

V. (ii) SUMMARY RECORDS OF THE SECOND GENERAL MEETING HELD ON 17TH JUNE 2003 AT 9:30 A. M.

The President H. E. Amb. Young-jin Choi in the Chair.

(a) **General Statements**

The Meeting continued its consideration of the **General Statements.**

1. **H. E. Judge Hisashi Owada of the International Court of Justice** said that it was an honour for him to represent the World Court at the 42nd Session of AALCO. He recalled his association with the AALCO over the course of 40 years of his service. He stated that no other inter-governmental organization embraced the two continents of Asia and Africa as AALCO did. It provided an indispensable forum for inter-regional co-operation in the field of legal affairs, in close collaboration with the United Nations and its organs and agencies as well as other international institutions. The invaluable contribution of the AALCO to the development and the dissemination of international law since its creation, in 1956, has given the Organization special eminence in the international legal community.

He observed that the achievements of the Organization were multiple both in terms of *form* and *substance*. First, in terms of *form*, as a consultative body of legal experts in the field of international law, the AALCO throughout the 50 year history of its existence has discharged its functions of disseminating information, conducting consultations and formulating recommendations. It had provided an indispensable forum for the exchange of views among its Member States of Asia and Africa, thereby leading to their active participation in the process of development of international law.

The most notable example of this process could be seen in the close relationship that the AALCO had developed with the International Law Commission (ILC) of the United Nations. Over the years, the AALCO had been keeping under its constant review the issues taken up by the ILC working in the field of codification and progressive development of international law. The AALCO had been serving as a precious forum for consultations among its member States on the work of the ILC, and helped them to formulate their views on many important issues under discussion by the ILC and reviewing its work from Asian and African perspectives. This process enabled the views of Asian and African nations to be duly reflected in the work of the ILC.

Through its efforts for harmonizing and consolidating the views of Asian and African states on many legal issues of high political importance in the field, the AALCO could make a significant contribution to the work of the United Nations Conference on the Law of Treaties, in Vienna, by bringing in the distinct voice of the Asian and African states, to the process of codification and progressive development, in this important field of international law. He also highlighted the contribution of AALCO in the field of the Law of the Sea and the adoption of the Bangkok Principles on Status and Treatment of Refugees, as revised in 2001.

The AALCO, he said had come to command respect as representing the legal thinking of the vast region of Asia and Africa. The importance of this forum was recognized by international society as a whole. It was to the credit of the Organization that the practice has come to be developed by which various legal institutions were represented as observers at the sessions of this Organization, in order to familiarize themselves with the legal thinking of Asia and Africa. The United Nations and its principal organs, including the International Court of Justice, cherished their links with the AALCO, through which the legal views of states of Asia and Africa are articulated. The maintenance of close working relationship with the United Nations, including its principal organs as well as other Specialized Agencies and the growing outreach of the AALCO was also benefiting the Organization by widening the scope of its outlook towards the world.

As regards the activities of the Organization in terms of *substance*, he said that the wide range of themes falling under the work programme of the Organization was truly impressive. He said that themes could be summarized into the following three categories.

First, the themes on which the Organization has focused its attention cover the most important fields of traditional international law, which had always been at the core of the international order, such as the law of treaties, the law of the sea, the law of state responsibility, and so forth.

Second, activities which were expanded into other areas of law and had acquired in recent years an increasing importance as a result of tremendous “interdependence” growing in the international community. They extend to such areas as international environmental law, international economic law, as well as norms in the field of co-operation against trafficking in women and children, or co-operation against organised international crimes.

Third, it was to be noted that the Organization had also been paying particular attention to those areas of international relations where new *opinio juris* of the world community and new international practice was emerging, reflecting the novel situation of “globalization”. Globalization, as distinct from the more traditional phenomenon of “internationalization” as a process of widening interaction between States in the international community, was a societal process of integration of human activities on a global scale, defying the national borders that separate sovereign nations. This novel phenomenon of globalization as a societal process of the global community was bound to affect the traditional framework of international relations based on the Westphalian legal order. As a result, new issues were now appearing on the horizon, forcing to give a fresh look at the traditional paradigm in a new context.

Further, he said that the issue of International Humanitarian Law that the present session of AALCO has decided to take up and examine in its Special Meeting seemed to be one good example. It was a field where the traditional treatment of the subject in international law was now undergoing a major challenge and where a new thinking was

being called for in light of the recent developments in relation to the law of human rights. How to cope with the problem of international terrorism was another such example, since the traditional structure for maintaining the international public order on the basis of the principle of partition of national competence cannot offer an effective legal framework for coping with this major challenge to the world community.

