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2003

Volume II
Part One

Documents of the fifty-fifth session

UNITED NATIONS



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NOTE

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CONTENTS

	<i>Page</i>
Abbreviations	iv
Note concerning quotations	iv
Filling of casual vacancies in the Commission (article 11 of the statute) (agenda item 1)	
<i>Document A/CN.4/527 and Add.2.</i> Note by the Secretariat	1
Diplomatic protection (agenda item 3)	
<i>Document A/CN.4/530 and Add.1.</i> Fourth report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	3
Reservations to treaties (agenda item 4)	
<i>Document A/CN.4/535 and Add.1.</i> Eighth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	31
Unilateral acts of States (agenda item 5)	
<i>Document A/CN.4/534.</i> Sixth report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur	53
International liability for injurious consequences arising out of acts not pro- hibited by international law (international liability in case of loss from transboundary damage arising out of hazardous activities) (agenda item 6)	
<i>Document A/CN.4/531.</i> First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur.....	71
Responsibility of international organizations (agenda item 7)	
<i>Document A/CN.4/532.</i> First report on the responsibility of international organi- zations, by Mr. Giorgio Gaja, Special Rapporteur	105
Shared natural resources (agenda item 9)	
<i>Document A/CN.4/533 and Add.1.</i> First report on shared natural resources, by Mr. Chusei Yamada, Special Rapporteur.....	117
Checklist of documents of the fifty-fifth session	139

ABBREVIATIONS

BHP	Broken Hill Proprietary Company
BIT	bilateral investment treaty
CAHDI	Committee of Legal Advisers on Public International Law
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
ESCWA	United Nations Economic and Social Commission for Western Asia
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GNP	gross national product
IAEA	International Atomic Energy Agency
IAH	International Association of Hydrogeologists
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IMO	International Maritime Organization
IOPC	International Oil Pollution Compensation
ISARM	Internationally Shared (Transboundary) Aquifer Resources Management
NGO	non-governmental organization
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OPOL	Offshore Pollution Liability Agreement
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
SDR	special drawing rights
UNCC	United Nations Compensation Commission
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WMO	World Meteorological Organization

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<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
LGDJ	Librairie générale de droit et de jurisprudence
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>P.C.I.J., Series C</i>	PCIJ, <i>Pleadings, Oral Arguments, Documents</i> (Nos. 52–88: beginning in 1931)
RGDIP	<i>Revue générale de droit international public</i> (Paris)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text. Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is www.un.org/law/ilc/index.htm.

**FILLING OF CASUAL VACANCIES IN THE COMMISSION
(ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

DOCUMENT A/CN.4/527 and Add.2

Note by the Secretariat

[Original: English]
[6 November 2002 and 9 June 2003]

1. Following the death of Mr. Valery Kuznetsov, the election of Mr. Bruno Simma and Mr. Peter Tomka to ICJ on 21 October 2002, and the resignation of Mr. Robert Rosenstock, effective 7 June 2003, four seats have become vacant in the Commission.

2. In this case, article 11 of the statute of the Commission is applicable. It prescribes that:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The terms of the four members to be elected by the Commission will expire at the end of 2006.

DIPLOMATIC PROTECTION

[Agenda item 3]

DOCUMENT A/CN.4/530 and Add.1

Fourth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur

[Original: English/French]
[13 March and 6 June 2003]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	3
Works cited in the present report	3
<i>Chapter</i>	<i>Paragraphs</i>
I. DIPLOMATIC PROTECTION OF CORPORATIONS AND SHAREHOLDERS	1–48 6
A. Introduction	1–2 6
B. The <i>Barcelona Traction</i> case	3–29 6
C. Options open to the Commission	30–48 11
II. PROPOSED ARTICLES ON DIPLOMATIC PROTECTION OF CORPORATIONS AND SHAREHOLDERS	49–128 15
A. Article 17	50–58 15
B. Article 18	59–91 17
C. Article 19	92–96 23
D. Article 20 (Continuous nationality of corporations)	97–109 24
E. Article 21 (<i>Lex specialis</i>)	110–116 26
F. Article 22 (Legal persons)	117–128 27

Multilateral instruments cited in the present report

	<i>Source</i>
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Convention on the settlement of investment disputes between States and nationals of other States (Washington, 18 March 1965)	United Nations, <i>Treaty Series</i> , vol. 575, No. 8359, p. 159; and ILM, vol. IV, No. 3 (May 1965), p. 532.

