NEW TOPICS ON THE AGENDA OF INTERNATIONAL LAW COMMISSION: AN OVERVIEW

There were five new topics that were discussed at the Sixty-Fourth Session of the International Law Commission. However, the Commission decided to request the ILC Secretariat to prepare a study related to the following topics;

1. Formation and evidence of customary international law, and
2. Provisional application of treaties

The AALCO Secretariat has prepared a short note on the above topics alongwith the topic "Protection of the atmosphere" as the Secretariat attaches great importance to this topic. Kindly find attached the short note on the above three topics and furnish your comments for future deliberations at the Sixth Committee of the UN general Assembly.

1. FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

Mr. Michael Wood, Member of the International Law Commission, United Kingdom of Great Britain and Northern Ireland had proposed this topic at the Sixty-sixth session of the ILC.

1. Introduction

At its sixty-fourth session held in 2012, the International Law Commission [ILC or the Commission] decided to place the topic "Formation and evidence of customary international law" on its current programme of work and appointed Sir Michael Wood as Special Rapporteur for the topic. In this brief note, an attempt is made to ascertain the core issues that emanate from this topic from the view point of developing states. It is believed that the ILC should necessarily address them in all earnest in order to articulate a coherent theoretical basis for the formation and evidence of customary law.

2. The Issue

Notwithstanding the great increase in the number and scope of treaties, Customary International Law,(CIL) remains an important source of international law. Treaty law binds only those states which have accepted its obligations. By contrast, most theorists accept that customary international law binds states generally whether or not they have formally consented to its rules. This aspect of custom is typically reconciled with a consensual theory of international law by the device of the "persistent objector" principle which allows a state to opt out of a particular customary norm in the process of its formation.

Customary international law is normally said to have two elements. First, there is an objective element consisting of sufficient state practice ("general practice" under the Statute of ICJ definition). Second, there is a subjective element, known as *opinio juris*, which requires that the practice be accepted as law or followed from a sense of legal obligation. This definition of custom, which is the most traditional one and has a host of problems, has given birth to differing approaches to the formation and identification of customary international law.

Firstly, the most important problems that have arisen in relation to the concept of CIL include: its *imprecise* character, lack of agreement on the *amount* or *consistency* of practice that is required, and even when the practice is consistent, how *widespread* that practice must be, the forms of *evidence* that could be used to demonstrate state practice etc. In the view of Robert Jennings, the tests of practice and *opinio juris* for the creation of custom are outmoded: they do not take account of the evidentiary problems of establishing practice, issues of the legality of unilateral action, the possibility of regional variations and the fact that the passage of a long period of time implied by the notion of custom is not necessarily appropriate in the modem world.

Secondly, this is compounded by the fact that the international legal system is decentralized, resulting in multiple interpreters of custom. The existence and content of custom is usually determined by states and academics, though the Court remains the ultimate arbiter in some cases. These interpreters are meant to determine customs on the basis of state practice and *opinion juris*.

Hence, securing a common understanding of the process could be of considerable practical importance. This is so not least because questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations.

3. *Concerns on the Topic*

Given the uncertain theoretical foundations of CIL, the ILC could work on these areas with the aim to produce an authoritative guidance for those called upon to identify customary international law, including national and international judges. However, there are a number of concerns, particularly of the developing countries that need to be addressed in order for the work of ILC to reflect the viewpoints of the developing countries.

Firstly, in any effort to codify the general rules on the identification and formation of CIL, it is critical to ensure that it is not stripped of its spontaneity/flexiblity. For example, the fact that practice of States could be consciously affected by various

international actions, particularly that of the Inter-governmental Organizations need to be realized. In this regard, the ILC needs to grapple with an important issue : to what extent should the resolutions of international institutions (especially when adopted by an overwhelming majority) be given weightage as evidence of *opinio juris*. The work of ILC should accord appropriate weightage and legitimacy to the consideration of this issue.