Thus, he said the panoply of subject-matters under consideration of the AALCO demonstrated how sensitive the Organization was to the challenges that were being faced, both in traditional and emerging areas of law in the international community of today.

He referred to a new significant development in the practice of the Court, where many of the cases that had been referred to the Court in recent years have come from a number of Asian and African States. As of June 2003, there are as many as twenty-four cases that the Court had in its docket; of these twenty-four cases, eight cases, or one-third of them, have been brought by Asian and African states. Last year, in 2002, the Court rendered its judgments in many cases whose parties belong to the Asian-African region. Two such cases, he cited, included the *Land and Maritime Boundary case (Cameroon v. Nigeria)* and the *Sovereignty over Palau Ligitan and Palau Sipadan case (Indonesia v. Malaysia)*.

He observed that a marked increase in the use of the Court on the part of the Asian and African states was a testimony to the growing consciousness in the Asia-Africa region that it was worthwhile to have the dispute settled on the basis of law by the international jurisdiction. The same can be said about the more active use of the advisory proceedings by the United Nations and other competent organs, where the nations of Asia and Africa play an increasingly important role for seeking a rule-based international public order on a universal basis. Advisory opinions by the Court on the *International Status of South West Africa* case was a harbinger of this process; the *Legality of the Threat or Use of Nuclear Weapons* case and the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case are just a few of the more recent examples of this development.

This renaissance of interest and confidence, especially noticeable among the nations of Asia and Africa, in the judicial settlement of international disputes and in the consolidation of the rule of law in the international community was a significant development. It dispelled a once widely held concern that certain reticence might exist among Asian and African states to the International Court of Justice and to the judicial settlement of disputes, partly due to the fear that the Court could be biased towards the cultural and intellectual tradition of the West, as reflected in its composition and in the contents of the law it applies. The new emerging trend in Asia and Africa to make a more frequent use of the Court was indeed a source for gratification in this respect, inasmuch as it was a testimony to the increasing confidence that the Asian and African states placed on the primacy of international law in international relations and on the role of the International Court of Justice as its primary agent.

Seen from this perspective, continuous and active participation by the Asian and African States in the norm-creating process was all the more vital, since their participation in this process will further strengthen their confidence in the international legal process and the universal validity of the norms that they actively participate in creating. In this regard, the importance of the role played by the Organisation in this direction can never be emphasized too much. In the light of all this, he called for promotion of a greater rapport and creation of an organic link between the International Court of Justice and the AALCO that could be profitable to both.

2. **Ambassador C. Yamada, Member of the United Nations University (UNU) Council** delivered a statement on behalf of the Rector of UNU, H. E. Mr. Hans van Ginkel.

H. E. Mr. Ginkel recalled that the UNU and the AALCO signed an agreement of cooperation, in 2002, to guide their joint efforts in areas of mutual interest: human rights and human security issues; and multilateral diplomacy, including the multilateral environmental agreements. It envisaged that such cooperation could take a number of different forms from mutual support of research, capacity development, scientific exchanges and the joint organization of seminars, workshops, or scientific meetings. He said that he was looking forward to working with Ambassador Kamil in the coming months to identify specific cooperative activities that could be undertaken by UNU and AALCO during 2004-05.

He noted that during 42nd Session AALCO would be convening a special meeting on “The relevance of international humanitarian law in today’s armed conflicts.” That is a particularly important topic in relation to the emerging world situation and he complimented the AALCO for choosing this topic.

Commenting on the theme of the Special Meeting, he stressed that the need for international humanitarian law had never been greater. At the same time, it was presently being challenged by the contemporary nature of conflict, which was making the categories of ‘war’ and ‘combatants’ ever vaguer.

The type of war that was envisaged by the drafters of The Hague and the Geneva Conventions, deriving from 19th Century norms of war, was quite different to what was witnessed today. Moreover, the signatories to these international agreements were often not the same parties who had disregard for human rights and human dignity.

Further, he observed that, contemporary wars, which are mostly civil wars, are characterized by the deliberate targeting and forcible displacement of civilians as a primary objective of violence. Systematic rape as a weapon of war, ethnic cleansing, the use of child soldiers, and a high proportion of civilian casualties are also present. The warlords and criminals who often perpetrate the abuses are not signatories to international humanitarian law, and they often operate with ‘failed states’.

