

**SUMMARY RECORD OF THE SECOND GENERAL MEETING HELD ON TUESDAY, 16 JULY 2002,
AT 10.05 A. M.**

Vice-President H. E. Dr. Yusril Ihza Mahindra in the Chair

The meeting resumed its consideration of the item “**Report on Matters relating to the work of the International Law Commission at its Fifty-third Session.**”

1. The **Delegate of India** at the outset offered felicitations to the Chairman and other members of the Bureau of the ILC on their election to their respective offices.

As regards ‘State Responsibility’ the delegate paid rich tributes to the contributions of all the Special Rapporteurs on this topic. Welcoming the ILC’s completion of work on this topic, the delegate felt that the draft articles as adopted were generally satisfactory. Following are inter alia, the observations offered by the delegate on the draft articles:

- (a) As regards the concept of “serious breach of an obligation arising under a peremptory norm of international law” the examples given in the commentary to the draft articles are only indicative. The precise content and conditions under which they could be treated as peremptory norms were open to debate. Therefore this concept required a careful study on the basis of further development of State practice.
- (b) Welcomed the checks and balances incorporated to prevent abuse of countermeasures.
- (c) Welcomed the ILC’s decision not to deal with the concept of “differently injured States” and for the provision of limits within which the State other than the injured State could invoke the responsibility of a State.
- (d) Parts II and III of the draft articles were proposals for the progressive development of international law. The reaction of States as regards their principles in specific contexts had to be carefully watched. For this reason, the delegate welcomed the decision of General Assembly to take note of these articles and allow time for State practices to evolve.

Commending the ILC and the Special Rapporteur Dr. P. S. Rao on the completion of the work on the topic of prevention, the delegate said that many of the principles recommended as part of the regime on management of risk inherent in hazardous activities were based on growing collection of international treaties in the broader area of environmental law and law concerning development and utilization of natural resources. More particularly, the principles concerning public participation, the non-discrimination and settlement of disputes were in the nature of progressive development of international law. The delegate was of the view that State practice in respect of these matters varied from region to region and hence might take time before universal standards could be developed.

2. The **Delegate of the Islamic Republic of Iran** thanked the Government of Nigeria for hosting the Session and offered his greetings to the President and Vice-President on their election. He also offered his deep condolences and sorrow on the tragic demise of late Chief BOLA IGE, the Vice-President of the 40th Session of AALCO.

As regards the topic of “State responsibility” the delegate was of the view that the draft articles adopted were a fair reflection of customary international law. Following were some comments offered on this topic:-

- (a) The deletion of “international crimes” does not weaken the draft articles.
- (b) Welcomed the omission of any reference to punitive damage among the particular consequences of a serious breach.
- (c) Welcomed the reference to consequences in the draft articles, whereby the States are obliged to cooperate to bring the breach to an end through lawful means and not to recognize the resulting situations as lawful or render assistance in maintaining the situation.
- (d) Unilateral determination of the legitimacy of countermeasures has operated in favour of powerful states, and therefore it is unfortunate that the draft articles have left to the State taking countermeasures to determine whether an act is unlawful.
- (e) It is essential to establish a link between countermeasures and the compulsory settlement of disputes between states concerned.
- (f) Countermeasures should be reversible and for this reason the list of prohibited countermeasures should have been more exhaustive. In this regard, the delegate welcomed the inclusion of “protection of fundamental human rights” in the list of obligations that should not be affected by countermeasures. It is generally agreed that the right to be free from hunger is a fundamental human right, and hence countermeasures banning access to markets by a responsible state for which exports is the principal source of income should be prohibited.
- (g) The delegate expressed concern on the provisions relating to invocation of responsibility by a state other than the injured state. The uncertainty of the concept of obligation owed to the international community as a whole or obligation for protection of collective interests, in the delegate’s view contained the potential for abuse.

3. The **Delegate of the Republic of Korea** at the outset, commended the ILC for its achievements during its 53rd Session.