Secondly, as regards the methodology adopted by the Commission, it needs to be pointed out that in identifying the formation of a particular customary rule it is important to distinguish between State practice and the jurisprudence of international courts and tribunals, on the one hand, and the practice and jurisprudence of domestic courts, on the other. The Commission should also proceed cautiously in gauging how unilateral acts, especially those committed in violation of general international law, affected the identification of customary international law. Such acts, even if they persisted for years, could not serve as evidence of an emerging rule or a change to an existing one.

Thirdly, the Commission should also ascertain the various ways (if any) through which CIL could arise from state practice and *opinion juris* of a discrete and limited number of state [regional, subregional, local or bilateral – "individualized" rules of customary international law]. As modern international law has grown out of the European and Christian law of nations and is today applied globally, it might well be asked whether and to what extent it gives consideration to, and recognizes, the customary international law of Asia or Africa.

Fourthly, since jurists from socialist and developing nations have, in the past, had reservations about reliance on custom as a source of international law due to international laws' Western orientation, the Commission should clearly address the issue of democratic deficit in the formation of custom. In this regard, it should make sure that international law-making by way of custom is located broadly within the state practice of a very wide variety of States.

4. Role of Member States of AALCO

As stated at the out set, this is a new topic that has been taken up by the ILC in which there remain a lot of concerns that have to be addressed by the Commission. Hence, the Secretariat of AALCO earnestly encourages all its Member States to present their comments/queries/concerns on this topic to it. This, it is believed, would go a significant way in enabling AALCO to help the Commission channelize the future direction of this topic taking into account the concerns of the developing world.

2. PROVISIONAL APPLICATION OF TREATIES

Mr. Giorgio Gaja, Former Member of the International Law Commission, Italy had proposed this topic at the Sixty-sixth session of the ILC.

The provisional application of a treaty finds its legal basis in Article 25 of the Vienna Convention on Law of Treaties (VCLT) 1969. If a treaty is applied before its formal entry into force, it is applied provisionally. In such a case, a negotiating state is bound by the treaty although the treaty has not yet been formally ratified on the national level. In general negotiating states will only consider such a provisional application if one of the states must submit the treaty to a Constitutional ratification process. Provisional application is thus a frequently used tool when national ratification might prolong the period between conclusion of a treaty and its entry into force.

Article 25 of the VCLT merely confirms the basic principle that a treaty may be provisionally applied. It is left to the Parties to agree on the exact scope and conditions of the provisional application. From practice it appears that the provisional application of a treaty by a state usually commences at the date of that state's signature of the treaty. Negotiating states can also agree on another date on which the provisional application of a treaty becomes effective. Agreement on such other date is more likely if the provisional application of a treaty is agreed upon in some other manner than in the treaty itself.

It is essential to define what provisional application consists of in order to determine its legal effects and consider certain issues that the Vienna Convention addresses only in part: the preconditions of provisional application and its termination. These matters will be illustrated in the following paragraphs. This brings us to the need for the ILC to take it up.

A study by the ILC based on a thorough analysis of practice would elucidate the issues considered in the preceding paragraphs. This study may lead to the drafting of a few articles that would supplement the scant rules contained in the Vienna Convention. These articles could address in return the meaning of provisional application, its preconditions and its termination.

The Commission could also elaborate some **Model Clauses** which would be of assistance to States intending to give a special meaning to the provisional application of a treaty or set out particular rules on its preconditions or termination.

3. PROTECTION OF THE ATMOSPHERE

Mr. Shinya Murase, Member of the International Law Commission, Japan had proposed this topic at the Sixty-sixth session of the ILC.

The topic "Protection of 'Atmosphere'[1]" was introduced by Prof. Shinya Murase, Member of the ILC from Japan, for being considered by the International Law Commission (ILC) at its recently held Sixty-fourth session. In this regard, it is essential to put forth the views of AALCO Member States during the forthcoming Meeting of the Sixth Committee of the United Nations, during its Sixty-Seventh Session.