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CHAPTER I

Diplomatic protection of corporations and shareholders

A. Introduction*

1. The three previous reports submitted by the present Special Rapporteur,¹ and considered by the International Law Commission, have dealt with the diplomatic protection of natural persons and the exhaustion of local remedies rule. Although the subject of diplomatic protection of legal persons has been raised from time to time in the course of the debates in the Commission, no direct attention has been given to the subject. In the fifty-fourth session of the Commission in 2002, an informal consultation was, however, held on the diplomatic protection of corporations.²

2. The present report is devoted entirely to the subject of the diplomatic protection of corporations and of shareholders in such corporations.

B. The *Barcelona Traction* case

3. The diplomatic protection of corporations and shareholders has been addressed in many judicial decisions. However, one decision dominates all discussion of this topic—the case concerning the *Barcelona Traction, Light and Power Company, Limited*.³ No serious attempt can be made to formulate a rule or rules on this subject without a full consideration of the ICJ decision, rendered in 1970, its implications and the criticisms to which it has been subjected. The present report, therefore, begins with a consideration of *Barcelona Traction*.

1. THE ICJ JUDGMENT

4. The *Barcelona Traction, Light and Power Company, Limited* was a company incorporated in 1911 in Toronto, Canada, where it had its head office, which carried on business in Spain. Some years after the First World War, *Barcelona Traction*'s share capital came to be held largely by Belgian nationals—natural or legal persons. At the critical time it is estimated that 88 per cent of the shares were held by Belgian nationals. As a result of a number of actions taken by the Spanish authorities, the company was rendered economically defunct. Belgium, the State of nationality of the majority shareholding, and not Canada, the State of nationality of the corporation, then instituted proceedings against Spain for reparation. Spain raised four preliminary objections to the Belgian claim, two

of which were dismissed in 1964,⁴ while the other two were joined to the merits. One of the objections joined to the merits concerned the right of Belgium to exercise diplomatic protection on behalf of its shareholders in a company incorporated in Canada. It is the ICJ decision upholding this preliminary objection that forms the subject of the present report.

5. ICJ emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in “a limited liability company whose capital is represented by shares”.⁵ Such companies are characterized by a clear distinction between company and shareholders.⁶ Whenever a shareholder's interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for “although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”.⁷ Only where the act complained of is aimed at the direct rights of the shareholders does a shareholder have an independent right of action.⁸ Such principles governing the distinction between company and shareholders are derived from municipal law and not international law.⁹

6. Guided by these general principles of law found in municipal legal systems, ICJ expounded the rule that the right of diplomatic protection in respect of an injury to a corporation belongs to the State under the laws of which the corporation is incorporated and in whose territory it has its registered office,¹⁰ and not to the national State(s) of the shareholders of the corporation. In so finding, the Court declined to follow both judicial decisions dealing with the characterization of enemy companies in time of war¹¹ and State practice in respect of lump-sum agreements,¹² which suggest that there might be a rule in favour of lifting the corporate veil in order to allow the State(s) of nationality of shareholders to exercise diplomatic protection on their behalf. Although the Court acknowledged that bilateral or multilateral investment treaties might confer direct protection on shareholders¹³ and that there was a body of general arbitral jurisprudence arising from the interpretation of such treaties which give support to shareholders' claims,¹⁴ this did not provide evidence of a rule of customary international law in favour of the right of the State(s) of nationality of shareholders to exercise diplomatic protection on their

* The Special Rapporteur wishes to acknowledge, with gratitude, the assistance in the preparation of this report of Mr. Larry Lee and Ms. Elina Kreditor, student interns from New York University, Ms. Kym Taylor of Cambridge University and Ms. Raelene Sharp of Leiden University.

¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, p. 205; *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514, p. 97; *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1, p. 49.

² *Yearbook ... 2002*, vol. II (Part Two), p. 50, para. 113.

³ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

⁴ *Ibid.*, *Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6.

