

**STATEMENT BY DR. M. GANDHI, COUNSELLOR, ON AGENDA ITEM 156:
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF
ITS FIFTY FOURTH SESSION : CHAPTER V: RESERVATIONS TO
TREATIES, CHAPTER VI: UNILATERAL ACTS OF STATES, CHAPTER VII:
INTERNATIONAL LIABILITY, CHAPTER VIII: RESPONSIBILITY OF
INTERNATIONAL ORGANISATIONS, CHAPTER IX: FRAGMENTATION OF
INTERNATIONAL LAW ON NOVEMBER 6, 2002**

Mr. Chairman,

Having offered our comments on Diplomatic protection, last week my delegation would like to offer our comments on Chapters IV, VI to IX of the Report of the International Law Commission now.

First, we shall offer our comments on the draft guidelines on the formulations and communications of reservations and interpretative declarations adopted by the Commission accompanied by commentaries. We warmly commend the efforts of the Special Rapporteur, Professor Alain Pellet, and look forward to the successful completion of the project during the present quinquennium. My delegation wishes to state that Guidelines 2.1.1 and 2.1.2 which provide that the form of a reservation and how its formal conformations must be made in writing, are acceptable to us. We believe that this is in conformity with Article 23, paragraph 1, of the Vienna Convention on the Law of Treaties, 1969 and 1986. However, the formulation of interpretative declarations, guideline 2.4.1 does not prescribe any particular form. It is the view of my delegation that the interpretative declarations whether simple or conditional need to be in writing.

The formulation given in guideline 2.1.5 on the communication of reservations is agreeable to my delegation as it reflects the practice, which is in vogue and covered under Article 23 of 1969 Vienna Convention. The ILC specifically has sought the view of the Governments with regard to guideline 2.1.6 dealing with a procedure for communication of reservations as to whether the communication relating to a reservation to a treaty can be made by the electronic mail or by facsimile, provided it is later confirmed by diplomatic note or depositary notification. It is the view of my delegation that reservations are generally made at the time of ratification or accession and hence, in general communication of reservation forms part of the communication of the instrument of ratification or accession. Therefore, the question of communication of reservation by electronic mail or by facsimile does not seem to arise at all.

The functions of the depositories referred to in guideline 2.1.7 are generally in order. However, we are skeptical as to the specific function under the guideline 2.1.8 which provided the depository with the power to decide a reservation manifestly impermissible. We believe that 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. My delegation therefore believes that the depository should not have any role in making the judgment about the impermissibility of reservations. We also believe that the depository need not have any role in communicating the reservation indicating the legal problem raised by the reservation.

Mr. Chairman,

On the topic of Unilateral Acts we thank the Special Rapporteur, Mr. Victor Cedenó for his fifth report, which contains five chapters, which dealt with various issues such as definition of unilateral acts; rules of interpretations and classification of unilateral acts, common rule applicable to such acts; rule regarding respect for unilateral acts; the application of acts in time, and its territorial application. We have examined with great care the important and complex issues like legal effects of the unilateral acts, besides the structure of draft articles provided in chapter five.

We found that the discussion on the topic of unilateral acts within the commission covered several important issues and remained inconclusive. The debate whether unilateral acts were political or legal in nature and who should have capability to formulate unilateral acts, – only states or international organizations, liberation movements, and other legal entities too – did not reach any conclusion. The questions as to whether unilateral acts are made with the intention of producing legal effects and whether a legal phenomenon such as unilateral acts is intended to produce reciprocity have also not been conclusively answered. The idea proposed by the 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. My delegation is not agreeable to this logic.

Mr. Chairman,

The topic of unilateral acts is indeed different from more traditional concepts. It involves progressive development rather than codification. Since every unilateral act is not formulated to create a legal obligation or the expectation, it is impossible to provide a mechanism by which an inference could be drawn indicative of a legal obligation. 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.

Mr. Chairman,

Now let me turn to the topic of International Liability in case of loss from Transboundary Harm Arising out of Hazardous Activities. We believe that the study of this subject is a logical second step after the completion of the first part of the study on the prevention of Transboundary harm from hazardous activities by the Commission last year. We also welcome the establishment of a Working Group on this topic and warmly congratulate Dr. Pemmaraju Sreenivasa Rao on his appointment as Special Rapporteur for this topic. We are sure that Dr. Rao with his able leadership and outstanding experience in the field of international law would be able to guide work on this very important topic. We agree that at the preliminary stage the scope of the topic should cover the same as those included in the topic of prevention. We agree with the idea that a threshold would have to be determined to trigger the application of the regime on allocation of loss caused. We believe that any such regime should involve in addition to States, relevant actors such as operators, insurance companies and pools of industry funds. We also believe that the operators should bear the primary responsibility in any regime of allocation of loss, as it is the operator who profits out of operation and not State. Nonetheless the third party involvement force majeure, non-foreseeability and non-traceability of the harm with full certainty to the source of activity would also need to be kept in view.

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 is a debatable point. Since the topic at hand is at a preliminary stage of consideration we would require more detailed inputs on number of issues before offering our comments. We continue to pledge our support and commitment to the ongoing work of the Commission on this very crucial topic.

Mr. Chairman,

The Commission's report deals with three new topics, namely, Responsibility of International Organizations; Fragmentation of International Law; difficulties arising from the diversification and expansion of International Law and other decisions and conclusions of the Commission's report. We welcome the appointment of Professor Giorgio Gaja, the Special Rapporteur for the topic of Responsibility of International Organizations. We agree in principle that the concept of responsibility should encompass the responsibility which international organisations incur for their wrongful acts. We also welcome the cautious approach taken by the Working Group to limit its study to inter-governmental

organisations. We have noted with satisfaction that the Working Group considered several specific issues, namely, questions of attribution; questions of responsibility of Member States for conduct that is attributed to international organisations; other questions arising of responsibility for international organisations; question of content and implementation of international responsibility and the settlement of disputes and their relevant practice to be taken into consideration. We look forward to the Special Rapporteur's preliminary report next year.

I now turn to the topic of "Fragmentation of International Law; difficulties arising from diversification and expansion of international law". We welcome the establishment of a study Group established under the Chairmanship of Professor Bruno Simma. We believe that this Study Group would provide a response to the growing concern about the possibility of negative implications arising from expansion and diversification of international law. This is definitely an unusual function of the commission which is generally involved in the codification or the progressive development of international law. A non-exhaustive list of topics provided in its recommendations would be topics which are in one way or other dealt by the Commission in earlier point of time. We welcome the proposed first step of the Chairman of the Study Group to study "the function and scope of the *lex specialis* rule and the question of "self-contained-regimes". We believe that the Study Group should avoid duplication of work already done or being under consideration by another Working Group.

Thank you Mr. Chairman.