1. Rationale of the topic:

Both human and natural environments can adversely affect the atmosphere. First, due to introduction of harmful substances (i. e. air pollution) into the troposphere and lower stratosphere causes changes in atmospheric conditions, emission of chlorofluorocarbons (CFCs) and halons into the upper troposphere and stratosphere cause ozone depletion; and changes in composition of the troposphere and lower stratosphere cause climate change. Protection of atmosphere requires a broad and multidimensional endeavour, which is a long-term and complex undertaking. The international community has been taking (both transnationally and domestically) a number of initiatives, both at the legal and policy level, to tackle a whole range of problems brought to the fore by the international environmental consciousness that came into being in the 1970s. There is a need for a comprehensive "framework convention" to address the whole range of atmospheric problems such as transboundary air pollution, depletion of Ozone layer and climate change. Further, one could envisage a future convention which could be similar to Part XII of the Law of the Sea Convention on the protection and preservation of maritime environment.

2. AALCO Inter-Sessional Meeting:

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[1] *Fourth Assessment Report* of the Intergovernmental Panel on Climate Change (IPCC) of 2007 defines the "atmosphere" as follows:

"The gaseous envelope surrounding the Earth. The dry atmosphere consists almost entirely of nitrogen (78.1% volume mixing ratio) and oxygen (20.9% volume mixing ratio), together with a number of trace gases, such as argon (0. 93% volume mixing ratio), helium and radiatively active *greenhouse gases* such as *carbon dioxide* (0.035% volume mixing ratio) and *ozone*. In addition, the atmosphere contains the greenhouse gas water vapour, whose amounts are highly variable but typically around 1% volume mixing ratio. The atmosphere also contains clouds and *aerosols*". [italics original].

Available at: http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-annexes.pdf.

There are three criteria for the selection of new topic by the ILC: *practical consideration, technical feasibility and political feasibility.* The ILC has stressed that "it should not restrict itself to *traditional topics* but could also consider those that reflect *new developments and pressing concerns* of the international community as a whole" (ILC Report 1997/98). During the Inter-Sessional Meeting of Legal Experts to discuss matters relating to the ILC, held on 10 April 2012 in AALCO Headquarters, New Delhi, Prof. Murase explained the feasibility aspect of this topic as follows:

- Environmental Degradation which was a pressing concern
- Number of Conventions and the relevant judicial decisions of international courts and tribunals have formed the gamut of international environmental law
- There was a need for de-politicization

In support to this argument and reiterating the need for concerted action by AALCO Member States in this regard, Ambassador Kriangsak Kittichaisaree, Member of the ILC from Thailand, in writing, presented his views which read thus:

> "Because of their practical relevance to the international community, especially African and Asian States, the topic of Protection of the Atmosphere and the topic of Fair and Equitable Treatment Standard in International Investment Law should be given a priority by the ILC over the other three new topics. AALCO Members should arrive at common positions on Protection of the Atmosphere, to be submitted to the ILC."

However, one of the delegates of AALCO Member States and observer delegate attending the Inter-Sessional Meeting raised concerns about the subject being not purely legal but highly technical and scientific unlike the Law of the Sea. Further, a concern was raised stating that whether there were gaps existing in the international environmental law and sought clarification with regard to the number of Parties to the existing Conventions. It was also stated that the issue would be addressed as a compromise text because of the formulation of provision and clarity was very important because it involved scientific method as international standards. The delegate reaffirmed of the approach of restorative mechanism while dealing with environmental issues.

3. Fifty-First Annual Session of AALCO:

At the 51st Annual Session of AALCO held in Abuja, Nigeria, delegations discussing on the agenda item "Environment and Sustainable Development" reiterated the adverse effects caused to the environment due to natural disasters.

4. AALCO Secretariat's Comments:

AALCO Secretariat observes that the proposed project needs widespread support from the Member States of AALCO because it involves serious environmental issues. This project would establish ***Guidelines*** on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere. Though there are number of relevant conventions dealing with environmental issues, they have remained merely piecemeal instruments. Like United Nations Convention on the Law of the Sea is regarded as "Constitution of the Oceans" there is a need to work on a project which would be futuristic and be beneficial for succeeding generations. However, one needs to be cautious that even if a Convention could be formulated after a long and arduous process could one be ensure its compliance. Would it not merely amount to adding another convention to the already existing plethora of "Multilateral Environmental Agreements", which have not yet succeeded in balancing some of the most vexatious issues of concern both to the developed and developing countries.