining part of the present quinquennium (2003-2006); agreed upon the distribution among its members of the preparation of the studies endorsed by the Commission in 2002; decided upon the methodology to be adopted for the studies; and held a preliminary discussion of an outline by the Chairman on the question of "The function and scope of the *lex specialis* rule and the question of self-contained regimes".

9. With regard to the topic **"Shared natural resources"**, the Commission considered the first report of the Special Rapporteur[6]. The report, which was of a preliminary nature, set out the background to the subject and proposed to limit the scope of the topic to the study of confined transboundary groundwaters, oil and gas, with work to proceed initially on the first subtopic.

---

[2]. A/CN.4/530 and Corr.1 and Add.1
[3]. A/CN.4/534
[4]. A/CN.4/531
[5]. A/CN.4/532
[6]. A/CN.4/533 and Add.1

I. RESERVATIONS TO TREATIES

A. BACKGROUND

1. It may be recalled that the UN General Assembly in its resolution 48/31 of December 1993 endorsed the decision of the ILC to include in its agenda the topic "The law and practice relating to reservations to treaties." At its forty-sixth session in 1994, the ILC appointed Mr. Alain Pellet as Special Rapporteur for the topic.

2. The ILC at its forty-seventh session in 1995 and the forty-eighth session in 1996 received and discussed the first[7] and second[8] reports of the Special Rapporteur, respectively.

3. The ILC continued its work on the understanding that: the title to the topic would read as "Reservations to Treaties"; the form the results of the study would take should be a guide to practice in respect of reservations; and the present work by the ILC should not alter the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on Treaties. As far as the Guide to practice is concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States, and international organizations. These guidelines would, if necessary, be accompanied by model clauses.

4. Since the year 1998, the Commission received the third, fourth, fifth and sixth reports of the Special Rapporteur. While the third and fourth reports dealt with the definition of reservations and interpretative declarations, the fifth report focused on the procedure and alternatives to reservations and interpretative declarations, and the sixth report concerned the modalities of formulating and publicity of reservations and interpretative declarations.

5. At the 54th session (2002), the Commission had before it the Special Rapporteur's seventh report[9] relating to the formulation, modification and withdrawal of reservations and interpretative declarations. The Commission also referred 15 draft guidelines dealing with withdrawal and modification of reservations to the Drafting Committee. On the basis of the Drafting Committee's report, the Commission, at this session, considered and provisionally adopted 11 draft guidelines dealing with formulation and communication of reservations and interpretative declarations.

6. Following the deliberations on these reports, the Commission had provisionally adopted 53 draft guidelines by the end of its 54th session (2002).[10]

---

7. A/CN.4/470 and Corr.1.
8. A/CN.4/477 and Add.7.
9. A/CN.4/526 and Add.1 to 3.
10. For the text of the draft guidelines, see Report of the International Law Commission, Fifty third session A/56/10 at pp.455-464.

7. For purposes of the Guide to Practice, "reservation" means a unilateral statement, however, phrased or named, made by a State or an 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, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

8. An 'interpretative declaration' on the other hand is a unilateral statement … made by a State or by an international organization … purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

9. At the present session the Commission had before it the eighth report[11] of the Special Rapporteur dealing with withdrawal and modification of reservations and interpretative declarations. The Commission further referred five draft guidelines dealing with withdrawal and modification of reservations and interpretative declarations to the Drafting Committee The Commission adopted 11 draft guidelines (with 3 model clauses) dealing with withdrawal and modification of reservations, which are described below.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations

> Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

10. This draft guideline is similar and the wording is almost identical with the wording of article 22 para. 1 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 which is based on that of article 22, paragraph1, of the 1969 Vienna Convention on the Law of Treaties, with the addition of international organizations[12].

11. By definition, a reservation is a unilateral act and the decision to opt for a reservation implies a resort to unilateralism.[13] Thus it would be illogical to require agreement from the other contracting parties to undo what the unilateral expression of the will of a State had done. Therefore this guideline implies that as the making of

---

[11]. A/CN.4/535 and Add.1

[12]. Article 22, para.1 of the Vienna Convention on the Law of Treaties, 1969, reads as follows:
Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal.

[13]. For a discussion on this issue, see; Frank Horn, *Reservations and Interpretative Declarations*, (T.M.C. Asser Instituut, 1988), pp. 223-224.

reservations is limiting the obligations of the concerned treaty, withdrawal of such reservations would result in reverting to the full-fledged acceptance of treaty obligations and does not require any consent from any State or international organization though they have accepted such reservations.[14]

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

12. The wording of this draft guideline is also identical to the wording of article 23 para.4 of the Vienna Conventions[15]. This guideline makes it clear that withdrawal has to be made in writing and does not admit any implicit withdrawals. However, in the commentary it is stated that a clause in a treaty places a limit on the period of validity of reservations. Similarly, in certain cases the reservation itself sets a time limit to its validity. In such cases the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set therein. Therefore the withdrawal of a reservation must be made only by way of formulating it in writing.

13. This guideline helps avoid legal uncertainty while ascertaining the treaty obligations of States parties avoiding subjective interpretations.

2.5.3 Periodic review of the usefulness of reservations

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

14. This guideline is an addition to the existing corpus on law relating to reservations. It is clear from article 22 para. 1 of the Vienna Convention on the Law of Treaties and the draft guideline 2.5.1 that a reservation may be withdrawn at any time if the State or the international organization making the reservation wish to do so.[16] However the guideline

---

[14]. This was also the position of the Commission while drafting the Vienna Convention on the Law of Treaties 1969, which said; "It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a regime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted." *Yearbook of the International Law Commission*, 1962, vol. II, pp. 181-182, doc. A/5209, para. (1) of the commentary to art. 22.

[15]. Article 23 para. 4 of the Vienna Convention on the Law of Treaties reads as follows. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

[16]. This is in consonance with the recent recommendations of the treaty monitoring bodies, particularly but not exclusively in the field of human rights which are calling frequently on States to reconsider their reservations and, if possible, to withdraw them. Recent examples are; among

on periodic review of the usefulness of reservations further requires States and international organizations to study the usefulness of reservations keeping in view the developments in internal law and other spheres since the making of the reservations.

15. Thus this guideline seeks States and international organizations to withdraw reservations if they become irrelevant in the context of changed circumstances to strengthen the integrity of the treaty concerned. However it may be mentioned that this guideline is recommendatory in nature as it seeks States only to consider withdrawing such irrelevant reservations.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty concluded between the accrediting States and that organization.

---

others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Human Rights Treaties (para. 7); 54/137 of 17 December 1999 and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 5); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Sub-Commission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), para. 7, dated 1 October 1993.

16. This draft guideline deals with the issue of persons competent to formulate the withdrawal of a reservation at the international level. This is also a new element and addition to the existing law on reservations. However it does not contain any substantive element so far as the issue of reservations is concerned as it describes an aspect, which is technical in nature. This guideline largely transposes to the wording of the guideline 2.1.3, which deals with the formulation of a reservation at the international level.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

17. This draft guideline clarifies that the act of withdrawal of reservations done at the international level cannot be revoked on the ground that it has been performed in violation of internal law of the State or the rule of the international organization concerned. Thus this guideline seeks to put onus on the States and international organizations to take appropriate measures relating to the procedure and competence prior to entrusting the task of withdrawing reservations to the competent person.

18. This guideline is same as the draft guideline 2.1.4 which deals with the 'Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations' with the replacement of words 'formulation' and 'formulate' by the words 'withdrawal' and 'withdraw'.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

19. This draft guideline reiterates the procedure contained in guidelines 2.1.5, 2.1.6 and 2.1.7 as applicable to the communication of reservations to be followed in the case of communication of withdrawal of reservations also.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State

or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

20. This guideline deals with the effect of withdrawal of a reservation by states and international organizations that are parties to the treaty concerned.

21. First paragraph of the guideline deals with the effect of withdrawal of a reservation between the State that has withdrawn it and all other states and international organizations whether they had accepted the reservation or objected to it and states that the provision to which reservation was made comes into operation as it is between them after the withdrawal of reservation.

22. Second paragraph deals with a situation wherein the objecting State or the international organization has also opposed the entry into force of the treaty between itself and the State or the international organization that has made the reservation by reason of that reservation. In this situation also, the guideline clarifies, the treaty comes into force between them, as is the case with the States and international organizations that have accepted or merely objected to the reservations. Therefore the result in the case of acceptances and mere objections the relevant provision will come into operation between them along with other provisions of the treaty. Whereas in the case of an objection made along with the opposition to the entry into force of the treaty, the whole treaty comes into force between the State that has withdrawn the reservation and the objecting State.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses

A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

B. Earlier effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

23. This guideline is similar to article 22 para.3 of the Vienna Conventions. It says that the withdrawal of a reservation becomes operational in relation to a contracting State or an organization when the notice of it has been received by that State or organization.

24. However, as mentioned above, the Commission also adopted three models clauses, which deal with three different situations. These model clauses mention about the receipt of withdrawal notification by the depository and not by States or international organizations, as is the case in the above guideline.

