Agenda Item 159: Report of the International Law Commission on the work of its fifty-second session: Chapters VII and VIII

Statement by Hon'ble Mr. Anant G. Geete, MP on November 1, 2000

Mr. Chairman,

I thank Ambassador Yamada, Chairman of the International Law Commission, for the introduction to Chapters VII and VIII of the Commission's Report dealing with the topics of Reservations to Treaties and International Liability for injurious consequences arising out of acts not prohibited by international law.

Professor Alain Pellet, the Special Rapporteur on the topic of Reservation to Treaties, has once again performed an excellent job in advancing the work on the guidelines during the last session of the Commission. Thanks to his energetic efforts, the Commission was able to adopt guidelines on: Reservations made under exclusionary clauses; Unilateral statements made under an optional clause; Unilateral statements made providing for a choice between the provisions of a treaty; Alternatives to reservations; and Alternatives to interpretative declarations .

It is an important clarification that unilateral statements made under an exclusionary clause are to be treated as reservations inasmuch as an exclusionary clause is a negotiated reservation (draft guideline 1. 1.8). It is equally clear that unilateral statements made by a State or by an international organization made under an optional clause are outside the scope of the Guide to Practice (draft guideline 1.4.6). However, if a State party to an optional clause were to make a statement modifying the terms of the operation of that optional clause, then such statement may be regarded as a reservation to the legal regime incorporated in the optional cause. To this extent the interpretation of the unilateral statements affecting the operation of the optional clause in respect of the State party may be governed by the scope of the present guidelines.

However, it appears reasonable to say that a unilateral statement made by a State or an international organization, to choose between two or more provisions of the treaty in accordance with a clause contained in that treaty expressly authorizing the parties to so choose, is not a reservation. Such statements are invariably made by States parties to treaties at the time of giving their consent to be bound by the treaty. Draft guideline 1.4.7 is thus acceptable.

The contribution of the Commission on the subject of alternatives to reservations (draft guideline 1.7.1) is very impressive. The broad categorization of the procedure involved in this regard on the basis of the techniques used and the object pursued, and illustration of various procedures under each of these categories is extremely helpful. This is one area where "the imagination of legal scholars and diplomats has proved to be unlimited". We agree that where supplementary agreements were concluded among States parties to an agreement where terms of the latter are modified or restricted as between parties to the former, the same would have to be treated as an independent agreement and not as reservation.

Another guideline on alternatives to interpretative declarations (guideline 1.7.2) recognizes the very limited choice open to states in this regard. These are firstly, the insertion into the treaty of a provision on the interpretation of the treaty, and secondly, the conclusion of a supplementary agreement towards the same end. It is noted that while the first option is common in State practice the second option is expressly envisaged in Article 31 para. 3 (a) of the Vienna Conventions of 1969 and 1986.

On the topic of international liability for injurious consequences arising out of acts not prohibited under international law, we are happy to note that the Commission is now poised to complete the second reading of the topic of Prevention. The Special Rapporteur, Dr. P.S. Rao, deserves our full appreciation for completing the work on this topic right on schedule. His reports to the Commission remain consistently well researched and balanced. The revised draft articles suggested now by the Special Rapporteur did not change the content of the previous set of articles but benefited from several useful comments made by States which are essentially drafting in nature. It may be recalled that while welcoming the thrust of the articles adopted on the first reading, we pointed out that the regime of prevention of significant risk of trans-boundary harm arising out of hazardous activities could not be isolated from issues of development. Necessary funding and transfer of resources, including enhanced access to suitable technology at fair and reasonable prices to less developed countries, is essential for the success of any standard building and implementation in this regard. In response to our demand, shared by several other delegations, the Special Rapporteur now proposed a preamble to the set of draft articles. The preamble, which referred to the right to development, among other equally important principles, is thus welcome even though we would have preferred to see one or more articles on the subject of linkage between capacity building and effective implementation of the duty of due diligence.

Various questions were considered by the Commission while examining the Third Report of the Special Rapporteur and the revised set of draft articles submitted by him. On the question of the effect of the set of factors involved in an equitable balance of interests indicated in Article 11 on the duty of prevention in Article 3, it is our view that reference to those factors in the draft Convention would in no way contribute to the dilution of the obligation of prevention. It may be noted that Article 10, paragraph 2, requires the States concerned to seek solutions based on an equitable balance of interest once consultations are held on measures to be adopted in order to prevent, or to minimize the risk of trans-boundary harm. While Article 3 generally referred to the obligation of prevention, Articles 9, 10, 11 and 12 come into play when the States concerned are engaged with each other to ensure that the measures undertaken by the State of origin are mutually satisfactory and proportional to the requirement of safe management of the risk involved.

Another important question that engaged the Commission at this stage, is whether the reference to the phrase "activities not prohibited under international law" should be retained or not in Article 1. It may be recalled that this phrase became a central and defining factor in isolating various issues arising out of the conflict of lawful, but risk-bearing activities, either undertaken or authorized by States in their territories for development. The phrase was originally intended to separate the topic of international liability from the topic of State responsibility, which dealt with legal consequences arising from wrongful acts.

We are grateful to the Special Rapporteur for examining the considerations involved, but leaving it to the members of the Commission and States to indicate their positions, before any final decision could be taken. We note that the members of the Commission were equally divided on this question. While we agree that the deletion of this phrase would not materially affect the regime of prevention, which is more oriented towards the management of risk and not towards questions of liability and responsibility, we favour the view that it should be retained, if necessary, with a suitable explanation. We will have to take a view at some point of time on the further course of action needed to be taken by the Commission to complete its mandate which requires consideration of the topic of liability as distinct from the sub-topic of prevention. While we are open to the timing of the consideration of the topic of liability, we are not in favor of dropping that subject altogether from the agenda of the Commission.

While the regime of prevention essentially incorporates the duty of due diligence and engagement between States concerned in case of any significant trans-boundary risk, we are not in favor of specifically referring to the duty of due diligence in Article 3. The present formulation referring to duty to take all appropriate measures is not only satisfactory, but also more appropriate for inclusion in Article 3 as it refers to all actions that the State is required to take by way of the duty of due diligence. We are equally convinced that the draft Articles deserve to be adopted as a framework convention. For this reason, we believe that a specific regime of settlement of disputes must be left to States concerned and there is no need for a provision on settlement of disputes to be included in the draft articles. We reiterate our earlier view shared by most States that the draft Articles proposed reflect progressive development of international law, particularly Article 8 on Information to the Public and Article 15 on Non-discrimination. We also welcome the two new articles on Emergency Preparedness (Article 16) and Notification of Emergency (Article 17).