Another challenge to humanitarian law was terrorism. In that context, he mentioned the terrorist attacks on 11 September on the USA and the response following that incident. He said that it was pressing challenge to maintain the relevance of human rights and humanitarian law in times of conflict. Some states would not be prepared to limit their war against an unseen and deadly enemy. Ultimately, in his opinion, neglecting human rights could give rise to ever-deadlier forms of terrorism.

3. The **Leader of the Delegation of Nepal** congratulated the President and the Vice President on their election. He congratulated Amb. Dr. Kamil on his reappointment as the Secretary-General of AALCO and also welcomed Brunei Darussalam as a new member of the Organization. He stated that the issues on the agenda of the session were not only important to Asian and African countries but also for all legal circles throughout the world. While reiterating Nepal's consistent support to the activities of AALCO, he said that it has made remarkable contribution towards progressive development and codification of international law.

4. The **Leader of Delegation of Sudan*** extended thanks to the Government of the Republic of Korea for hosting the 42nd Session. He congratulated the President and Vice-President for their election. He also congratulated Amb. Dr. Wafik Z. Kamil for his re-election. He welcomed the new member Brunei Darussalam, and hoped that more new members would join the organization. He appreciated the efforts of the Secretary-General in forging closer cooperation with the United Nations as well as the Sixth Committee. Turning to the items on the agenda of the session, he stated that they were well chosen and of interest to the international community. While condemning terrorism in all forms and manifestations, he wanted a clear distinction between terrorism and people's legitimate struggle for self-determination. He also called for a common position regarding extra-territorial application of national legislation against third parties. On the item trafficking against women and children, he was of the firm belief that this phenomenon could only be uprooted with full cooperation of all Member States. Deportation of Palestinians in violation of international law was a grave problem to which finding a just, comprehensive and durable solutions was the only way of bringing peace to the people of Palestine. He wanted AALCO to consider this as an extremely important item on which cooperation of all Member States was necessary.

5. The **Leader of the Delegation of the State of Qatar*** expressed gratitude to the Republic of Korea for hosting the 42nd Session and welcomed Brunei Darussalam on becoming member of AALCO. He stated that his Government was keen to have effective participation in AALCO. He stated that the items on the agenda of the session were well chosen. Turning to the topic on International Terrorism, he stated, that it was a complex problem facing the international community and it was necessary to find solutions.

6. The **Observer from the Holy See**, thanked the members of the AALCO and the organizers of the session. He focused his statement on the problem of trafficking in

* Statement delivered in Arabic. Unofficial translation from the Interpreters version.

women and children and observed that concerted action were needed to overcome this shameful phenomenon. He stated that trafficking in any human being constitutes a shocking offence against humanity and international community and regional groupings of States have failed to identify this problem with what could be seen as the emergence of a new form of slavery in the twenty-first century. He underlined that a basic human rights perspective must be integrated into any cooperative approach to stem the increase in trafficking. He also emphasized that victims must be helped to find again the deeper freedom, which is an essential part of one's human dignity. He appealed that States, in cooperation with intergovernmental and non-governmental organizations, must explore options to address trafficking in women and children both at its source as well as in the context of demand. Recognizing that economic disparities were the primary cause for the trafficking, he stated that less developed countries must develop more effective mechanisms and similarly developed countries should implement developmental policies at source points.

He stated that ways must be found for cooperating for the good of every woman and child trafficked, for the good of all peoples of the Asian and African region and for the good of a future world.

(b) Report on Matters relating to the work of the ILC at its 54th Session

1. The Meeting then took up for consideration the agenda item **“Report on the Matters relating to the work of the ILC at its 54th Session.”**

2. **Amb. Dr. Ali Reza Dehim, the Deputy Secretary-General of AALCO** introduced the Secretariat document (AALCO/XLII/SEOUL/ 2003/S.1) on this item.

At the fifty-fourth session of the Commission, Dr. Dehim said, the ILCs agenda included 4 new topics:-

- (a) Following the adoption at its 53rd session of a set of draft articles on Prevention of Transboundary Damage from Hazardous Activities, the ILC at its 54th session decided to resume the study of the second part of the topic, relating to international liability for failure to prevent loss from transboundary harm arising out of hazardous activities. The Commission appointed Dr. P. S. Rao as the Special Rapporteur for the topic and preliminary work on exploring the potential scope and content has been carried out by a Working Group of the Commission.
- (b) With the successful completion of its work on “Responsibility of States for internationally wrongful acts” the Commission has now taken up the codification of the law relating to responsibility of international organizations. Prof. Giorgio Gaja has been named Special Rapporteur for the topic.
- (c) The third new topic is the one relating to Fragmentation of International Law. Though originally conceived as “Risks ensuing from Fragmentation of

International Law”, the title of the topic has been altered to “Difficulties arising from the diversification of international law”.