25. Model clause (A) deals with a situation wherein the effect of withdrawal of a reservation does not become operation immediately after the receipt of notice by the depository but only after the expiration of a particular period.[17]

26. Model clause (B) is intended for the situation wherein the parties agree that they prefer a shorter time scale than that resulting from the application of the principle embodied in article 22, paragraph 3(a) of the Vienna Conventions and also contained in draft guideline 2.5.8.[18]

27. Model clause (C) describes the situation wherein the withdrawal shall take effect on the date set by the withdrawing State in the notification addressed to the depository. The wording of this model clause follows that of article 12, paragraph 2, of the 1973 Kyoto Convention (Revised)[19].

---

[17]. See for example, the United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980, art. 94, para. 4 (six months), the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), of 23 June 1979, art. XIV. para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary), or the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted 1 August 1989 by the Hague Conference on Private International Law, art. 24, para. 3 (three months after notification of the withdrawal).

[18]. For example, under the European Convention on Transfrontier Television, of 5 May 1989, article 32, paragraph 3, says; "Any contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General." Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: cf. the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, art. 8, para. 2; the 1977 European Agreement on the Transmission of Applications for Legal Aid, art. 13, para. 2; or the 1997 European Convention on Nationality, art. 29, para. 3.

[19]. This article reads: "Any contracting party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depository specifying the date on which such withdrawal takes effect". International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention (Revised)) of 18 May 1973.

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(b) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

28. This guideline also deals with the effective date of withdrawal of a reservation but in a different form. It governs the situation where the withdrawing State or international organization unilaterally set the effective date of withdrawal of a reservation. However, Paragraph (a) sets the condition that the unilaterally decided effective date of withdrawal of reservation shall be later than the date on which the other contracting States or international organizations received notification of it.

29. Paragraph (a) considers the possibility of a reserving State or international organization setting a date, which is later than that resulting from the application of article 22, paragraph (a) of the Vienna Convention on the Law of Treaties. This does not raise any particular difficulties as the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State or international organization renouncing its reservation.

30. Similarly, paragraph (b) sets another condition by which the withdrawing State or international organization should not be able to put itself in an advantageous position vis-à-vis other contracting parties through the unilateral decision of effective date of withdrawal of a reservation. In the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a) of the Vienna Conventions. However, the commission believes that it is not worth retaining the category of treaties establishing "integral obligations", especially in the field of human rights. In such situation, there can be no objection to the fact that the withdrawal takes immediate, even retroactive effect, if the State making the original reservation so wishes, since the legislation of other States is not affected.[20]

2.5.10 [2.5.11] Partial withdrawal of a reservation

---

[20]. Commentary cited P.H. Imbert (*les reserves aux traits multilareraux*, Pedone, Paris, 1979, p. 291) who referred to the examples of withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954.

The partial withdrawal of a reservation purports to limit the legal effect of the reservation and to achieve a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

31. This guideline seeks to describe as to what the partial reservation is in terms of its legal effect[21]. It says that a partial withdrawal limits the legal effect of the reservation thereby leading to a more complete application of the treaty provisions. The partial withdrawal results in reducing the effect of the reservation thereby expanding the application of the provisions of the treaty to the withdrawing State or international organization. This guideline is not without previous examples as there are some conventions, which contain provisions of this nature[22].

32. As second paragraph states, formal and procedural rules are same as they are applied in the case of total withdrawal. Thus it refers to draft guidelines 2.5.1, 2.5.2, 2.5.5, 2.5.6 and 2.5.8, which fully apply to partial withdrawal also.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

33. This guideline deals with an important aspect by substantiating the effect of the partial withdrawal of a reservation. It clarifies that an objection made to a reservation originally would remain in operation as long as its author does not withdraw it. However the objection's operation would be effective to the extent that it does not apply exclusively to that part of the reservation, which has been withdrawn.

---

[21]. During the preparation of the draft articles of the Vienna Convention on the Law of Treaties by the International Law Commission, the Special Rapporteur Sir Humphry Waldock suggested the adoption of draft article 17, para.6 placing the total and partial withdrawal of reservations on an equal footing, but finally it was not included in the Convention. *Yearbook of the International Law Commission*, 1962, vol.II, p. 69.

[22]. Examples of the provisions of this nature are: Article 23, paragraph 2, of the Convention, on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976; article 8, paragraph 3, of the Convention on the Nationality of Married Women, of 20 February 1957; article 17, paragraph 2, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law, of 4 November 1998; and article 15, paragraph 2, of the Convention on the fight against corruption involving officials of the European Communities or officials of States members of the European Union, of 26 May 1997:

34. Second paragraph of the guideline deals with the situation of making fresh objections after the partial withdrawal of a reservation. It prohibits any new objections unless the partial withdrawal of a reservation results in a discriminatory effect on the relations among the parties to the treaty. This paragraph sets out both the principles that it is impossible to object to a reservation in the event of a partial withdrawal and the exception when the withdrawal is discriminatory.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

35. The Commission would welcome comments from Governments on the following issues.

36. In chapter II of his eighth report, the Special Rapporteur proposed a definition of objections to reservations in order to fill a gap in the 1969 and 1996 Vienna Conventions, which do not contain such a definition. His proposal was based on the fact that objecting States or international organizations intend their statement to produce one or another of the effects provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions. He therefore proposed the following definition:

37. Draft guideline 2.6.1 *Definition of objections to reservations*

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

38. The proposed definition was regarded as being too narrow by some members of the Commission, whose view was that it did not take account of other categories of statements by which States express their opposition to reservations, while intending that their objections should produce various effects. Other members considered that the effects of objections to reservations under the Vienna Conventions were not very clear-cut and that it was better not to rely on the provisions of those Conventions in defining objections.

39. The Commission would be particularly interested in receiving the comments of Governments on this question and would be grateful to States for transmitting specific examples of objections which do not contain this (or an equivalent) term and which they nevertheless regard as genuine objections.

40. The Commission would like to know the views of States on the following position taken in 1977 by the arbitral tribunal that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case:

"Whether … such [a negative] reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned."

41. Does this position reflect practice?

If so, are there clear-cut examples of critical reactions to the reservation which can nonetheless not be characterized as objections?

42. The Commission would also be grateful to Governments for comments on the advantages and disadvantages of clearly stating the grounds for objections to reservations formulated by other States or international organizations.

43. Draft guideline 2.3.5 Enlargement of the scope of a reservation ("The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3]."), gave rise to divergent positions. It was referred to the Drafting Committee. The views of Governments on this guideline would be particularly welcomed.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

44. The delegate of **China** said that the enlargement of the scope of reservations should be treated as the late formulation of a reservation. The provisions in the draft guidelines on the question should apply. China believed that the definition of objections should clearly provide that objections to reservations could merely produce the legal effects defined in the Vienna Convention on the Law of Treaties.

45. The delegate of **Iran** supported the "reservation dialogue" that had been proposed for the Commission's next session. He called attention to the so-called doctrine of "super-maximum" effects. In that, the concept of reservations as the basic element in consent by States to enter treaties was destroyed for the sake of a treaty's integrity. There should be new wording on the draft guideline to strike a balance between the consent of sovereign States and the integrity of treaties.

46. The delegate of **Japan** said the intentions of a country formulating a reservation, and of one making an objection to it, should be interpreted according to the texts of the

reservation and objection. A dialogue between the parties to clarify intentions when not apparent from the texts would be helpful. The Commission should not predetermine the modality of the "reservations dialogue" it was taking up, since there were many ways in which States could explain and clarify their intentions to others with respect to reservations or objections.

47. He further said that the intention of a State making an objection to a reservation should be the basis for determining the nature and effect of the objection. To fully ascertain the nature of a statement made by a country in response to another country's reservation, primary attention should be on the intent of the responder. That would disclose whether the State intended not to apply part of a treaty on which the reservation was made; whether it intended to block the application of the entire treaty with regard to the reserving State; or whether it was making a comment with no legal effect on the reservation. Finally, actual State practice in formulating reservations, and in ways of examining reservations and objecting to them, should be examined when discussing reservations.

48. The delegate of **Kenya** noted the progress that had been made in the Commission's work on reservations to treaties. She further said that States should be discouraged from modifying reservations to treaties with the aim of enlarging their scope. Objections should be formulated to clearly bring out the intention of the objecting party.

49. The delegate of **Malaysia** said she welcomed a broad-based definition of "objections". A clear guide on what was an objection was timely, since current practice showed divergence and caused uncertainty among States. Guidelines to encourage States to give reasons for objections to reservations should be formulated. Stating grounds for objections to reservations had many advantages, including transparency and certainty. It also gave reserving States an opportunity to evaluate the validity of an objection and carry out an informed review of its reservation.

50. The delegate of **Pakistan** said that he did not object to any clarifications of the Vienna Convention and he appreciated the work done in that regard, relative to reservations to treaties. It should be noted that the formulation of a reservation or objection did not affect the entry into force of the treaty and the binding of parties within its domain. The guidelines on late reservations were not in keeping with the Vienna Convention and would introduce an unwelcome uncertainty into the question. Further, it was not within the scope of a depository's responsibilities to make objections to reservations.

II. DIPLOMATIC PROTECTION

A. BACKGROUND

1. The ILC at its forty-eighth session in 1996 identified the topic of "Diplomatic Protection" as one of the topics appropriate for codification and progressive development.[23] By resolution 51/160, the General Assembly in the same year invited the ILC to further examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make.