⁵ *Ibid.*, *Second Phase, Judgment, I.C.J. Reports 1970*, p. 34, para. 40.

⁶ *Ibid.*, para. 41.

⁷ *Ibid.*, p. 35, para. 44.

⁸ *Ibid.*, p. 36, para. 47.

⁹ *Ibid.*, p. 37, para. 50.

¹⁰ *Ibid.*, p. 42, para. 70, and p. 46, para. 88.

¹¹ *Ibid.*, p. 39, para. 60.

¹² *Ibid.*, p. 40, para. 61.

¹³ *Ibid.*, p. 47, para. 90.

¹⁴ *Ibid.*, p. 40, para. 63.

behalf. All these practices and treaties were dismissed as *lex specialis*.

7. ICJ accepted that the State(s) of nationality of shareholders *might* exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation¹⁵—which was not the case with Barcelona Traction; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level was through their State(s) of nationality¹⁶—which was not the case with Barcelona Traction. (Consequently, the Court declined to give endorsement to this exception.)¹⁷

8. Suggestions that the protection of shareholders might be allowed on grounds of equity were dismissed by ICJ in the circumstances of the case before it.¹⁸ The Court also declined to recognize the existence of a secondary right of diplomatic protection attaching to the State(s) of nationality of shareholders where, as in the present case,¹⁹ the State of incorporation declined to exercise diplomatic protection on behalf of the company.²⁰

9. The argument that the ICJ decision in the *Nottebohm* case,²¹ requiring the existence of a genuine link between an injured individual and the State of nationality seeking to protect him, might be applied to corporations, with the consequence that Belgium, with which Barcelona Traction was most genuinely linked by virtue of its nationals holding 88 per cent of the shares in the company, was the appropriate State to exercise diplomatic protection, was not accepted. The Court did not, however, dismiss the application of the genuine link test to corporations, as it held that *in casu* there was “a close and permanent” link between Barcelona Traction and Canada as it had its registered office there and had held its board meetings there for many years.²²

10. In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, ICJ was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf.²³ Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise

shareholders of many nationalities.²⁴ In this connection the Court indicated that if the shareholder's State of nationality was empowered to act on his behalf, there was no reason why every individual shareholder should not enjoy such a right.²⁵ Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.²⁶

2. SEPARATE OPINIONS

11. Although the Government of Belgium's claim was dismissed by 15 votes to 1 (the Belgian judge *ad hoc*, Riphagen), there was widespread disagreement among judges over the reasoning of ICJ in *Barcelona Traction*. This was evidenced by the fact that 8 of the 16 judges gave separate opinions, of which 5 (including Judge *ad hoc* Riphagen) supported the right of the State of nationality of the shareholders to afford diplomatic protection.

12. Judge Tanaka found that “customary international law does not prohibit protection of shareholders by their national State even when the national State of the company possesses the right of protection in respect of the latter”.²⁷ He added that:

It is true that there is no rule of international law which allows two kinds of diplomatic protection to a company and its shareholders respectively, but there is no rule of international law either which prohibits double protection.²⁸

Although Judges Fitzmaurice, Jessup and Gros did not go as far as Judge Tanaka, they were patently in disagreement with the philosophy and reasoning of the majority judgement and held that in certain circumstances, particularly where the State of nationality of the corporation was the wrongdoing State,²⁹ the State of nationality of the shareholders had the right to exercise diplomatic protection. Judge Gros moreover accused ICJ of being blind to the realities of modern investment:

The foundation of a rule of economic international law must abide by economic realities. The company's link of bare nationality may not reflect any substantial economic bond. As between the two criteria the judge must choose the one on the test of which the law and the facts coincide: it is the State whose national economy is in fact adversely affected that possesses the right to take legal action.³⁰

13. In contrast, Judges Morelli,³¹ Padilla Nervo³² and Ammoun³³ were not only supportive of the ICJ reasoning, but rejected suggestions that the State of nationality of the shareholders might take action where the State of nationality of the corporation was the wrongdoing State. Judge Padilla Nervo spoke for developing States when he declared:

¹⁵ *Ibid.*, pp. 40–41, paras. 64–68.