- (d) A fourth new topic is “Shared Natural Resources”. Amb. Chusei Yamada has been appointed as Special Rapporteur for this topic.

Amb. Deihim informed that besides these new topics, the Commission at its 54th Session continued with the consideration of the following three topics: Reservations to Treaties; Diplomatic Protection; and Unilateral Acts of States.

The Deputy Secretary-General also drew the attention of the delegates to the information requested by the ILC on many of its agenda items. The feed back and information on State practice of AALCO Member States, he said, could be immensely helpful in enabling the Commission to take on board the views of different legal systems. Therefore, he urged delegates to submit specific comments and observations on the ILC topics so that they could be reflected in the statement of the Secretary-General when he attends the session of the ILC this year.

3. Prof. Choung Il Chee, the Second Vice-Chairman of the ILC represented the Commission at the Session. At the outset, Prof. Chee expressed appreciation for the high caliber and comprehensiveness of the Secretariat document on this agenda item.

As regards the work on “Reservation to Treaties” Prof. Chee informed that the Special Rapporteur Allain Pallet has submitted his report, along with a model clause regarding withdrawal of reservations.

As regards “Diplomatic Protection” , the Commission was adhering to the basic rule enunciated by the ICJ in the *Barcelona Traction* Case that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. The Commission, he said, had also produced Articles 18(a) and (b) that serve as exceptions to the *Barcelona Traction* ruling.

On “Unilateral Acts of States” after the initial difficulties over the form and methodology of the work, the Special Rapporteur Mr. Victor Rodriguez Cedeno is expected to produce a report on a category of unilateral acts – namely the declaratory character of recognition of States and governments.

As regards the work of International Liability, Prof. Chee informed that Dr. P. S. Rao, the Special Rapporteur for this topic has presented his report to the 55th Session, which focused on “Allocation of Losses”. It was expected that a Drafting Committee on this subject would be constituted during the next session of the ILC.

As regards the topic “Responsibility of international organizations”, he informed that the scope of the work would be limited to inter-governmental and international organizations. The Special Rapporteur Prof. Giorgia Gaja had presented 3 articles, dealing with: definition, scope and general principles.

With regard to the topic, “Fragmentation of International Law” Prof. Marti Koskienemi has been appointed as Special Rapporteur. He informed that the impression within the Commission was that the formal title of this topic could be modified.

On “Shared Natural Resources”, he said that the Special Rapporteur Amb. Chusei Yamada has submitted his first report to the ILC this year.

Recalling the good work done by AALCO in highlighting the work of ILC, Prof. Chee requested AALCO Member States to respond to the information sought by the Commission and provide feedback in terms of the law and practice existing in their countries on topics of interest to ILC. Mutual representation by ILC and AALCO in each other’s session, he said, could be helpful in this regard.

4. The **Delegate of Arab Republic of Egypt**^{*} said that the topics currently for consideration before the ILC are very important.

So far as the topic of reservations to treaties is concerned, the delegate said that they consider Articles 19-23 of the Vienna Convention on the Law of Treaties maintains the unity and flexibility of the texts and the universality of accession to the international treaties .

Regarding diplomatic protection, he supported, the proposal to codify the law on the subject. He said that AALCO countries should furnish information on national laws and judgments on the subject to facilitate its work.

Regarding international liability, he said, that there is a direct relationship between prevention and liability and hence the liability topic has to be addressed as soon as possible, having concluded the prevention topic.

On the item “Unilateral Acts”, the delegate pointed out there were many issues which are still unclear and inconclusive. Pointing out that unilateral acts could have extra-territorial effects and negatively affect international peace and security, he called for further examination of the topic.

The delegate welcomed the significance of including the topic of “Responsibility of international organizations” to the ILC’s agenda. Expressing support for the report of the Special Rapporteur Prof. G. Gaja, the delegate stressed that the accumulated wisdom and knowledge over the long years of work on State responsibility should be put to use in elaborating analogous concepts under the present topic before the Commission.