2. At its 49th session (1997), a Working Group was established on this topic. The Working Group attempted to clarify the scope of the topic and identify issues to be studied in the context of the topic. The report of the Working Group was endorsed by the ILC. It was decided that the ILC should endeavor to complete the first reading of the topic by the end of the present quinquennium. Mr. Mohamed Bennouna was appointed Special Rapporteur for the topic.

3. At its 50th session in 1998, the ILC had before it the preliminary report of the Special Rapporteur.[24] At the same session, the ILC established an open-ended Working Group to consider possible conclusions, which might be drawn on the basis of the discussion as to the approach to the topic.[25]

4. At its 51st session in 1999, the ILC appointed Mr. Christopher John R. Dugard as Special Rapporteur for the topic to replace Mr. Bennouna who was elected as a judge to the International Criminal Tribunal for the former Yugoslavia.

5. At the 52nd session, the ILC had before it the Special Rapporteur's first Reports[26]. The ILC considered the first report contained in document A/CN.4/506 and Corr. 1, and for lack of time deferred consideration of A/CN.4/506/Add.1 to the next session. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6. The Commission subsequently decided to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

6. At its 53rd session (2001), the Commission had before it the remainder of the Special Rapporteur's first reports[27], as well as his second report.[28] Due to lack of time, the Commission was only able to consider those parts of the second report covering draft

---

23. Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and annex II, addendum 1.
24. A/CN.4/484.
25. The conclusions of the Working Group are contained in Official Records of the General Assembly, Fifty- third Session, Supplement No. 10 (A/53/10), para. 108.
26. A/CN.4/506 and Corr. 1 and Add. 1.
27. A/CN.4/506/Add.1.
28. A/CN.4/514.

articles 10 and 11, and deferred consideration of the remainder of the document concerning draft articles 12 and 13, to the next session. Draft articles 9, 10 and 11 were referred to the Drafting Committee.

7. At its 54th session (2002), the Commission had before it the remainder of the second report of the Special Rapporteur (concerning draft articles 12 and 13), as well as his third reports[29]. Following its consideration of the above-said reports, the Commission decided to refer draft article 14, paragraphs (a), (b), (c), (d) and (e) to the Drafting Committee. After considering the report of the Drafting Committee, the Commission adopted draft articles 1 to 7, along with commentaries thereto.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

8. At the present session the Commission had before it the fourth report of the Special Rapporteur covering draft articles 17 to 22 on the diplomatic protection of corporations and shareholders and of other legal persons[30].

9. Following its consideration of the above mentioned reports, the Commission decided to refer draft articles 17 to 22 to the Drafting Committee.

10. After considering the report of the Drafting Committee the Commission adopted draft articles 8(10), 9(11) and 10(14) with commentaries thereto.

11. An overview of the draft articles 8(10), 9(11) and 10(14) as provisionally adopted by the Commission is given below.

Article 8 [10][31]

Exhaustion of local remedies

> 1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8][32] before the injured person has, subject to article 10 [14], exhausted all local remedies.
>
> 2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

12. This provision seeks to codify the existing rule of exhaustion of local remedies, which is a well-established rule of customary international law as it was reflected in the

---

29. A/CN.4/523 and Add.1.
30. A/CN.4/530 and Corr.1 and Add.1
31. Articles 8 [10], 9 [11] and 10 [14] are to be included in a future Part Four to be entitled "Local remedies", and will be renumbered.
32. The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles.

plenary discussions of the Commission and was also recognized by the International Court of Justice[33].

13. Paragraph 1 makes a reference to article 10(14) which talks about the exceptions to the local remedies rule clarifying that this rule can be dispensed with in circumstances mentioned under article 10(14).

14. Paragraph 2 of the provision defines the scope of the phrase "local remedies". The emphasis of the paragraph is that the remedy should be in the form of right and not as a favour or grace to the injured person. Therefore it does not matter whether it is a judicial or administrative in nature or ordinary or special. Thus the provision underlines that any remedy to be exhausted must be in the form of a right resulting in the binding decision, which is in accordance with the principle *ubi jus ibi remedium*[34]. It is also not required to approach the executive for relief under its discretionary powers. The focus is laid on the nature of the remedy than on the structure or form of the institution before which the matter is brought. In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise in the municipal proceedings all the arguments he intends to raise in international proceedings.

Article 9 [11]

Classification of claims

> Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].

15. Article 9(11) deals with the classification of claims for the purposes of the applicability of the exhaustion of local remedies rule. 'Mavrommatis principle'[35]

---

[33]. *Interhande*l Case, I.C.J. Reports, 1959, 27 and *Elettronica Sicula (ELSI)* Case, I.C.J. Reports, 1989, 42, Para, 50.

[34]. Right without remedy cannot be regarded as a real right. Without remedy, a right remains only on the paper. This argument is explained in Latin as; *ubi jus ibi remedium:* where there is a right there is remedy.

[35]. The *Mavrommatis Palestine Concessions* case, decided by the Permanet Court of International Justice in 1924, was brought against Great Britain by Greece, further to the former' s refusal to recognize, as the sovereign power in Palestine under a mandate assigned by the League of Nations, the contractual rights acquired by Mavrommatis, a Greek national, through agreements signed with the authorities of the Ottoman Empire, the former sovereign power in Palestine. The Court so held: "It is true that the dispute was at first between a private person and a state...Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two states... It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his

established that an injury to the national is an injury to the State. Such an injury is an indirect injury to the State, which requires the exhaustion of local remedies rule as opposed to the cases of direct injury to the State wherein this rule does not apply.

16. Keeping in view the fact that in some cases it is not clear whether it is a 'direct' or 'indirect' injury, two possible tests were considered for the purpose of determining the character of injuries. The first was the preponderance test as approved by the International Court of Justice in both *ELSI* and *Interhandel* cases whereby the injured individual is obliged to exhaust local remedies where the claim is preponderantly one that relates to the injured individual as opposed to the State. The second test is the *sine qua non* or "but for" test wherein it is determined whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national.

17. The special Rapporteur proposed both tests for the purpose of emphasizing that the injury to the national must be dominant factor in the bringing of the claim if the local remedies are to be exhausted. However, keeping in view the prevailing view that the preponderance test received most attention in judicial decisions the Commission preferred to retain only the preponderance test in the article and to deal with the other test in the commentary.

18. This provision further makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment simply requesting a decision on the interpretation and application of a treaty, if it is brought preponderantly on the basis of an injury to a national.

Article 10 [14]

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

---

behalf, a state is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant." *(Greek V UK) 1924, P.C.I.J. Seiesr.A,* No.2, p.11-12. This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Saldutiskis Railway* case (Estonia V Lithuania) P.C.I.J. Reports, Series A/B, No. 76, P.16.

(c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.[36]

19. This provision deals with the exceptions to the local remedies rule, which was proposed by the Special Rapporteur in his third report. It describes four situations as exceptions to the local remedies rule.

20. Paragraph (a) deals with the situation where, even though local remedies exist, they do not provide any reasonable possibility of effective redress. This paragraph was adopted after considering other two proposals of the Special Rapporteur i.e., the local remedies need not be exhausted where they are obviously futile or where they offer no reasonable prospect of success. Of these two the former was considered too high a threshold and the latter too weak.

21. Thus paragraph (a) which is based on the formulation in the separate opinion of judge Lauterpacht in the *Norwegian loans* case[37] was adopted as a balanced approach for the purpose of assessing the effective nature of prospective results in the local remedies prior to resorting to them.

22. Paragraph (b) deals with the issue of 'undue delay' that may be caused in the exhaustion of local remedies, which can be used as a ground for non-exhaustion of local remedies. The provision further makes it clear that the undue delay in the remedial process should be attributable to the State alleged to be responsible for an injury to an alien.

23. However this provision codifies the basic principle without describing as to what constitutes undue delay leaving it for the concerned tribunal to decide upon.[38]

24. Paragraph (c) is broader in nature to the extent that it contains dual situations wherein the condition of exhaustion of local remedies can be dispensed with. The first part of the paragraph says that when there is no relevant connection between the injured person and the State alleged to be responsible then there is no need of exhaustion of local remedies.[39] Similarly the paragraph's latter part also extends the exception to situations

---

[36]. Paragraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver".

[37]. *I.C.J. Reports*, 1957 at p. 39

[38]. It is considered difficult to giving an objective content or meaning to 'undue delay'. The British Mexican Claims Commission stated in this regard that; "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter". *El Oro Mining and Railway Company (Limited) (Great Britain V. United Mexican States) 1931 U.N.R.A.A.*, vol. V, p. 191 at p. 198.

[39]. Exception to the exhaustion of local remedies rule contained in article 10[14] (a) does not cover situations where the local remedies might offer the reasonable possibility of effective redress but it

where the circumstances of the case otherwise make the exhaustion of local remedies unreasonable.

25. Therefore the first part of the paragraph talks about the condition of relevant connection that necessarily involves various situations as relevant connection may be in different forms. Similarly latter part of the paragraph is broader to the extent that 'unreasonableness' includes various situations differing from case to case.