¹⁶ *Ibid.*, p. 48, para. 92.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, paras. 92–93, and p. 50, para. 101.

¹⁹ For a number of reasons, including the absence of a treaty between Canada and Spain conferring jurisdiction on ICJ, Canada declined to institute proceedings on behalf of Barcelona Traction (*ibid.*, p. 45, paras. 81–83).

²⁰ *Ibid.*, p. 49, para. 96.

²¹ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

²² *I.C.J. Reports 1970* (see footnote 3 above), p. 42, paras. 70–71.

²³ *Ibid.*, p. 35, para. 43, p. 46, paras. 86–87, and p. 50, para. 99.

²⁴ *Ibid.*, pp. 48–49, paras. 94–96.

²⁵ *Ibid.*, p. 48, paras. 94–95.

²⁶ *Ibid.*, p. 38, para. 53, and p. 50, para. 98.

²⁷ *Ibid.*, p. 134. See also page 130.

²⁸ *Ibid.*, p. 131.

²⁹ *Ibid.*, Judge Fitzmaurice, pp. 72–75; and Judge Jessup, pp. 191–194.

³⁰ *Ibid.*, p. 279.

³¹ *Ibid.*, pp. 240–241.

³² *Ibid.*, p. 257.

³³ *Ibid.*, p. 318.

It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from governments who appear to be always ready to back at any rate their national shareholders.³⁴

3. CRITICISM OF THE ICJ JUDGMENT

14. The ICJ decision in *Barcelona Traction* has been subjected to a wide range of criticisms. The following are some of the criticisms that should be taken into consideration in the search for the formulation of a satisfactory rule on the subject of diplomatic protection of corporations and/or shareholders.

15. The rule expounded in *Barcelona Traction* is derived from general principles of corporation law recognized by civilized nations rather than from customary international law. Had ICJ had regard to State practice expressed in bilateral and multilateral investment treaties and lump-sum settlement agreements and to arbitral decisions interpreting such treaties, instead of dismissing such treaties as *lex specialis*, it might have found sufficient evidence of a rule of customary international law in favour of shareholders' claims. According to Lillich, the Court summarily rejected "as irrelevant the bulk of traditional international practice governing shareholder claims" and missed "an excellent opportunity to place its judicial imprimatur upon a developing rule of customary international law with respect to shareholder claims" by opting "to refer exclusively to the municipal law of corporations, under which a wrong inflicted upon a corporation generally does not give rise to an enforceable right in the hands of its shareholders".³⁵ In directing this criticism at the Court, Lillich echoed the statement of Judge Wellington Koo when the *Barcelona Traction* case first came before ICJ in 1964:

[T]here is seen a substantial body of evidence of State practice, treaty arrangements and arbitral decisions to warrant the affirmation of the inexplicit existence of a rule under international law recognizing such a right of protection on the part of any State of its nationals, shareholders in a foreign company, against another wrongdoing State, irrespective of whether that other State is the national State of the company or not, for injury sustained by them through the injury it has caused to the company.³⁶

16. *Barcelona Traction* established "an unworkable standard".³⁷ In practice States will not exercise diplomatic protection merely on the basis of incorporation, that is, in the absence of some genuine connection arising from substantial national shareholding in the corporation. It is unrealistic to expect a State to expend time, energy, money and political influence on a corporation injured abroad when it has no material connection with the corporation. Conversely, it is unrealistic to expect a respondent

State to accept such a minor link as incorporation as constituting the "genuine link" necessary to confer standing to present an international claim. This explains why in practice many States have indicated that they will not exercise diplomatic protection on behalf of a corporation with which they do not have a connection³⁸ in the nature of economic control (dominant shareholding or beneficial ownership), *siège social* (headquarters or centre of administration) or a combination of both. The practice of the post-*Barcelona Traction* era shows that States adopt a variety of approaches in deciding whether to espouse the claim of a company against another State.³⁹ Some, such as the United Kingdom of Great Britain and Northern Ireland⁴⁰ and the United States of America,⁴¹ require a real and substantial connection with the corporation, while others emphasize the *siège social* or economic control. In summary, tests such as control, *siège social* or majority shareholding, which emphasize the genuine connection between the State exercising diplomatic protection and the company, enjoy greater support than the slender and neutral link of incorporation.

