Agenda item 162: Report of the International Law Commission on the work of its fifty third session: Chapters VI (reservations to treaties), VII (diplomatic protection) and VIII (unilateral acts)

Statement by Mr. Narinder Singh, First Secretary on November 9, 2001

Mr. Chairman,

I would like to thank Mr. Peter Kabatsi, Chairman of the International Law Commission, for his detailed presentation of Chapters VI, VII and VIII of the ILC's Report on reservations to treaties, diplomatic protection and unilateral acts.

On the topic of reservations to treaties, we commend Professor A1ain Pellet, the Special Rapporteur, and all members of the ILC, for the progress achieved at this session at which the ILC adopted 12 draft guidelines dealing with the formulation of reservations and interpretative declarations, and referred to the Drafting Committee Chapter VI of the Guide containing 13 draft guidelines dealing with the form and notification of reservations and interpretative declarations. As our final comments on all the draft guidelines will have to await the recommendations of the Drafting Committee, our comments at this stage are limited to the specific issues on which the ILC has sought the views of Governments. These are: conditional interpretative declarations; late formulation of reservations and the role of the depositary.

The ILC has provisionally adopted provisions on 'simple' and conditional interpretative declarations. The difference between a 'reservation' and a simple interpretative declaration lies in the time of their formulation and effects. A reservation is made at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereas a simple interpretative declaration may be formulated at any time (draft guideline 2.4.3) unless a treaty specifies any time for that purpose. However, a conditional interpretative declaration may be formulated at the time when a reservation is formulated. With respect to interpretative declarations, we would like to first make the point that these should not be confused with reservations. Such declarations could differ from reservations both in form and in the time of their submission, in other words, they could even be oral and could be expressed in any framework. They need not be made at the time when the State is communicating its ratification or acceptance of the treaty. In effect, they do not amount to a reservation and they only state the understanding of the Party concerned of the manner and method by which the particular obligations of the treaty would be implemented or the relationship of such obligations with obligations undertaken by the Party under a different treaty or treaties.

However, we do not believe that the Guide to Practice could usefully deal with conditional interpretative declarations separately as they are only reservations in a different form. Accordingly, we endorse the view that they should not be included in the Guide. We might also in the same connection, note that the ILC should not deal with late reservations as part of the Guide under preparation. The manner in which it is now

proposed does not add anything to the present position under the Vienna Convention on the Law of Treaties if, in effect, it suggests that such reservations could be allowed if the Parties to the agreement expressly make a provision in the Treaty itself to permit such reservations, perhaps within certain time limits. Where time limits are suggested by the treaty, then, by definition, any reservation submitted within such limit would not become a late reservation. Thereafter, any reservation submitted after expiry of such time limit would amount to a revision of a treaty obligation and the same should be subject to the procedures of amendment or withdrawal from the treaty contained either in the treaty itself or under the general regime of the law of treaties.

It is also our view that the depositary should not have any role in rejecting a reservation. This is the function of the States Parties under the law of treaties. The depositary could only bring its views by way of comment to the notice of the party making the reservations and request them to reconsider their submission. They could also suggest any other alternative formulation which may not amount to a prohibited or unacceptable reservation as they understand the terms of the Convention but the final decision should always rest with the State Party wishing to submit the reservation. Further, the status and acceptability of such a reservation is thereafter left to other States Parties as provided under the law of treaties to leave scope for reciprocal engagements as long as they are consistent with the object and purpose of the treaty. In this light, where a treaty prohibits reservations altogether, a State submitting a reservation automatically rules itself out as a party to the Convention and the depositary is entitled to reject reservations as the treaty itself prohibits the same. The role of the depositary in this regard is more like an umpire and should be distinguished from the role of a facilitator with respect to reservations, which are permitted by the treaty.

Mr. Chairman,

On the topic of Unilateral Acts of States, we thank the Special Rapporteur, Mr. Victor Rodriguez Cedeno, for his fourth report which dealt with two fundamental issues: the elaboration of criteria upon which to proceed with a classification of unilateral acts and the interpretation of unilateral acts, against a set of rules of interpretation common to all unilateral acts, regardless of their material content. The Special Rapporteur emphasized on the need to reach agreement on the general issues and the structure of the topic to enable him to make progress on the draft articles.

The discussion on the topic of unilateral acts within the Commission covered several important issues and remained inconclusive. Doubts have been expressed on the feasibility of proceeding with the study. On the other hand a study on the topic to be useful, it was also suggested that it should include examination of topics like acquiescence and estoppel. The lack of sufficient State practice, absence of comments from most States and the difficulty of locating a new source of international law are no doubt problems preventing the Special Rapporteur from achieving a breakthrough on his study.

However, it must be admitted that the Special Rapporteur has succeeded in establishing the importance of the topic and the role of unilateral acts in giving rise to international rights and obligations. The material he presented in his reports and the discussion in the Commission particularly on the basis of his Fourth report has significantly contributed to the clarity of the scope and content of the law governing a unilateral act. The

Commission therefore may now consider the possibility of identifying a set of conclusions on the topic rather than proceeding with the task of preparing draft articles.

Mr. Chairman,

I now turn to the topic of diplomatic protection. At its last session, the debate at the last session of the ILC was based on the second report of the Special Rapporteur and dealt with articles 9, 10 and 11, which raised very important issues. While we appreciate the effort of the Special Rapporteur, Mr. John Dugard, for his thorough and scholarly study, we believe that the institution of diplomatic protection is better served if it is not confused or modulated to become an instrument to promote and implement human rights. The institution of diplomatic protection must continue to be the vehicle to present State-to-State claims in respect of rights and obligations involved.

On article 9 concerning the rule of continuous nationality, we believe that a State should be able to sponsor the claim of a person only when he is a national of that State at the point of time when the injury occurred. Involuntary change of nationality due to marriage, or death of the person involved or due to a succession of States, should be differentiated in treating cases of mitigation of continuous nationality from other cases where transfer of claims could occur for reasons of subrogation, assignment and adoption or naturalization. The latter cases require a more careful examination and should not be treated as cases of continuous nationality even if under some agreed and specified circumstances, which we are not aware at the moment, diplomatic protection could still be extended or allowed.

Article l0 on exhaustion of local remedies is largely acceptable. It is however agreed that individuals should exhaust the entire range of available legal remedies. 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 the standards should not give rise to questioning their effectiveness. We also suggest that the ILC should be cautious to enter into questions concerning the concept of denial of justice which may amount to proposing a new rule or amending the existing understanding of the law, as that is an exercise which is outside the scope of any statement on the principle of exhaustion of local remedies. We look forward to further work on this article by the ILC. Similarly, we look forward to further work on article 11 dealing with indirect injury .The ILC may even consider merging these two articles.

We are happy to note that five new topics have been identified by the ILC in its long term programme of work, and can go along with any agreement to narrow down the list to two topics which are generally acceptable for preparation of studies to examine their suitability.