26. Paragraph (d) deals with waiver of the rule of exhaustion of local remedies by the State alleged to be responsible. This paragraph does not mention whether it should be 'expressed or implied', which was deleted from the proposal of the Special Rapporteur.

27. As stated in the footnote to the paragraph in the report it might be considered in the future keeping in view the fact that there were views expressing doubts whether it could be considered as an exception in the normal sense. Thus it was left open for future consideration for the formulation as a separate provision.

28. Waiver of local remedies may take many different forms. Though there is a general agreement that an express waiver of the local remedies is valid, in the commentary to the provision, the Commission took the view that it was wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

---

would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State. (Theodore Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies', *British Yearbook of International Law*, 1959, 35, p. 94.). Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhausted local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the Aerial Incident in which Bulgaria shot down an El A1 flight that had accidentally entered its airspace (Case Concerning the Aerial Incident of 27 July 1955, *Israel v. Bulgaria*)). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

29. The Commission would welcome comments from Governments on whether there are any issues other than those already covered in the draft articles approved in principle by the Commission and the below mentioned two items which ought still to be considered by the Commission on the topic.

(a) The diplomatic protection of members of a ship's crew by the flag State (an issue considered by the Sixth Committee in 2002);

(b) The diplomatic protection of nationals employed by an intergovernmental international organization in the context of the Reparation for Injuries case.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

30. The delegate of **Cyprus** said that the topic of diplomatic protection was a classical one on which a wealth of authority existed. The topic was adequately dealt with in the draft articles approved, in principle, by the Commission, and, in his delegation's view, there was no need to include other issues.

31. The delegate of **Nigeria** said the right to exercise it rested with a State of the same nationality as a corporation in respect of an injury. However, the concerns of the corporate investor as a legal entity, and the interests of shareholders regardless of nationality, had also to be guaranteed adequate protection. His country had created an investment regime that recognized the role of foreign direct investment. It protected foreign investors while ensuring quality services to the country, thereby guaranteeing a stable and secure investment climate.

32. The delegate of **Iran** said that the question of protection for a ship's crew did not fall into the category of diplomatic protection but was covered by the Law of the Sea Convention. On the draft articles adopted this year, he agreed that the State of incorporation was entitled to exercise diplomatic protection. Article 18, dealing with exceptions to the principle enshrined in article 17 on nationality of corporations, was highly controversial and could jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State. Article 22, dealing with legal persons other than corporations, could also cause problems from the perspective of practical implementation.

33. The delegate of **Japan** noted that the work the Commission had accomplished on the complex issue of protecting legal persons and their shareholders. Future deliberations, he said, should focus on a number of areas. On the relationship between

customary international law and bilateral agreements, he said, the issue of protecting foreign investment must take into account the developments made in bilateral investment treaties as well as international and regional frameworks on investment protection. Draft article 21 dealing with the question did not adequately identify the relationship between customary international law on diplomatic protection and special law pertaining to bilateral and other investment treaties. The drafting committee should perhaps add relevant provisions in the final clause of the entire text of draft articles rather than confining the scope of the matter to disputes involving foreign investment and legal persons.

34. He further said that the criteria for determining the nationality of an enterprise should not include that of genuine or effective links since that was difficult to determine in a global world. A draft article should be elaborated to allow for flexibility in applying the draft articles to legal persons other than corporation. Finally, with regard to the diplomatic protection of nationals employed by an international organization, the International Court of Justice had acknowledged the status of the United Nations as a legal person. The functional protection of the United Nations to file a claim for damage imposed on its employees had been recognized. However, the criteria or means of adjustment had not been set out between the functional protection of the United Nations and the diplomatic protection that could be exercised by the injured person's State of nationality. Perhaps the State could exercise its right when the functional right could not be exercised by the United Nations.

35. The delegate of **China** commented on the exhaustion of the local remedies rule and the diplomatic protection of corporate persons, and he referred to the three articles adopted provisionally by the Commission at its recent session. He outlined points which should be made clear regarding the four exceptions to local remedies provided for in the draft articles (article 10). He said the right to exercise diplomatic protection should solely belong to the State of nationality of the corporation. The State of the nationality of shareholders, as a general rule, had no right to confer diplomatic protection on shareholders. China favoured the principle, established by the International Court of Justice in the *Barcelona Traction* case,[40] as the primary basis for the exercise of diplomatic protection in respect of corporate legal persons. Foreign shareholders should first exhaust local remedies, before intervention by their State of nationality, in respect of diplomatic protection.

36. On the protection of other legal persons set out in article 22, he said China was of the view that if the provisions on the exercise of diplomatic protection in respect of the corporation were to be applied *mutatis mutandis* to other legal persons it would give rise

---

[40]. The 1970 Judgment of the International Court of Justice involved an incorporated Canadian Corporation, Barcelona Traction, a majority of whose shareholders were nationals of Belgium. The court expounded the rule that the right of diplomatic protection, in respect of an injury to a corporation, belonged to the State, under whose laws the corporation was incorporated, and in whose territory it had its registered office, and not the State of nationality of the shareholders. *Barcelona Traction, Light and Power Company Limited, I.C.J. Reports*, 1970.

to serious problems. There was hardly any mature case law to draw upon, he said, and proposed the deletion of the article.

37. The delegate of **Republic of Korea,** speaking on diplomatic protection, said his delegation regarded the rule of the International Court of Justice in the Barcelona Traction case as part of customary law, and that today's rules and practices governing foreign investment had been built upon that ruling. It believed that the State of incorporation was entitled to exercise diplomatic protection with respect to injury to a corporation. The State of nationality of shareholders should also be entitled to exercise diplomatic protection for reasons of equity, if the corporation had ceased to exist or if the injury to the corporation was caused by the State of incorporation.

38. He said it was important that rules of the 1982 Convention on the Law of the Sea and the jurisprudence of the International Tribunal for the Law of the Sea were not prejudiced in cases concerning diplomatic protection of members of a ship's crew by a flag State. As regards diplomatic protection of nationals employed by an intergovernmental organization, his delegation believed that the 1949 decision of the International Court of Justice in the Reparation for Injuries case should be fully respected.

39. The delegate of **Sierra Leone** said that the State of nationality of a corporation was the State in which it was incorporated. There should be supplementary criteria if the corporation did not have a real link with the State of incorporation. The protection should be extended to other legal persons and the State of nationality of the owner of a ship should be entitled to exercise diplomatic protection in all cases. He suggested that perhaps the word "diplomatic" should be dropped, since the classic understanding of the concept caused confusion.

III. UNILATERAL ACTS OF STATES

A. BACKGROUND

1. In the report on the work of its 48th session the International Law Commission had proposed to the General Assembly that the law of unilateral acts of States be included as a topic for the progressive development and codification of international law. By its resolution 51/160, the General Assembly had *inter alia* invited the ILC to examine the topic "Unilateral Acts of States" and to indicate its scope and content.

2. At its 49th session (1997) the ILC established a Working Group on the topic. The Working Group in its consideration of the scope and content of the topic took the view that the consideration by the ILC, of the Unilateral Acts of States, was "advisable and feasible". At its 49th session, the ILC had appointed Mr. Victor Rodriguez Cedano, Special Rapporteur for the topic.

3. At its 50th session (1998) the ILC considered the First Report of the Special Rapporteur on the topic. Following consideration of that Report in the Plenary the ILC had reconvened the Working Group on the Unilateral Acts of States. The Working Group reported to the ILC on issues related to the scope and content of the topic, the approach thereto, the definition of unilateral acts of States and the future work of the Special Rapporteur. The ILC at its 50th session considered and endorsed the Report of the Working Group.

4. At its 51st session the ILC considered the Second Report of the Special Rapporteur[41] and decided to reconvene the Working Group on the subject. The Working Group reported to the ILC on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the ILC's study of the topic.

5. The General Assembly, by paragraph 4 of its resolution 54/111, invited Governments to respond in writing by 1 March 2000 to the questionnaire on unilateral acts of States circulated by the Secretariat to all Governments on 30 September 1999 and by paragraph 6 of the same resolution recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the General Assembly, the ILC should continue its work on the topics in its current programme.

---

[41] . See *Second Report on Unilateral Acts of States* A/CN.4/500 and Add.1.

6. At its fifty-second session in 2000, the Commission considered the third report of the Special Rapporteur on the topics[42], along with the text of the replies received from States[43] to the questionnaire on the topic circulated on 30 September 1999. The Commission then decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article to the Working Group on the topic.

7. At its fifty-third session in 2001, the Commission considered the Special Rapporteur's fourth report and established an open-ended Working Group, which held two meetings chaired by the Special Rapporteur. On the basis of the oral report of the Chairman of the Working Group, the Commission requested the Secretariat to circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

8. At its fifty-fourth session in 2002, the Commission considered the fifth report[44] of the Special Rapporteur and the text of replies received from States to the questionnaire[45] on the topic circulated on 31 August 2001.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

9. The Commission considered the sixth report[46] of the Special Rapporteur, which focused on the unilateral act of recognition. The Commission also established an open-ended Working Group on unilateral acts of States.

10. The special Rapporteur's sixth report dealt in a preliminary manner with one type of unilateral act, recognition, with special emphasis on recognition of States. This report contained four chapters dealing with, namely, various forms of recognition, validity of the unilateral acts of recognition, legal effects of recognition and application of acts of recognition respectively. The report also contained the following definition of the act of recognition.