As regard ‘State responsibility’, the delegate was of the view that the draft articles as adopted had emphasized codification rather than introducing progressive elements of international law. While codification had the advantage of rendering the draft articles more acceptable to States, elements of progressive development had the potential to invite further debates among States. Examples of such controversial progressive elements in the draft articles, as cited by the delegate include: the notion of “serious breach of obligations under peremptory norms of general international law” and the invocation of responsibility by a State other than the injured State. Yet, the delegate considered the draft articles as adopted as the best that could be obtained after 50 years of consideration and hard work. Welcoming the decision of the General Assembly to include this topic on the agenda of its 59th Session in 2004, the delegate said it offered sufficient time for States to reflect on the draft articles and observe its impact on State practice.

As regards the draft articles on prevention, the delegate commended the work as a significant step forward in the field of international environmental law and could provide a solid basis for a framework convention for international cooperation and regulation. The delegate also urged the ILC to continue its long-deferred work on the liability aspect of the topic.

On the topic “Reservations to Treaties”, the delegate said that late reservations, in the interests of stability and integrity of treaties, should not be permitted. Secondly, the delegate considered ‘conditional’ interpretative declarations as reservations in another form, and hence should not be treated as a separate category different from reservations. Thirdly, the role of the depository should not go beyond the scope of the 1969 Vienna Convention on the Law of Treaties.

On the topic of “Diplomatic protection”, the delegate acknowledged that the ‘rule of continuous nationality’ was a long-established rule of international law. Under this rule, the change of nationality due to marriage or nationalization does not entitle an individual to have recourse to diplomatic protection by the new State of nationality. However, the delegate was of the view that due consideration should be given to protection of rights of an individual who encountered a bonafide change of nationality that caused a bonafide transfer of claims between the time when an injury was sustained and the time when the claim

was presented by a new State of nationality. Secondly, on the 'rule of exhaustion of local remedies' the delegate stated that draft article 10 on this topic contained no reference as to the criteria for determining whether the local remedies had been exhausted. In particular, it would be too great a burden on the part of victims of generalized human rights violations to require that "all available local remedies" be exhausted.

On topic of "Unilateral Acts", the delegate urged the ILC to take a more practical approach. Commenting on the Special Rapporteur's classification of unilateral acts based on the "legal effects" criterion, the delegate believed that despite its theoretical usefulness, such a classification might not be viable in practice. As regards interpretation of unilateral acts and their applicable rules, the delegate preferred discussing this after the delineation of the scope and definition of unilateral acts was accomplished.

4. The **Delegate of the People's Republic of China** commended the ILC on the work accomplished at its 53rd Session.

Welcoming the completion of work on "State responsibility", the delegate said that, in general, the draft articles adopted were balanced and rich in content. Following are inter-alia the views expressed by the delegate on this topic:

- (a) The notion "serious breaches of obligations under peremptory norms of general international law" might give rise to controversy especially since the draft articles had not made clear as to who should judge whether an international wrongful act constituted a "serious breach".
- (b) It was the understanding of the delegation that under article 48 (Invocation of responsibility by a State other than an injured State) any State other than an injured State might express its concern in some appropriate form or demand the responsible State to cease the wrongful act. However, the delegate was doubtful about the appropriateness of elevating such actions to the level of legal responsibility of the State. The concept of "the beneficiaries of the obligations breached" in article 48 (2) (b) confers on third States a broad excessive right, and was therefore likely to lead to disputes between States concerned.
- (c) On countermeasures, the delegate reiterated the importance for appropriate restrictions against abuse of the right of counter-measures. The Chinese delegation opposed expanding the scope of the State entitled to take countermeasures and introducing the notion of "collective countermeasures".
- (d) Welcomed the decision of the General Assembly to include this topic on the agenda of its 59th Session.

As regards the topic "Diplomatic protection", the delegate supported the view that the rule of "continuous nationality" should be maintained as a basic standard for diplomatic protection. However, exceptions could be allowed in cases where individuals had changed nationality involuntarily and ended up with no diplomatic protection from any State.

While acknowledging the status of the rule of "exhaustion of local remedies" as part of customary international law, the delegate set out his understanding that diplomatic protection was exercised by a State when its national was injured. If an international claim was brought on the basis of a direct injury to a State instead of its national, then, it was beyond the scope of diplomatic protection and the rule of exhaustion of local remedies had no relevance. Against this backdrop, the delegate said that the rule laid down by draft article 11 was not necessary.