17. Support for the criticism in the preceding paragraph is to be found in the subsequent practice of States in respect of lump-sum agreements and investment treaties. In their interim reports to the Committee on Diplomatic Protection of Persons and Property of the International Law Association at its seventieth conference in New Delhi in 2002,⁴² both Bederman and Kokott stressed that States have deliberately regulated their affairs in order to avoid the ICJ ruling in *Barcelona Traction*.

18. In his interim report on, "Lump sum agreements and diplomatic protection", Bederman shows that the eligibility of corporations to claim under such agreements post-*Barcelona Traction* is based more frequently on the whereabouts of the headquarters of the company (*siège social*), control or preponderance of shareholding than on mere incorporation.⁴³ Moreover, shareholders are generally allowed to claim in terms of such agreements which sanction the settlements of claims for property, rights, interests and claims adversely affected by the respondent State.⁴⁴ This leads him to conclude that "[t]he eligibility standards for corporations and their shareholders appear to have been relaxed substantially, and so the substantive holding in *Barcelona Traction* may now well be cast in doubt (at least as reflected in lump sum agreements)".⁴⁵

³⁴ *Ibid.*, p. 248.

³⁵ "The rigidity of Barcelona", pp. 525 and 531. See also Higgins, "Aspects of the case concerning the Barcelona Traction, Light and Power Company, Ltd.", p. 331; and "Round table—toward more adequate diplomatic protection of private claims: 'Aris Gloves', 'Barcelona Traction', and beyond", p. 345 (Caffisch), p. 343 (Domke) and p. 344 (Weston).

³⁶ *I.C.J. Reports 1964* (see footnote 4 above), p. 63.

³⁷ Metzger, "Nationality of corporate investment under investment guaranty schemes: the relevance of Barcelona Traction", p. 541.

³⁸ *Ibid.* See the table attached to Metzger's article, pp. 542–543, showing that in order for a corporation to be eligible for investment guarantee schemes, States usually require some substantial link between State and corporation.

³⁹ Brownlie, *Principles of Public International Law*, 5th ed., pp. 487–489.

⁴⁰ See the British rules applying to international claims of 1985, reproduced in Warbrick, "Protection of nationals abroad", pp. 1006–1007 (comment on rule IV).

⁴¹ See the statement of the United States on 1 November 2002, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 23rd meeting (A/C.6/57/SR.23), paras. 50–56.

⁴² International Law Association, *Report of the Seventieth Conference held in New Delhi, 2–6 April 2002*, p. 228.

⁴³ *Ibid.*, pp. 252–253.

⁴⁴ *Ibid.*, pp. 253–255.

⁴⁵ *Ibid.*, p. 258.

19. Kokott's interim report on "The role of diplomatic protection in the field of the protection of foreign investment" adopts a similar approach. She shows that the discretionary nature of diplomatic protection and the restrictive rule laid down in *Barcelona Traction* have prompted States to resort to bilateral investment treaties (BITs),⁴⁶ which allow investors to settle their investment disputes with the host State before *ad hoc* arbitration tribunals or ICSID, established under the Convention on the settlement of investment disputes between States and nationals of other States. She concludes:

There is no need to go so far as to say that DP [diplomatic protection] and the rules governing the protection of FI [foreign investment] exclude each other. However, the result might well appear disappointing from the perspective of somebody who wants to argue that DP should play a strong role in today's law of foreign investment. The analysis of the BIT regime as well as multilateral approaches has shown that DP does not play a major role among the available means of dispute resolution. Generally speaking, the agreements, both bilateral and multilateral, prefer alternative dispute resolution procedures and allow investors to access international arbitration bodies. This way gives them standing under international law and circumvents DP. This report shows that this development offers a number of advantages, compared to the need to resort to a home state's willingness (or ability) to exercise DP.