> "A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a de facto or de jure situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself."

Complexity of the issue

11. Having reiterated the importance of the topic as the State practice showed that unilateral acts gave rise to international obligations and played a substantial role in State relations it was also acknowledged that the topic was complex and that it posed some

---

[42]. A/CN.4/505.
[43]. A/CN.4/500 and Add.1.
[44]. A/CN.4/525 and Add.1 and 2.
[45]. A/CN.4/524.
[46]. A/CN.4/534

extremely difficult problems. These problems were; the relationship of topic to the law of treaties, susceptibility of the subject matter of the unilateral acts to overlapping classifications, the issue of informality of the acts, too restrictive nature of the concept of unilateral acts and the absence of a clear legal position on unilateral acts in domestic legislation.

Declarative and Constitutive nature

12. Regarding the nature of the act of recognition as discussed in chapter III of the sixth report of the Special Rapporteur, it was noted that such issue was usually related to the consequences of recognition and not to its nature. Though majority of writers considered recognition declaratory, it was observed that an examination of State practice led to different conclusions and as a whole the effects of recognition could be more constitutive than declaratory.

Inclusion of *rebus sic stantibus*

13. A view was expressed in the Commission that the principle of *acta sunt servanda*[47] proposed by the Special Rapporteur must be accompanied by a *rebus sic stantibus*[48] clause so that if there was a fundamental change of circumstance that would affect the object of a unilateral act, then the unilateral act would also be affected.

---

[47]. The binding nature of a unilateral act is based on a specific rule, *'acta sunt servanda'* taken from the *'pacta sunt servanda'* rule that governs the law of treaties. The principle of *'pacta sunt servanda'* has been considered as universally recognized principle by the preamble of the Vienna Convention on the Law of Treaties, 1969 and has been enshrined under article 26, which reads as follows.

'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

[48]. Example to this clause is found in article 62 of the Vienna Convention on the Law of Treaties, which reads as follows.

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

14. The debate in the Commission this year led to a redefinition of the scope of the topic. The Commission will continue to consider unilateral acts *stricto sensu* (a unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law), as it has been doing until now. In addition, however, it will begin its study of conduct of States which may produce legal effects similar to those of such unilateral acts, for the purpose of including guidelines or recommendations, if appropriate.

15. In this connection, the Commission would like to know the opinion of Governments on conduct of States which may come within the category of conduct that may, in certain circumstances, create obligations or produce legal effects under international law similar to those of unilateral acts *stricto sensu*.

16. The lack of information on State practice has been one of the main obstacles to progress on the study of the topic of unilateral acts. The Commission therefore once again requests Governments to provide information on general practice relating to unilateral acts and the unilateral conduct of States, along the lines of interest to the Commission. (Questionnaire on Unilateral Acts of States circulated to member Governments in 2001

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

17. The delegate of **Cyprus** said that Cyprus agreed that governments should respond positively to the request to provide information on relevant general practice.

18. The delegate of **India** said that further discussions on the topic of unilateral acts of States would be beneficial if the Commission focused on specific issues such as recognition, promise, waiver, renunciation and estoppel.

19. The delegate of **Kenya** said that the Commission's focus should be in line with the draft definition of such acts in the strict sense, as it had previously analyzed. Extending the scope to encompass State conduct would require re-consideration of prior reports. Although the topic was complex, she said it was necessary that some rules for such acts of States were elaborated.

---

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

20. The delegate of **Malaysia** said she supported the effort to identify and elaborate guidelines on when unilateral acts of States created legal obligations in the interest of furthering legal security. States must know when the unilateral expression of their will or intentions would be taken to be legally binding commitments, as opposed to mere political statements. That was more obvious in light of the Commission's consensus that unilateral acts could not be simply revoked, modified or suspended by subsequent unilateral acts. Also, formulation of legal rules should be deferred until materials on State practice could be analyzed. The conduct of States leading to possible legal effects similar to unilateral acts should also be studied with a view towards being included in guidelines or recommendations on the matter.

21. The delegate of **China** said China favoured the scope defined by the Commission. It hoped that the Commission, based on a study of State practice, would proceed expeditiously so that the draft articles or guidelines on unilateral acts of States could be prepared at an early date.

22. The delegate of **Sierra Leone** welcomed the broadening of the scope of "unilateral acts" as justified by decisions of the International Court of Justice.

IV. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. BACKGROUND

1. It may be recalled that, the ILC at its forty-ninth Session in 1997 decided to proceed with its work on the topic "International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law" dealing first with the issue of "Prevention of Transboundary Damage from Hazardous Activities". Accordingly the Commission at its 53rd session completed its work with the adoption of the draft preamble and a set of 19 draft articles on the issue of prevention.

2. During its 56th session (2001), the General Assembly of the United Nations by resolution 56/82 requested the ILC "to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by governments".

3. At its fifty-fourth session (2002), in accordance with the mandate of the General Assembly, the Commission established a Working Group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao with a view to proceed with its work on the second part of the topic i.e. "International Liability for Failure to Prevent Loss from Transboundary Harm Arising Out of Hazardous Activities". The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao as special Rapporteur for the topic.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

4. At the present session the Commission had before it the first report[49] of the Special Rapporteur on the topic.

5. The Special Rapporteur made certain recommendations and submissions for the consideration of the Commission, which, if found accepted, could constitute a basis for drafting more precise formulations. Accordingly the Commission considered the following submissions made by the Special Rapporteur.

(a) While the schemes had common elements, each scheme was tailor-made for a particular context. It did not follow that in every case that duty would best be discharged by negotiating a liability convention, still less one based on any particular set of elements. The duty could equally be discharged, if considered appropriate, by forum shopping and allowing the plaintiff to sue in the most favourable jurisdiction, or by negotiating an ad hoc settlement.

---

[49]. A/CN.4/531

(b) States should have sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss to be endorsed by the Commission should be general and residuary in character.

(c) In developing such a model, and taking into consideration some of the earlier work of the Commission on the topic, the Special Rapporteur proposed that the Commission could take the following into consideration:

(1) Any regime should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. For the purposes of the present scheme, the model of allocation of loss in case of transboundary harm need not be based on any system of liability, such as strict or fault liability;

(2) Any such regime should be without prejudice to claims under international law, in particular the law of State responsibility;

(3) The scope of the topic for the purpose of the present scheme of allocation should be the same as the one adopted for the draft articles on prevention;

(4) The same threshold of significant harm as defined and agreed in the context of the draft articles on prevention should be applied. The survey of the various schemes of liability and compensation showed that they all endorsed some threshold or the other as a basis for the application of a regime;

(5) State liability was an exception and was accepted only in the case of outer space activities;

(6) Liability and the obligation to compensate should first be placed at the doorstep of the person most in command and control of the hazardous activity at the time the accident or incident occurred. This might not always be the operator of an installation or a risk-bearing activity;

(7) Liability of the person in command and control of the hazardous activity could ensue once the harm caused could reasonably be traced to the activity in question. The test of reasonableness and not strict proof of causal connection should be sufficient to give rise to liability. This was necessary because hazardous operations involved complicated scientific and technological elements. Moreover, the issues involved harm, which was transboundary in character;

(8) The test of reasonableness, however, could be overridden, for example, on the ground that the harm was the result of more than one source; or that there were other intervening causes, beyond the control of the person bearing liability but for which harm could not have occurred;

(9) Where the harm was caused by more than one activity and could be reasonably traced to each one of them, but could not be separated with any degree of certainty, liability could either be joint and several or could be equitably apportioned. Alternatively, States could decide in accordance with their national law and practice;

(10) Limited liability should be supplemented by additional funding mechanisms. Such funds may be developed out of contributions from the principal beneficiaries of the activity or from the same class of operators or from earmarked State funds;

(11) The State, in addition to the obligation earmarking national funds, should also be responsible for designing suitable schemes specific to addressing problems concerning transboundary harm. Such schemes could address protection of citizens against possible risk of transboundary harm; prevention of such harm from spilling over or spreading to other States on account of activities within its territory; institution of contingency and other measures of preparedness; and putting in place necessary measures of response, once such harm occurred;

(12) The State should also ensure that recourse was available within its legal system, in accordance with evolving international standards, for equitable and expeditious compensation and relief to victims of transboundary harm;

(13) The definition of damage eligible for compensation was not a well-settled matter. Damage to persons and property was generally compensable. Damage to environment or natural resources within the jurisdiction or in areas under the control of a State was also well accepted. However, compensation in such cases was limited to costs actually incurred on account of prevention or response measures as well as measures of restoration. Such measures must be reasonable or authorized by the State or provided for under its laws or regulations or adjudged as such by a court of law. Costs could be regarded as reasonable if they were proportional to the results achieved or achievable in the light of available scientific knowledge and technological means. Where actual restoration of damaged environment or natural resources was not possible, costs incurred to introduce equivalent elements could be reimbursed;

(14) Damage to environment per se, not resulting in any direct loss to proprietary or possessory interests of individuals or the State should not be considered compensable, for the purposes of the present topic. Similarly, loss of profits and tourism on account of environmental damage needed not be included in the definition of compensable damage. However, it could be left to national courts to decide such claims on their merits in each case.