5. The **Delegate of India** articulated his delegation’s position on the following topics.

A. Diplomatic Protection:

* Statement delivered in Arabic. Unofficial translation from the Interpreters version.

- Diplomatic protection is a discretionary right of the State.
- The Commission's work on the topic should be limited to precedent and practice.
- In view of the expanding capabilities of an individual to espouse his claim in any forum directly, the concerns of the individuals involved should not be stretched beyond the point where it becomes obligatory for the State of nationality to espouse the claims involved, ignoring political or other sensitivities of the State of nationality.
- The position that the principle of "Exhaustion of local remedies" is part of customary international law and is central to the triggering of diplomatic protection must be stated as clearly and unambiguously as possible. Secondly, whether an available remedy was effective or not would raise questions about standards of justice employed in the State. As long as these are in conformity with the principles of natural justice, variations involved in standards should not give rise to a questioning of their effectiveness. Third, greater caution is required while dealing with exceptions to the exhaustion of local remedies rule, as any tilt in the balance would undermine the domestic jurisdiction of the State where the alien is located.
- With regard to the three options referred to in draft article 14, the third option could be the basis for future discussions. However, the concept of "effective remedies" and "undue delay" used in that article being relative concepts in respect of which no universal standards would be possible, the Rapporteur has to find some other replacement capable of representing unambiguous objective standards.
- With regard to implied waiver, caution is warranted, as it is difficult to devise any objective test for implied waiver.
- In the context of draft article 15 dealing with burden of proof, as it is a principle of evidence, it is best left to the rules of procedure and need not be elaborated in a separate article.

B. Reservations to Treaties

- Guidelines 2.1.1 and 2.1.2 which provide the form of a reservation and how its formal conformation must be made in writing, are acceptable and are in conformity with the Vienna Convention on the Law of Treaties.

- Guidelines 2.4.1 on the formulation of interpretative declaration does not prescribe any particular form. It was the delegate's view that interpretative declarations, whether simple or conditional, need to be in writing
- Formulation of Guideline 2.1.5 on the communication of observations is agreeable as it reflects the State practice.
- With regard to Guideline 2.1.6 dealing with the procedure for communication of reservations on which the ILC has sought State's viewpoints, the Indian delegate maintained that reservations are generally made at the time of ratification or accession. Hence, in general, communication of reservation forms part of the communication of the instrument of ratification or accession, and therefore the question of communication of reservation by electronic mail or by facsimile does not seem to arise at all.
- While Guideline 2.1.7 on the functions of the depositaries was generally acceptable, the delegate was skeptical as to the specific function under the guideline 2.1.8 which provided the depositary with the power to decide a reservation manifestly impermissible. The decision relating to the impermissibility of reservation generally springs from the incompatibility of this reservation with the object and purpose of the treaty, which is decided by the States parties to the treaty under contemporary law of treaties. The delegation therefore believes that the depositary should not have any role in making a judgement about the impermissibility of reservations.

C. Unilateral Acts

The topic of unilateral acts is different from more traditional concepts. It involves progressive development rather than codification. As regards methodology, India believes that the Special Rapporteur should first concentrate on those unilateral acts which, from the recorded international practice, culminated into obligations. This approach may provide a way forward to the development of new concepts and to the fruitful completion of the project.

The proposal by the Special Rapporteur to have a new concept namely *acta sunt servanda* as a legal basis for the binding nature of the unilateral act as *pacta sunt servanda* being the basis of treaty relationship does not seem to have any basis in international law.

D. International Liability

- Welcomes the work on this topic and the scope of the topic should cover the same as those included in the topic of prevention.
- As regards the regime on allocation of loss caused, it should involve relevant actors such as operators, insurance companies and pools of industry funds.

However, it is not the State but the operators profiting out of the operation, who should bear the primary responsibility in this regard.

- With regard to the role of the State under the liability regime, a careful study of international precedents on this area is important. The liability regime established under treaties (sectoral conventions) could provide some insight into the utility of time-tested mechanisms. Nonetheless, whether those practices work, as a general principle outside the treaty regime need to be carefully examined.

As regards the topic of “Responsibility of International Organizations” the delegate welcomed the cautious approach taken by the Working Group to limit its study to inter-governmental organizations.

On the topic of “Fragmentation of International Law” the delegate welcomed the proposal of the Chairman of the study group to first study the function and scope of the *lex specialis* rule and the question of “self-contained regimes.”