On diplomatic protection of companies, the delegate said that only the State, whose nationality a company had acquired through incorporating or registering in the State had the right to provide diplomatic protection to the company. In addition, it was not appropriate for the States whose nationals were shareholders to exercise diplomatic protection vis-à-vis the state in which the company was

incorporated/registered. In the delegate's view, if an individual shareholder of a company was injured by the wrongful acts of the State in which the company was incorporated, the state whose nationality the individual shareholder held, had the right to provide diplomatic protection. But this, the delegate said, was within the scope of diplomatic protection for individuals, not companies.

On the topic of "Unilateral Acts", the delegate while recognizing the importance of codifying the law on this topic was doubtful as to the viability of the classification of unilateral acts as proposed by the Special Rapporteur. The Chinese delegate suggested that the draft articles could be divided into three parts: a general section; rules relating to acts whereby the State undertakes obligations; and those that relate to acts whereby the State reaffirms its right. At the present stage, it was preferable for the ILC to focus on formulating general rules applicable to all unilateral acts.

While acknowledging the importance of interpretation of unilateral acts, the delegate felt that it was not yet time to consider this issue. The delegate's initial view was that when formulating the rules on interpretation, related provisions of the Vienna Convention on the Law of Treaties could be used as a reference. When interpreting those provisions, specific circumstances should be taken into account while considering the true intention of the State. At the same time, the delegate pointed out that the special characteristics of the unilateral act itself should be considered, without duplicating provisions.

On the topic of "prevention", the delegate said that the draft articles adopted by the ILC would serve as a practical guide for the elaboration of international legal instruments dealing with specific aspects of environmental protection.

As regards "Reservations to Treaties" the Chinese delegate offered the following observations: -

- (a) "Conditional interpretations declarations," which are different from simple interpretations declarations, to a certain extent, limit or modify the effect of articles concerned on a particular State party, thus function as reservations to treaties. Therefore, it would be a good idea to make a distinction between conditional interpretative declarations and simple interpretation declarations without setting separate norms for the former and make them subject to the same legal regimes as regards reservations.
- (b) On "late formulation of reservations", the Chinese delegation believed that as a general rule, in order to maintain the stability and predictability of treaty relations, a state should raise its reservations with regard to certain articles of a treaty before it agrees to be bound by that treaty. However, we should not exclude the possibility that under specific circumstances, a state may be allowed to formulate reservations after it agrees to accept the binding force of a treaty. And such a situation already exists in practice. The Guide to Practice should regulate the issue of "late formulation of reservations", and especially clarify the conditions for such a practice as well as the procedure followed in refusing or accepting a late formulation of reservations. The content of the relevant draft articles adopted by the Commission in first reading is acceptable.
- (c) On "the role of the depositary" with regard to reservations, China held the view that the depositary could, in accordance with Article 77(1)(iv) and (v) of the Vienna Convention on the Law of Treaties, examine the appropriateness of the form of reservations formulated by states to see if it was in conformity with the relevant rules of the Convention and, when necessary, draw the attention of the state concerned to its examination. The depositary should also inform other states parties or states which were entitled to become state parties of the reservation formulated by a state. However, a depositary was neither an interpreter of the text of the treaty, nor a judge on the compliance by a state with the treaty. So, a depositary should not be endowed with the right to review the permissibility of reservations and to refuse to communicate such reservations to the states concerned.

5. The **Delegate of the Arab Republic of Egypt** at the outset paid rich tributes to the contribution of the ILC in the codification and progressive development of international law.

As regards the topic of 'State responsibility' the delegate welcomed the ILC for successfully bringing to a fruitful conclusion the efforts that had been initiated in 1953. The delegate endorsed the recommendation of ILC and the decision of the General Assembly on this topic.

On "prevention" the delegate commended the ILC and the Special Rapporteur Dr. P. S. Rao for taking into account all view points expressed on this topic while finalizing the draft articles. Given the linkages between prevention and liability, the delegate hoped that the ILC would speedily finalize its work on liability.

On "Reservations to Treaties", the delegate emphasized that the work of ILC should aim at maintaining a balance between sustaining the integrity of multilateral treaties and securing the widest possible adherence to such treaties.

As regards the topics of 'diplomatic protection' and 'unilateral acts', the delegate urged Member States to submit to the **ILC** their views and observations reflecting their national position on these areas, so as to enable the ILC to take into account State practice in its work.