Form of the instrument

6. Regarding the form of the outcome of the Commission's work some members supported the Special Rapporteur's suggestion for a draft protocol on liability and some others favoured a convention. There was also a suggestion in favour of recommendations, guidelines or general rules on liability. However no final decision was arrived at in this regard.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

7. The Commission would welcome comments from Governments on the different points raised by the Special Rapporteur referred to in the Commission's report. In particular, they may wish to comment on the following issues:

(a) The procedural and substantive requirements that the State should place on an operator;

(b) The basis and limits of allocation of loss to the operator;

(c) The types of supplementary sources of funding that might be considered to meet losses not covered by the operator;

(d) The nature and the extent of State funding and the steps that might or should be taken by States in respect of losses that are not covered by the operator or other sources of supplementary funding

(e) Taking into consideration the scope of the topic, the extent to which damage to the environment per se, meaning damage not included in the concept of “damage” to persons, property including cultural property, the environment including landscape, and the natural heritage within and under the national sovereignty and jurisdiction and patrimony of a State, should or could be covered; and

(f) The final form of the work on the topic.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

8. The delegate of **Nigeria** recalling a 1988 disaster in his country in which tons of radioactive industrial wastes had been dumped on its territory, said the absence of relevant international legal instruments had increased the difficulty of dealing with the associated human and environmental problems. The work on international liability was, therefore, particularly welcome. The legal regime on allocation of loss should be rigorously examined and the existing liability regimes analyzed. A study should also be conducted on how much of recent environmental disasters had resulted from violating the duty of prevention, an area of particular concern to developing countries since hazardous wastes were a major socio-economic and security threat to the world.

9. The delegate of **India** said that States preferred civil liability regimes. He stressed the merit of a strict liability regime for certain selected hazardous activities. It should be remembered that not all States authorizing lawful hazardous activities had the means to pay residual compensation. The primary liability should be that of the operator. Development of State liability of residual character in certain well-defined cases might be of some use, he said.

10. The delegate of **Nepal** said the Commission should continue to give attention to the interrelationship between prevention and liability.

11. The delegate of **China** said conditions were in place for the International Law Commission to pursue an in-depth study on international liability. The Commission should carry out more studies on domestic and international practices on the topic, to find common denominators that would solidly lay the groundwork for a uniform regime. The proposed allocation-of-loss regime should combine principles with flexibility. China endorsed, in principle, the various proposals of the special rapporteur on the scope of the topic and compensation for damage to the environment, among others. He said the proposals should be fleshed out and adjusted on the basis of further survey of State practice.

12. The delegate of **Sierra Leone** said he supported the treatment of international liability but was not convinced that a strict liability standard should apply. A test of "reasonableness" should be the applicable standard.

V. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. BACKGROUND

1. At its fifty-second session, in 2002, the Commission decided to include the topic of 'Responsibility of International Organizations' in its long-term programme of work[50]. The General Assembly in its resolution 55/152 of 12 December 2000, took note of the commission's decision and in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic.

2. At its fifty-fourth session, in 2002, the Commission decided to include the topic of 'Responsibility of International Organizations'[51] in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session a Working Group was established and at the end of the session the Commission adopted the report of the Working Group.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

3. At the present session, the Commission considered the first report of the Special Rapporteur dealing with the scope of the work and general principles concerning responsibility of international organizations.

4. Following the consideration of the above report the Commission referred three draft articles to the Drafting Committee.

5. The Commission further adopted articles 1to 3 as recommended by the Drafting Committee together with commentaries.

6. An Overview of draft articles 1to 3 as provisionally adopted by the Commission is given below.

Article1
Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

---

50. Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10(A/55/10), chap., IX para.729.

51. This topic attains significance, as there are 6415 international intergovernmental organizations and 43958 international non-governmental organizations of various kinds operating in various fields. *Yearbook of International Organizations*, 1999/2000. http://www.uia.org/

7. This provision deals with the scope that would be covered by the draft articles. Paragraph 1 provides for the main category of cases falling within the scope of the topic. Thus the paragraph makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law. The draft articles do not as such cover the issues of responsibility or liability under municipal law. The reference to acts that are wrongful under international law also implies that the draft articles do not consider the question of liability for injurious consequences arising out of acts not prohibited by international law.

8. Paragraph 2 includes within the scope of the present draft articles some issues that have been evoked, but not dealt with, in the articles on responsibility of States for internationally wrongful acts. Thus the main question that has been left out in the articles on state responsibility and that will be considered in the present draft articles is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization.

Article 2
Use of terms

> For the purpose of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to states, other entities.

9. The definition provided in this provision is not intended as a general definition, but rather as a definition, which is appropriate for the purposes of the draft articles. For the purpose of covering organizations established by States at the international level without a treaty, this provision refers, as an alternative to treaties, to any 'other instrument governed by international law'. This wording is intended to include non-binding instruments, such as for example a resolution adopted by the General Assembly of the United Nations or by a conference of States.[52]

---

[52]. Most international organizations have been established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for example with regard to the Nordic Council, a treaty was subsequently concluded. In other cases, although an implicit agreement may be held to exist, Member States insisted that there was no treaty concluded to that effect, as for example in respect of the Organization for Security and Cooperation in Europe (OSCE). In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any "other instrument governed by international law". Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH), the organization of the Petroleum Exporting Countries and OSCE. The definition in article 2 does not cover organizations that are established through instruments governed by municipal laws, unless a treaty or other instrument governed by international law has been subsequently adopted and has entered into force. Thus the definition does not include organizations such as the World Conservation Union (IUCN), although over 70 States are among its members, or the Institut du Monde Arabe, which was established as a foundation under French law by 20 States.

10. The reference in the second sentence of article 2 of entities other than States-such as international organizations, territories or private entities- as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.[53]

Article 3
General principles

1.Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law;

and

(b) Constitutes a breach of an international obligation of that international organization.

11. The statement of general principles in this provision is without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a state or of another organization. Moreover, the general principles clearly do not apply to the issues of state responsibility referred to in article 1, paragraph 2. The obligation may also result either from a treaty binding the international organization or from any other source of international law applicable to the organization.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

12. In 2004, in its study, the Commission will address questions of attribution of conduct. Certain parallel issues relating to attribution of conduct to States are dealt with in articles 4 to 11 of the articles on responsibility of States for internationally wrongful acts. Article 4, paragraph 1, of those articles sets out as a general rule that "[t]he conduct of any State organ shall be considered an act of that State under international law". The following paragraph says that"[a]n organ includes any person on entity which has that status in accordance with the internal law of the State".

13. The Commission would welcome the views of Governments especially on the following questions:

---

[53]. For instance, the European Community has become a member of the Food and Agricultural Organization (FAO), whose constitution was amended in 1991 in order to allow the admission of regional economic integration organizations. Article 3 (d) (e) of the Constitution of the World Meteorological Organization (WMO) entitles entities other than States, referred to as "territories" or "groups of territories, to become members. Similarly the World Tourism Organization includes States as "full members", "territories or groups of States" as "associate members" and "intentional bodies, both intergovernmental and non-governmental" as "affiliate members".

(a) Whether a general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization";

(b) If the answer to (a) is in the affirmative, whether the definition of "rules of the organization", as it appears in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, is adequate;

(c) The extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

14. The delegate of **Egypt** said the issue of responsibility of international organizations was an important matter in need of codification. To say the rules of an organization were the equivalent of national legislation was incorrect, since an organization's rules could be the outcome of treaties and thus subject to international law. It was also important to remain in conformity with the Geneva Convention and the Law of Treaties, and not to open the door on agreements previously achieved. The conduct of peacekeeping forces must be attributed to the United Nations at the start, but if the injured party could prove that the action was in contravention to the agreed-upon mandate, then the contributing State must also assume responsibility. The causal link in a wrongful act must be established.

15. He said the organization concerned was responsible in such a case, but the State had to be held responsible if it had acted in bad faith. The court or tribunal involved would determine responsibility and it was up to the injured party to prove the case. Those who held that the responsibility of an international organization could be dealt with in national courts should take into consideration that the International Law Commission had affirmed that the only reference for international organizations was international law. Therefore, the Commission should consider and study the question of whether the International Court of Justice was the competent Court to decide on matters involving the United Nations and its specialized agencies and other bodies within its system. He said that if the International Court of Justice was found to be the competent quarter in the very sensitive area of law, then other questions would arise. For example, if the Security Council refused to take a decision because of a veto, it should be considered a violation of international law and the matter should be taken to the Court. That would have ramifications if an injured State claimed that the veto had been used for the self-interest of a State and it was proved. The matter of the Court's competence in affairs involving the United Nations was important. Relevant questions could not be ignored or left to national courts.

16. The delegate of **Cyprus** said that Cyprus aligned itself with the position of the European Union on the question of responsibility of international organizations.

17. The delegate of **India** said there was need for a more precise definition for the draft articles on the topic. Any definition of international organizations essentially included intergovernmental organizations, although non-State entities like those bodies could also become members of international organizations in some cases. It was appropriate to exclude non-governmental organizations from the scope of the topic, as they did not perform any governmental functions. His delegation agreed with the recommendation of the special rapporteur on the topic that the present study should only be concerned with responsibility under international law and should not deal with issues concerning liability of international organizations.