In conclusion, the delegate drew attention to the fact that the UN General Assembly would consider the articles on State Responsibility (as adopted by the GA in the year 2001) during its 59th Session (2004). Therefore, he suggested that AALCO should consider including this topic as a priority item for the year 2004.

6. The **Delegate of the Islamic Republic of Iran** confined his statement to observations on the work of ILC at its 54th Session on topics of “Diplomatic Protection” and “Reservation to Treaties”.

A. Diplomatic Protection

The delegate supported the conclusion of the Special Rapporteur that the draft articles should be confined to issues relating to the “nationality of the claim” and “exhaustion of local remedies”. As regards the extension of the scope of draft articles, the delegate offered the following observations:-

- (a) The issue of diplomatic protection of crew members and passengers on ships should not be included as it was already covered by the 1982 UN Convention on the Law of the Sea (Articles 94 and 292).
- (b) As for the protection exercised by international organizations in respect of their officials, such protection should be characterized as functional rather than diplomatic protection. Moreover, as no link of nationality is involved, the issue does not fall within the sphere of diplomatic protection.
- (c) As regards situations when a State occupies, administers or controls a territory other than its own territory, the question of that State exercising diplomatic protection on behalf of the territory’s inhabitants should not be included in the

draft articles as such an occupation of territory was illegitimate under international law.

- d) As regards the possibility of the exercise of diplomatic protection by an international organization administering a territory, such situations are typically temporary in nature and would better be considered in the context of the topic of the responsibility of international organizations.

As regards draft article 12, the delegate welcomed the requirement that local remedies must be exhausted before a State raises an international claim based on injury to a national arising out of an internationally wrongful act committed against national.

The delegate cautioned that the Commission should be careful to find a proper balance between the rule of exhaustion of local remedies and any exceptions to it. Such exceptions should meet explicit criteria and their application should be clearly defined. The delegate offered the following comments on Draft article 14 dealing with this issue:-

- a On the draft article 14 relating to the futility of the local remedies as an exception to the rule imposing the exhaustion of local remedies, the delegate favoured Option Three as proposed by the Special Rapporteur that is to say, if the local remedies provide no reasonable possibility of an effective remedy, they should be considered to be futile;
- b Sub-paragraph (c) of draft article 14 relating to the voluntary link between injured person and respondent State is consistent with existing practice;
- c Sub-paragraphs (e) and (f) relating to ‘undue delay’ and ‘denial of justice’ respectively should be considered along with the question of futility of local remedies. Undue delay must be intentional and amount to a denial of justice.

Draft Article 15 concerning the burden of proof does not fit in the draft articles on diplomatic protection and must be deleted. The question should be left to the rules of procedure in case of resort to international judicial forums and to the laws of the State in case of adjudication by national courts.

B. Reservations to Treaties

The delegate reiterated his country’s position that the Draft Guidelines prepared on this topic should be assessed in the light of their compatibility with Vienna Convention regime on treaties. The delegate proposed that ILC should shorten some of its commentaries since lengthy commentaries on non-controversial matters might give the impression that the law regarding reservation to treaties is less clear or more complex than it really is.

As regards specific draft guidelines, he offered the following observations:

- Draft Guideline 2.1.8 stipulating the procedure in case of impermissibility of reservations to treaties goes beyond the Vienna Convention on the Law of Treaties. If the depository were to intervene on the question of compatibility of the reservation with the object and purpose of the treaty as it is proposed in this guideline, it might prompt the State to react, which would not help to resolve the problem. It is therefore unlikely that a more active role of the depository would lead to the withdrawal of the reservation.

Therefore, his delegation favoured the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention.

- Draft Guideline 2.5X deals with the question of withdrawal of reservations held to be impermissible by a body monitoring the implementation of the treaty. According to this guideline, the reserving State or international organization, following such a finding, must take action accordingly. It may fulfill its obligations in that regard by totally or partially withdrawing the reservation.

Asserting that withdrawal of reservations is a sovereign prerogative of the State, the delegate characterized recent developments where some monitoring bodies are assigned the role of assessing reservations to a treaty as an “exception” and should not be covered by the guidelines under preparation.

The delegate stressed the need for States to send their replies to questions posed by the Commission, as it would enable the Special Rapporteurs to take into account the law and state practice of Asian-African States, in the preparation of their reports.

7. **The Delegate of Japan, Amb. Chusei Yamada**, who is also the ILC’s Special Rapporteur on the topic “Shared natural resources” informed that he has submitted his first report to the first part of the 55th Session of the Commission this year. The Report was preliminary in nature, dealing with the background and the formulation of the topic. His approach was to circumscribe the scope of the work to transboundary ground water, oil and other non-renewable resources. The report has not yet been taken up for discussion in the Commission.