6. **Ambassador Chusei Yamada, the Representative of ILC** briefly responded to the comments and observations of Member States on this item. Responding to the concern expressed by delegates of China and Republic of Korea on the rule of continuous nationality, Ambassador Yamada assured that draft article 4 on the topic of diplomatic protection maintained the rule of continuous nationality, with some exceptions. The other issue of exhaustion of local remedies was still under consideration by the ILC.

On the topic of "Reservations to Treaties" Ambassador Yamada said many Members of the ILC also shared views similar to the one expressed by the delegate of Republic of Korea on the inadmissibility of late reservations. However, he noted that there already was established practice where the depositary accepted late reservations, when unanimously accepted by parties to the treaty.

As to the necessity of distinguishing between "simple" and "conditional" interpretative declarations, the ILC would consider it in-depth at a later stage.

On the topic of liability, he informed that the ILC had decided to approach the issue of prevention first, before taking up the question of liability. Accordingly during its 53rd Session the ILC completed its work on prevention. At its current session (54th Session) the ILC started considering the issue of liability. It had set up a Working Group under the chairmanship of Dr. P. S. Rao. Before moving ahead, the ILC would have to delineate the scope of its work on the topic.

Ambassador Yamada urged Member States of AALCO to support the work of ILC and communicate their observations to the Commission so as to offer feedback to guide its future work.

7. **The meeting then took up for consideration the agenda item "Jurisdictional Immunities of States and their property."**

8. **Dr. Li Zhenhua, the Assistant Secretary-General of AALCO** introduced the Secretariat document on this topic. Dr. Li stated that, at its 55th Session, the General Assembly decided to establish an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property to carry forward the work done so far, consolidate areas of agreement and resolve outstanding issues with a view to elaborating a generally acceptable instrument on this topic.

The Meeting of the Ad Hoc committee held in February 2002 was fruitful. Out of the five substantive issues, two seems to be satisfactorily resolved, namely – the concept of a State for purposes of immunity

and secondly the issue on measures of constraint against State property. As regards the other three outstanding issues, he hoped the forthcoming 57th Session of the UN General Assembly could provide an opportunity to narrow down the differences.

9. The **Delegate of Republic of Korea** expressed appreciation for the comprehensive report prepared by the Secretariat on this subject. Highlighting the practicality of this topic for States, the delegate complimented the Ad Hoc Committee for its achievements in narrowing down the differences on the outstanding issues. The delegate noted with satisfaction that representatives within the Ad Hoc Committee preferred the restrict approach to immunity and combined views of 'nature test' as the primary standard and 'purpose test' under certain circumstances, as the criteria for determining what amounts to commercial transactions.

10. The **Delegate of the People's Republic of China** considered that the 1991 ILC's draft articles on jurisdictional immunities as a good foundation for discussion in the Ad Hoc Committee. Following were the observations of the delegations on the outstanding issues:-

- (a) On the question of criteria of commercial transactions, the delegation believed that judicial practice of some States, which take into consideration, the 'purpose' of a transaction, as a complementary criterion to the 'nature' of such a transaction should be retained in the draft articles in determining whether a transaction is commercial.
- (b) On the issue of state enterprises, the delegation was of the view that theretention of the relationship between state enterprises and the state vis-à-vis the system of immunity would clarify the text and guide judicial practice of States.
- (c) As regards post-judgment measures of constraint, the linkage:- between the property against which execution was to be levied and the claim; and the linkage between the said property and the agency or instrumentality against which the proceeding was directed should be retained to avoid abusive execution.

11. The **Delegate of the Arab Republic of Egypt** outlined the evolution and progress of work on this subject within the ILC and the Sixth Committee of the General Assembly. Drawing attention to the implication of unilateral determination of State immunity by courts in developed countries adversely impacting on developing States, he stressed the importance of the work on this topic to harmonize and streamline the practice of States.

He commended the work of the Ad Hoc Committee in narrowing down the differences on outstanding issues. Noting the divergence of views in the Ad Hoc Committee on the appropriate criteria to determine commercial transactions, the delegation warned that widening the scope of commercial transactions would hamper the social and economic interests of developing countries.