18. The delegate of **Japan** said using the term "rules" of the international organization in the attribution of responsibility required the emphasis to be placed on how widely those rules varied. The difficulty pointed out by the Special Rapporteur in making the analogy of internal laws of a State and rules of an international organization was noteworthy. The decision not to use the draft articles on State responsibility as a model for organizations was an appropriate one. It would have been simplistic. For example, the Charter was clearly an organization's rule while, at the same time, international law prescribing rights and obligations of Member States. The status of internal State law and the rules of an organization thus had to be considered. And since those rules varied broadly, careful consideration must be given to defining "rules" in the draft articles so as to encompass the wide variety of the rules of all existing international organizations.

19. The delegate of **Nepal** said that, in view of the diversified characteristics of international organizations, the proposed three draft articles dealing with the scope and general principles required further consideration. The rules of international organizations were not uniform. The international personality of those organizations and States must be differentiated.

20. The delegate of **Pakistan** said there was need for extensive study of international organizations. He felt that the provisions of draft article 1 on the responsibility of international organizations were quite acceptable to his delegation. Paragraph 2 of the article required some clarification, he said, adding that the reference to the international responsibility of a State was not clear in the text. The reference should be to a "member State". He said article 2 on "use of terms" needed further consideration. The provisions of draft article 3 on "general principles" were quite adequate, but he had some difficulties with the issue of attribution. A reference should be made to rules of the organization. The question of the legal personality of international organizations should be taken into account and he cited cases that had been heard by the International Court of Justice. The question of peacekeeping forces had been the subject of legal cases in the past, he said, noting that the issue would not be easy to resolve.

21. The delegate of **Sierra Leone** said he welcomed the consideration of responsibility of international organizations in parallel with State responsibility, although the two were differently structured and needed to be approached appropriately. The

definition should be broadened to include international organizations having other entities as members, in addition to States, although the concept of "other entities" needed further clarification. The rules of the organization should be referred to when attributing responsibility for an internationally wrongful act. The scope of responsibility in regard to peacekeeping forces should be considered once the general principle of responsibility had been established.

VI. FRAGMENTATION OF INTERNATIONAL LAW

A. BACKGROUND

1. It may be recalled that, in the course of the last quinquennium the topic 'Risks ensuing from fragmentation of international law" was identified as a subject that might be suitable for further study by the International Law Commission's Working Group on the long-term programme of work. After consideration of the feasibility study conducted by Mr. Gerhard Hafner the Commission decided at its fifty-second session (2000) to include the topic in its long-term programme. The Commission, at its fifty-fourth session (2002) established a study Group on the fragmentation of international law, which held discussion on the topic. This study by Mr. Hafner formed the starting point for consideration of the topic by the newly elected Commission at its present session.

2. At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work and established a Study Group on the fragmentation of international law chaired by Mr. Bruno Simma.[54] It also decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". The commission further decided to undertake a series of studies commencing first with a study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" to be undertaken by the Chairman of the Study Group.

3. At the present session, the Commission decided to establish an open-ended Study Group on the topic and appointed Mr. Martti Koskenniemi as Chairman, to replace Mr. Bruno Simma who was no longer in the Commission. The Study Group held four meetings focusing on various issues. The summary of the discussion within the Study Group is stated below.

B. REPORT OF THE STUDY GROUP: AN OVERVIEW

4. The Study Group in its discussions observed that a distinction is ought to be drawn between institutional and substantive perspectives while dealing with the topic. While the institutional perspective was related to institutional questions of practical coordination, institutional hierarchy and the need for the various actors to pay attention to each other's jurisprudence, the latter involved the consideration of whether and how the substance of the law itself may have fragmented into special regimes which might be lacking in coherence or were in conflict with each other. In this regard, the Commission's 2002 report was referred to wherein it was agreed that the Commission should not deal with institutional proliferation but should focus on substantive perspective only.

---

[54]. The members of the Study Group are as follows: E. Addo, I. Brownlie, E. Candioti, C. Dugard, P. Escarameia, G. Gaja, Z. Galicki, M. Kamto, J. Kateka, F. Kemicha, M. Koskenniemi, W. Mansfield, D. Momtaz, B. Niehaus, G. Pambou-Tchivounda, A. Pellet, P. Rao, R. Rosenstock, B. Sepulveda, B. Simma, P. Tomka, H. Xue, C. Yamada, V. Kuznetsov (ex officio).

5. The Study group identified three different patterns of interpretation or conflict, which were relevant to the question of fragmentation. These three patterns are:

(a) Conflict between different understandings or interpretations of general law.[55]

(b) Conflict arising when a special body deviates from the general law not as a result of disagreement as to the general law but on the basis that a special law applies.[56]

(c) Conflict arising when specialized fields of law seem to be in conflict with each other.[57]

6. It was further observed that the above three situations were to be kept analytically distinct only because they would raise the question of fragmentation in different ways.

7. The study Group also noted that though the Commission decided not to draw hierarchical analogies with domestic legal systems, hierarchy was not completely overlooked from the Commission's study as evidenced from the topic 'Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules", which was identified for further study in paragraph 512(e) of the 2002 report of the Commission.

---

[55]. An example of this is the judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Prosecutor v. Dusko Tadic* case (Case No. IT-94-1-A, A.Ch., 15 July 1999), which deviated from the test of "effective control" employed in the *Nicaragua* case (*Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, I.C.J. Reports,* 1986, P. 14) by the international Court of Justice as the legal criterion for establishing when , in an armed conflict which is prima facie internal, an armed military or paramilitary group may be regarded as acting on behalf of a foreign power. Instead it opted for an "overall control" test. The Tribunal, having examined the Court's and other jurisprudence, decided to depart from the reasoning in the Court's judgment.

[56]. In this case no change is contemplated to the general law but the special body asserts that a special law applies in such a case. This situation has arisen in respect of human rights bodies when applying human rights law in relation to the general law of treaties, particularly in cases concerning the effects of reservations. In the *Belilos* case (*Belilos v. Switzerland*, Judgment of 29 April 1988, 1988 *ECHR (Ser. A)*, No. 132) the European Court of Human Rights struck down an interpretative declaration by construing it first as an inadmissible reservation and then disregarding it while simultaneously holding the declaring State as bound by the Convention.

[57]. An example of this is the conflict between international trade law and international environmental law. The approaches in the jurisprudence on this matter have not been consistent. The GATT dispute settlement panel in its 1994 report in *Tuna/Dolphins disputes* (*United Sates-Restrictions of Imports of Tuna, 33 ILM* (1994) 839. See also *United States-Restrictions of Imports of Tuna, 30 ILM* (1991) 1594), while acknowledging that the objective of sustainable development was widely recognized by the GATT Contracting Parties, observed that the practice under the bilateral and multilateral treaties dealing with the environment could not be taken as practice under the law administered under the GATT regime and therefore could not affect the interpretation of it. In the Beef Hormones case, the Appellate Body of the World Trade Organization concluded that whatever the status of the "precautionary principle" under environmental law, it had not become binding on the WTO as it had not, in its view, become binding as a customary rule of international law.

8. The Study Group also considered the outline on the topic 'the function and scope of the *lex specialis* rule and the question of "self-contained regimes"'. It welcomed the general thrust of the outline, which dealt with, *inter alia,* the normative framework of fragmentation. There was agreement that the *lex specialis* rule could be said to operate in the two different contexts proposed by the outline, namely *lex specialis* as an elaboration or application on general law in a particular situation and *lex specialis* as an exception to the general law. It was decided that areas regulated by regional law should be considered within the topic keeping in view the opinions expressed by some that it is conceptually different from *lex specialis*.

9. The Study Group further agreed upon the tentative schedule for 2004 to 2006 to proceed on the basis of the recommended studies contained in paragraph 512 of the Commission's 2002 report[58]. It further decided on the methodology to be adopted in this regard and the distribution of work on topics among the members of the Study Group.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

10. The delegate of **Cyprus** said Cyprus considered it as a natural consequence of the expansion of international law, which was a sign of vitality and, thus, might strengthen international law if approached with caution.

11. The delegate of **India** said the topic was still at a formative stage, and the identification of a non-exhaustive list of broad areas where fragmentation occurred could be very useful. He was confident that further study of those matters would pave the way for the reconciliation of conflicting rules.

12. The delegate of **Japan** said the area had evolved rapidly and had become increasingly difficult for States and organizations to manage. The question was intimately related to trade, States rights and workers rights, all of which were directly affected by related questions. The five topics that had been listed in the relevant report had been outlined in general terms but they could already be applied, for example, to clear up areas of conflict in international law. However, the Commission should be cautious about applying guidelines when information was based on too narrow a study of practice, and they should not apply to legislation States could already be in the process of

---

[58]. The following topics were included in 2002: (a) The function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (b) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (d) The modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); (e) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

developing, since situations could exist in which the general regime did not meet needs. A self-contained regime should not be overemphasized when dealing with fragmentation.

13. The delegate of **Kenya** noted that the approach adopted by the Commission would lead to a fruitful and acceptable outcome. It was important that a distinction was drawn between institutional and substantive law. There was a real need for a comprehensive international framework to provide basis and direction for fragmentation of international law.