Drawing attention to the importance of underground water resources for the Asian-African States, Amb. Yamada stated that he would be submitting a questionnaire, with a view to collect the laws and practice of countries in this regard, to the ILC for circulation to States. He urged AALCO Member States to provide their responses to the questionnaire.

8. **The Delegate of the Republic of Korea** offered the following observations:

A . Diplomatic Protection

The Commission's work represents a good basis for codification with elements of progressive development along with those of customary international law.

As the "Calvo" clause has been increasingly losing its practical usefulness in the globalized economy, the delegate saw no need to deal with it in the draft articles. Moreover, the Calvo clause is simply a contractual device, and no individual can renounce the protection of his or her State, since the right to exercise diplomatic protection belongs to State.

As the protection of crews of a ship are already covered by the 1982 Convention on the Law of the Sea, it would be desirable for the matter to be addressed within the framework of the law of the sea regime, rather than as a general rule of diplomatic protection.

As regards the issue of diplomatic protection of shareholders by the state of nationality, the delegate supported the basic rule enunciated by the ICJ in the *Barcelona Traction* case that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. At the same time, the delegate took note of the three exceptions the ICJ envisaged for reasons of equity: the direct infringement of the shareholders' rights, the legal demise of the company, and the injury inflicted on the company by the State of incorporation.

The delegation conveyed his country's reluctance to grant a right to diplomatic protection to the State of nationality of the majority of shareholders in a company. It could result in the discriminatory treatment of small shareholders, and it would be difficult to establish a quantitative standard for such a distinction. The delegate added that it would be difficult to reconcile the idea of the State of nationality of the majority of shareholders in a company having a "secondary" right to exercise diplomatic protection if the State of incorporation refuses or fails to do so, with the discretionary power of the company's state of incorporation.

On specific aspects of the draft articles:

The delegate supported the general thrust of Article 3, which laid down the rule that the State entitled to exercise diplomatic protection is the State of nationality. For today's world of economic globalization and migration makes it inappropriate to apply strictly a genuine link requirement between a State and its national, along the lines suggested in the *Nottebohm* case.

As regards Article 7, the delegate welcomed the commentary to this provision which clarifies that the term "refugee" is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, but is intended to cover, in addition, persons who do not strictly conform to this definition, thus leaving the scope of the definition open for further expansion.

B. Reservations to Treaties

The delegate expressed satisfaction with the draft guidelines and the accompanying commentaries provisionally adopted by the ILC at the last session. Commenting on draft guideline 2.1.8, he said that the depositary should play a strictly procedural role in compliance with the relevant provisions of the 1969 and 1986 Vienna Conventions.

As regards the questions posed by the ILC in relation to the communication of a reservation by electronic mail or facsimile, which is subsequently confirmed in writing, the delegate stated that these forms of communication are not normal practice in the Republic of Korea. Yet, he acknowledged that there might be circumstances where these forms of communication could prove useful in the light of the need of rapid communication in modern times.

On the question concerning draft guideline 2.5.X, dealing with the issue of the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, his delegation was of the view that the term “body monitoring the implementation of the treaty” requires clarification, since the competence of monitoring bodies to pronounce on the validity of a reservation depended upon the powers assigned to them by the treaty in question. Otherwise, the power to decide on the permissibility of reservations to treaties rests only with the States or international organizations, which are contracting parties to those treaties.

C. Unilateral Acts of States

Recognising the conceptual and theoretical difficulties of the topic, the delegate proposed that it might be useful to study each specific type of acts, such as promise, recognition, renunciation or protest, before elaborating on the general rules on unilateral acts of States.

As regards the new topics, his delegation noted their importance and would follow their work with great interest and enthusiasm.

9. The **Delegate of the People’s Republic of China** offered the following observations:-

A. Diplomatic Protection

The delegate stressed that while keeping an eye on the progressive development, emphasis should be laid on the codification of customary rules. The 54th Session of the ILC adopted 7 draft articles in regard to natural persons. In general, the current draft articles reflect the customary rules of international law, namely, diplomatic protection is the right of a State under international law, nationality link between the individual and the State is the prerequisite of diplomatic protection and the principle of continuous nationality, etc.