As regards the question of State enterprises the delegate stressed the need to distinguish the distinct legal personality of State enterprises from that of the parent State, so as to avoid the potential of abuse of judicial process.

12. The **Delegate of Japan** offered an overview of the work of the Ad Hoc Committee and its outcome. The Ad Hoc Committee emphasized the importance of elaborating in a timely manner a generally acceptable instrument based on the ILC's draft articles and recommended to the Sixth Committee of UN General Assembly to provide appropriate opportunity to resolve outstanding issues at the 57th Session of the General Assembly in 2002. The delegate informed that the Sixth Committee would consider the topic on 24 and 25 October 2002. In this context, he urged AALCO Member States to actively participate in the work of Sixth Committee with a view to adopting an international instrument at an early opportunity.

13. The **Delegate of India** said that the ILC's draft articles adopted in 1991 made a marked contribution in clarifying the scope and nature of immunities of States and their property in legal proceedings concerning commercial activities. The draft articles represented a delicate balance between the interest of developed and developing countries and hence further negotiations to resolve the outstanding issues should give primacy to these draft articles.

Welcoming the progress made by the Ad Hoc Committee, he hoped that agreement could be reached during the 57th Session of UN General Assembly, with a view to adopting an international convention on the subject. Any agreement reached on the outstanding issues, should recognize that State immunity must not be affected by legal proceedings against a State enterprise, which has a distinct legal personality of its own and its own assets. Further, the delegate stated, that any legal proceedings or enforcement of a judgment against a State enterprise should be confined to the State enterprise that was a party to the proceeding and its assets. It should not affect the functioning of other State enterprises operating in the Forum State.

Following is the text of communication from Malaysia on this topic:

1. Malaysia continues its support of the work of the Ad Hoc Committee and the proposal for the AALCO Secretariat to collate the information disseminated during the 41st Session to formulate its position on the outstanding issues for the purpose of the 57th Session of the General Assembly.
2. It is proposed that, depending on the views expressed by other AALCO Member States, Malaysia may consider supporting a further resolution that the Secretariat monitor the developments in this matter.

The Meeting then took up for consideration the item **“Extraterritorial Application of National Legislation: Sanction Imposed Against Third Parties”**.

14. **Dr. Ali Reza Deihim, Deputy Secretary-General of AALCO** introduced the Secretariat document on this topic. Dr. Deihim said that promulgation of domestic laws having extra-territorial effect, including imposition of unilateral secondary boycotts were violative of the sovereignty and economic interest of a State. It also violated the core principles of territorial sovereignty and political integrity of a State and constitutes interference in the internal affairs of a State. They also hamper trade and economic cooperation among States.

Drawing attention to the much criticized D'Amato-Kennedy Act and the Helms-Bunton Act, Ambassador Deihim said that in an increasingly interdependent world, unilateral sanctions against States besides possessing infirmities in law were bad as a foreign policy tool.

Unlike multilateral sanctions, unilateral sanctions were inherently ineffective and lacked the collective will of the international community. For these reasons, Dr. Deihim said it was imperative that all States must reject the promulgation and application of this dubious form of legislation

15. The **Delegate of the Islamic Republic of Iran** was of the view that the Secretariat document on this item was useful and informative.

Unilateral sanctions and extraterritorial measures against other countries, he said, were inadmissible under international law. Such actions, the delegate said, violate the principles set out in the UN Charter; the Declaration on the Inadmissibility of Interference in the Internal Affairs of States and the Protection of their Independence and Sovereignty (adopted in 1969); the 1979 Charter of Economic Rights and Duties of States; and the Friendly Relations Declaration of 1980. They also violate many other resolutions of UN General Assembly and ECOSOC resolutions that express grave concern over the negative impact of unilateral extraterritorial coercive economic measures and call for their immediate repeal.

The delegate pointed out that such illegal measures impede free international trade and negatively impinge upon social and human development in the targeted developing countries.

The delegate said that the Islamic Republic of Iran had been subjected to these measures in the past 20 years. While the form and method of applying such measures had changed with the passage of time, their nature remained unchanged. Both developed and developing countries, he said, had vigorously reacted to these unlawful measures. Some of them had gone as far as to adopt legislation aimed at countering the legal effects of such measures within their national territory.