14. The delegate of **China** said the study of the topic should clarify the inherent lack of coherence and certainty in international law, and show States the way out of the dilemmas in applying international law.

VII. SHARED NATURAL RESOURCES

A. INTRODUCTION

1. At its fifty-fourth session (2002), the commission decided to include the topic "shared natural resources" in its programme of work and accordingly appointed Mr. Chusie Yamada as Special Rapporteur for the topic. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic in its programme of work.

B. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

2. At the present session the commission considered the first report[59] of the Special Rapporteur on the topic. In furtherance of its work on the topic the Commission also had an informal briefing by experts on groundwaters from the Food and Agricultural organization and the United Nations Educational, Scientific and Cultural Organization.

3. Under the topic, the Special Rapporteur proposed to cover confined ground waters, oil and gas and initially to limit the work to transboundary groundwaters only. In this regard it was felt that the title of the topic was too broad and suggested the addition of a subtitle that would specify the three subtopics that were intended to be dealt with or by referring exclusively to the subtitle of confined transboundary groundwaters.

4. It was felt before the Commission that there was a need for a terminological clarification of the precise meaning of the term "groundwaters" and the necessity to understand the differences between confined groundwaters and surface waters. Another suggestion was made to develop a definition of transboundary groundwaters not connected to surface water and to determine their significance for States, in particular developing ones.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

5. The Commission would be focusing for the time being on groundwaters within the wider topic of shared natural resources. In the view of the Commission, it would be essential that it collect basic information on groundwaters in order to formulate appropriate rules in this area. Accordingly, the Commission would welcome information from Governments and international organizations on aspects of groundwaters with which they are concerned. Since the Commission has not yet made a final decision on the scope of groundwaters to be covered in the current study, it appreciates receiving information on the following issues with regard to major groundwaters, regardless of whether they are related to surface waters or whether they extend beyond national borders:

(a) Major groundwaters and their social and economic importance;

---

[59]. A/CN.4/533 and Add. 1

(b) Main uses of specific groundwater relating to their management;

(c) Contamination problems and preventive measures being taken;

(d) National legislation, in particular the legislation of federal States that governs groundwaters across its political subdivisions together with information as to and how such legislation is implemented;

(e) Bilateral and multilateral agreements and arrangements concerning groundwater resources in general and in particular those governing quantity and quality of groundwaters.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS FIFTY-EIGHTH SESSION (2003)

6. The delegate of **Cyprus** said that there should be further study of its technical and legal aspects.

7. The delegate of **Nigeria** said he endorsed the proposal of the special rapporteur to conduct a study of State practice on uses and management of shared natural resources. He said the emphasis should be on the technical and legal aspects of the role of water. The technical needs of developing countries should be noted so as to enhance their capacity to participate in further work on the subject.

8. The delegate of **India** said that a deeper study of the topic was required before the Commission embarked on a workable definition. India did not agree that the legal regime on non-navigable uses of watercourses was similar to that on groundwater. The question required a thorough and careful study.

9. The delegate of **Iran** said that the guiding principle should be the one governing the permanent sovereignty of States over the natural resources, as enshrined in the 1962 General Assembly resolution 1803(XVII).

10. The delegate of **Japan** said a pragmatic approach should be adopted in studying shared natural resources. The Commission should not be too ambitious in broadening the scope. On the issue of groundwater management, he said that while his country was an island and did not have transboundary groundwater with neighbours, that water was important in activities involving its spas and urban activities. Pollution was a growing problem, detected in more than 1,000 areas. Laws had been put into effect to protect the water from pollution. Governors were required to conduct surveys, as an example, and the Government was required to perform analyses. Japan would submit an in-depth report.

11. The delegate of **Kenya** said she hoped the Commission would look into all aspects of transboundary groundwaters. The Commission should also examine the nexus

between activities on the surface and confined groundwaters to harmonize the two regimes.

12. The delegate of **Malaysia** said she supported the Commission's approach of collecting information before embarking on a formulation of rules in the area of shared natural resources. Also, the actual scope of considering the question of groundwater was still to be determined. Whether all groundwater was covered, including surface and transboundary waters, the need to protect those waters from environmental pollution and other disruptive activities was vital. While his country had been fortunate not to have exploited its groundwaters since perennial rivers and abundant rainfall had made surface waters adequate, steps had been taken to ensure adequate protection for the quality and quantity of groundwater in line with sustainable development.

13. Describing the holistic and federally controlled water management programme his country was developing, he said preventive measures were urgently needed in all countries. Measures that could be taken included the creation of source protection zones and vulnerability mapping. Sustainable development policy activities could include data collection, standard setting, control of extraction, monitoring, identification of pollution sources, establishment of protected areas and enforcement of standards and regulations. Also, awareness-raising activities, as well as research and development efforts, could be carried out. All those steps would help countries prepare for future challenges in using groundwater and protecting it from pollution.

14. The delegate of **Nepal** said that the study on groundwaters would help not only in codifying international rules, but also alleviate the suffering of millions from water-borne diseases in many developing countries.

15. The delegate of **China** said China supported the Commission's decision to begin a study on the topic, since confined groundwaters, compared with other transboundary natural resources, were more closely linked with the productive activities and livelihood of mankind. As transboundary confined groundwaters were under the territories of several States, actions in one State were bound to affect the exploitation and use of those waters in another. The Commission, in its study, should consider the interests of all States and ensure, to the extent possible, their sovereignty over and security of those natural resources.

CONCLUDING REMARKS

1. The work of the Commission at the present session was satisfactory as along with topics reservations to treaties and diplomatic protection there was a considerable progress in the case of new topics such as responsibility of international organizations.

2. As regards some of the topics considered during the current session, the AALCO Secretariat offers the following observations.

A. Reservations to Treaties

(a) The guideline 2.5.3 dealing with periodic review of reservations is an addition to the existing corpus on law relating to reservations. Though this guideline does not mention any specific period for the review of reservations, in the view of the AALCO Secretariat, it would certainly add new responsibility to parties to a treaty and would further help in preserving the integrity of a treaty

.

(b) The guideline 2.5.7 dealing with effect of withdrawal of a reservation is an addition to the existing law of reservations as it has not been included in the Vienna Convention on the Law of Treaties 1969. This provision clarifies a situation, which has been, till now understood in an implied manner as reversing the legal effect of reservations.

(c) Regarding the effective date of withdrawal of a reservation the guideline 2.5.8 and the model clauses mentioned there under provide different options to States and international organizations. In the view of the AALCO Secretariat, the three model clauses talk about the receipt of notification of withdrawal by the depository and not by parties and it may be looked at carefully as sometimes, some parties to a treaty may not even know the withdrawal of a reservation by a party and its consequent effects.

B. Diplomatic Protection

3. Compliments are due to the Special Rapporteur Mr Chrostopher Dugard and the Commission as the Commission has adopted three important draft provisions dealing with exhaustion of local remedies on the topic.

4. As regards draft articles 8 to 10 the Secretariat offers the following remarks.

(a) The AALCO Secretariat welcomes the adoption of exhaustion of local remedies rule, as it is a well-established principle of customary international law. It is significant that the provision emphasizes that the remedies to be exhausted must be in the form of right resulting in a binding decision than on the structure or form of the institution before which the matter is decided.

(b) The Commission rightly favored for the adoption of preponderance test, as approved by the International Court of Justice in *ELSI* and *Interhandel* cases, for the purpose of classification of claims. It is significant to note in this regard that the Commission made it clear that local remedies need to be exhausted both in the case of international claims as well as in the cases of request for a declaratory judgment.

(c) Draft article 10, as adopted by the Commission, rightly contains the exceptions to the local remedies rule as this provision makes the provisions on local remedies rule more comprehensive. This draft article establishes clear guidelines for adjudicating upon the question of exhaustion of local remedies.

C. Unilateral Acts

5. The AALCO Secretariat takes note with appreciation of the deliberations within the Commission on this complex topic and also takes note of the deliberations on the sixth report of the Special Rapporteur, which dealt in a preliminary manner with one type of unilateral act, i.e., recognition, with special emphasis on recognition of States.

D. Responsibility of International Organizations

6. The AALCO Secretariat takes note with appreciation the first report of the Special Rapoporteur on the topic and also the deliberations within the Commission. The Secretariat welcomes the adoption of draft articles 1to 3 as recommended by the Drafting Committee together with commentaries.

7. As regards draft articles 1to 3, the Secretariat offers the following observations.

(a) Draft article 1 clarifies two issues. Paragraph 1 of the provision deals with the scope that would be covered by draft articles. Paragraph 2 deals with the responsibility of a State, which is a member of an international organization for a wrongful act committed by that organization. Thus the provision is comprehensive in nature to the extent of defining the scope of the draft articles in their application.

(b) With regard to the draft article 2, the AALCO Secretariat considers the limiting of the definition of international organization only for the purpose of draft articles as a positive step for achieving consensus and for the application without ambiguity.

(c) Draft article 3 explains as to what constitutes the internationally wrongful act of an international organization. However it is clear that it is without prejudice to the existence of cases in which an organization’s international responsibility may be established for conduct of a State or of another organization and also it does not apply to the issues of State responsibility referred to in article 1, paragraph 2.