Referring to the ruling of ICJ in the *Barcelona Traction Case* on the issue of diplomatic protection for shareholders, the delegate was of the view that developing countries from Asia-Africa region need to give the Commission policy guidance as how to balance the interests between the protection of foreign investment and the prevention of multiple international litigations and undue intervention in domestic economic affairs by exercising diplomatic protection.

B. International Liability

The delegate felt that it was not an easy task to codify and progressively develop rules in this area because the existing treaty regimes have been developed primarily on regional and sectoral basis, and it involves profound interests of State Parties concerned.

Referring to the decision of the Special Rapporteur Dr. P.S.Rao to substitute “allocation of loss” for “liability” in the title of the topic, the delegate characterized this a constructive approach as allocation of loss in the final analysis concerns the relationship between economic development and environmental protection. As to the allocation of loss, the operator should bear primary liability in any loss-sharing scheme, and there should be a balance between rights and obligations of the operator, the beneficiary and the victim.

The delegate suggested that the ILC should work on general rules, so as to ensure that States have enough options to handle each case against its specific circumstances. This would reflect the general principle of peaceful settlement of international disputes.

C. Responsibility of International Organizations

It was the delegate’s view that with the proliferation of international organizations and the expansion of their fields of activities, this topic has assumed more practical meaning.

As regards the scope of work, the delegate proposed that it should focus on intergovernmental organizations, as they are subjects of international law, in addition to sovereign States. With regard to international organizations composed of non-State entities, or with non-State entities, the delegate recommended that the Commission should take a cautious approach as they are vast in number and normally governed by domestic laws of States rather than international law.

10. The **Delegate of Indonesia** offered the following remarks on:-

A. Reservation to Treaties

Welcoming the draft Guidelines on this topic, the delegate felt that its practical utility would be enhanced if it is accompanied by model clauses. It was his

delegation's position that further work of the ILC on this particular issue should be in line with the spirit of the Vienna Convention on Law of Treaties.

With regard to the role of depositary of treaties, Indonesia maintains that, according to Article 77(1) of the Vienna Convention on the Law of Treaties, they may examine the appropriateness of the form of reservations formulated by States to see if it is in conformity with the relevant rules of the Convention. A depositary should not be endowed with the right to review the permissibility of the reservation and to refuse to communicate such reservation to the State concerned.

As regards late reservations, the delegate said that it should be avoided as much as possible, in order to ensure stability and predictability of treaty relations. Late reservations is permissible, however, if none of the other contracting parties object to it.

B. Diplomatic Protection

The Indonesian delegation attaches great significance to diplomatic protection, since it might be employed as a means to advancing the protection of human rights.

In line with the ruling of the ICJ in the Barcelona Traction Case, the right of diplomatic protection vests in the State. The State must be viewed as a sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.

Diplomatic protection shall not be abused for justifying the use of force against a State. Exceptional cases of diplomatic protection must be sanctioned by the Security Council under Chapter VII of the UN Charter.

While the rule of "continuous nationality" must be used as basic standard for diplomatic protection. However, exception could be allowed in cases where individuals have changed nationality involuntarily and ended up with no diplomatic protection from any State.

C. Unilateral Acts

Recognizing that unilateral acts of States were a well established institution in international law, the delegate reiterated the feasibility of the topic for codification and progressive development and its utility for States to know what risk they ran in formulating such acts. As regards the classification of unilateral acts, the delegate stressed the need to employ the "legal effects" criterion. Consequently, there would be two major categories, namely acts whereby a State undertakes obligations and acts whereby a State reaffirms a right.

Prof.Choung Il Chee, the Representative of the ILC in his intervention said that the Special Rapporteur on Reservations to Treaties had withdrawn the controversial notion of "impermissible reservations" in draft Guideline 2.1.8.

6. The **Observer from Vietnam** in his general statement said that his country highly valued the role played by AALCO. He stated that they are ready to work with other countries in codifying and developing progressive international norms to help ensure regional and global peace and security. He mentioned that Vietnam condemned terrorism in all its forms. However he stated that they are strongly opposed to any attempt or act aimed at interfering in the internal affairs of sovereign States under the pretext of combating terrorism and pointed out that terrorism could be eliminated only by thoroughly dealing with its root causes.

He stated that the issue of jurisdictional immunities of States and their property should be governed by appropriate provisions to ensure national sovereignty while facilitating international commercial and economic activities. He thanked the Republic of Korea for inviting Vietnam as observer and allowing him to address the session.

7. The meeting was thereafter adjourned.