The delegate urged retaining this topic on the agenda of the AALCO work-programme, so as to carrying on and enriching the already-conducted extensive study of the issue.

17. The **Delegate of Indonesia** cited the example of the US Helms-Burton Act and Kennedy-D'Amato Act as extraterritorial measures intended to isolate target countries, economically and politically. More particularly, such US policy towards Iran and Libya, the delegate said, had been addressed by the Organization of Islamic Conference (OIC) at its 26th Session. The resolution adopted by the OIC on this matter proposed seeking comprehensive solutions through dialogue and peaceful means to resolve the problem and condemned any political or economic measures applied unilaterally and extraterritorially.

Therefore his country rejected the application of extra-territorial measures as they were violative of international law. The delegate called for reflecting this position in the resolution to be adopted on the topic. He supported AALCO Resolution No. 39/5 as a legal document containing the norms of international relations which should be adopted by all States.

18. The **Delegate of Democratic People's Republic of Korea** welcomed the Secretariat document on the topic. He said that the United States has imposed multi-faceted sanctions against his country for several decades now, thus hampering its independent socio-economic development and prosperity. Such unilateral sanctions, the delegate said, violated the principles of sovereignty and non-interference and presented a serious threat to world peace and security. Therefore he joined the Delegate of Iran in urging the retention of this topic on the AALCO's agenda.

19. The **Delegate of Sudan** thanked the Government of Nigeria for hosting this Session and offered his felicitations to the President and Vice-President on their election. Sudan is opposed to extra-territorial application of national laws, as it constituted a flagrant violation of the established norms of public international law and incompatible with the principles of the world public order. Terming such illegal acts as dangerous, the delegate pointed out that it consequently affected free trade and the rights of nations and peoples to attain social economic development.

Sudan, along with many other countries had been affected by such extraterritorial measures. Due to such measures, the delegate informed that a good number of international companies had been denied the opportunity to invest in Sudan, more particularly in the petroleum production sector. Consequently, the Sudanese people had been deprived of their rightful opportunity to benefit from the use of their natural resources.

He urged retaining the item on the agenda of the next Session.

Following is the text of the communication from **Malaysia** on this agenda item:

1. Malaysia has expressed its views on national laws that have ET application contrary to the norms of international law at various fora. Malaysia has had first-hand experience of the application of the Helms-Burton Act and the Kennedy-D'Amato Act because of its investments in Cuba and Iran.
2. At the 55th General Assembly, Malaysia, while commenting that the US attitude towards Cuba was changing in relation to the Helms-Burton Act, expressed the view that a lot still needed to be done to do away with national laws with ET application. Malaysia is of the view that all

- forms of economic, commercial and financial sanctions run counter to the letter and spirit of the UN Charter Malaysia called for an immediate end to the embargo against Cuba as it violated the principles of international law, in particular international humanitarian law, and freedom of trade and navigation (cited at paragraph 79 of Doc. AALCC/XL/H.Q.India/2001/S.5)
3. At the 56th General Assembly, Malaysia rejected the ET application of national laws and called for an immediate end to the embargo imposed against Cuba. In Malaysia's view, the embargo, besides undermining the principles of sovereignty of States, also seriously infringes the rights of the Cuban people to life and socio-economic development.
 4. Malaysia agrees with the views expressed by the Secretariat in the document tabled for the consideration of the 41st Session that ET measures, besides being infirm in law are also bad instruments of foreign policy being largely ineffective as deterrents against the targeted States. They also undermine the efforts being made by the UN, WTO and other international organizations to establish an equitable, multilateral, non-discriminatory, rule-based trading system and question the primacy of international law.
 5. Malaysia continues its support of the campaign of the international community to end the ET application of national legislation and lauds the lead that has been taken by the UN in this regard. These efforts must continue for so long as ET application of national legislation continues.
 6. In view that certain States still continue to enact national legislation with ET application and States that have such legislation have not repealed such ET laws in accordance with the calls of the General Assembly resolutions, it is proposed that, depending on the views expressed by other AALCO Member States, Malaysia may consider supporting a further resolution that the item be placed on the agenda of the 42nd Session and that the Secretariat monitor the developments in this matter.

The Meeting adjourned for lunch.