There appears to be a strong sentiment of distrust towards DP—as regards its political uncertainties, its discretionary nature and its ability to protect foreign shareholders under the ICJ's doctrine. What is the consequence? There appear to be two different options. One of them might be a call for a change of the rules governing DP with the aim of meeting the demands of investors. However, this option does not seem to be realistic because it neglects the existence of a network of bilateral agreements, accompanied by multilateral agreements. Sooner or later, a successor of the MAI [Multilateral Agreement on Investment] will come into existence. Based on these considerations, a second option is more realistic: to accept that, in the context of foreign investment, the traditional law of DP has been to a large extent replaced by a number of treaty-based dispute settlement procedures.⁴⁷

20. The handling by ICJ of the relevance of the *Nottebohm* case⁴⁸ to the diplomatic protection of companies is far from satisfactory.⁴⁹ On the one hand, the judgment appears to reject the application of the "genuine link" to companies by its findings that "in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance"⁵⁰ and that there was no analogy between the issues raised in *Barcelona Traction* and *Nottebohm*. On the other hand, the Court examines the links between *Barcelona Traction* and Canada—incorporation, registered office, accounts, share registers, board meetings and listing with the Canadian tax authorities—and concludes that "a close and permanent connection has been established" between Canada and the company.⁵¹

21. The relevance of the *Nottebohm* "genuine link" to corporations is confirmed by the separate opinions

of Judges Fitzmaurice,⁵² Jessup,⁵³ Padilla Nervo⁵⁴ and Gros.⁵⁵ On the basis of the ICJ finding that there was "a close and permanent connection"⁵⁶ between Canada and the company, Mann⁵⁷ has suggested that the Court found that the State of the shareholders' nationality may have a right of protection where the State of incorporation lacks the capacity to act on behalf of the company because of an insufficient connection with the company.

22. ICJ in *Barcelona Traction* acknowledged that the shareholders' national State might extend diplomatic protection to it in three situations: first, where the direct rights of the shareholders are infringed;⁵⁸ secondly, where the company ceases to exist;⁵⁹ and thirdly, possibly, where the State of nationality of the corporation is the wrongdoing State.⁶⁰ None of these exceptions to the rule it expounds in favour of diplomatic protection by the State of incorporation of the company is properly considered.⁶¹ Weaknesses in the Court's reasoning on this matter will be considered below when rules allowing the diplomatic protection of shareholders are considered.

23. Finally, ICJ fails to justify adequately its reasoning on issues of policy described above in paragraph 10. Why should shareholders that invest in a corporation doing business abroad be expected to bear the risk that their investment will fail? The existence of bilateral investment treaties designed to protect foreign investment seems to contradict this philosophy.⁶² Why should the prospect of a multiplicity of claims by shareholders against a wrongdoing State create an atmosphere of confusion and insecurity in international economic relations?⁶³ Why should the rules of dual protection applicable to individuals and to international organizations⁶⁴ not apply equally to corporations and shareholders? It is not sufficient simply to argue that there is no analogy between the two.⁶⁵

4. THE AUTHORITY OF *BARCELONA TRACTION*

24. Decisions of ICJ are not binding on the Commission. Although there is an understandable reluctance on the part of the Commission to reject such decisions, it must be recalled that it has in recent years severely limited the scope of a major decision of over 40 years' standing—the *Nottebohm* case⁶⁶—and expressly rejected another of

⁵² *Ibid.*, p. 80.

⁵³ *Ibid.*, p. 186.

⁵⁴ *Ibid.*, p. 254.

⁵⁵ *Ibid.*, p. 281.

⁵⁶ *Ibid.*, p. 42, para. 71.

⁵⁷ "The protection of shareholders' interests in the light of the *Barcelona Traction* case", pp. 264, 269 and 273.

⁵⁸ *I.C.J. Reports 1970* (see footnote 3 above), p. 36, para. 47.

⁵⁹ *Ibid.*, pp. 40–41, paras. 64–68.

⁶⁰ *Ibid.*, p. 48, para. 92.

⁶¹ Mann, "The protection of shareholders' interests ...", pp. 265–272.

⁶² See *I.C.J. Reports 1970* (footnote 3 above), p. 275, separate opinion of Judge Gros.

⁶³ *Ibid.*, p. 49, para. 96.

⁶⁴ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 185.

⁶⁵ *I.C.J. Reports 1970* (see footnote 3 above), p. 38, para. 53.

⁶⁶ See footnote 21 above; and *Yearbook ... 2002* (footnote 2 above), pp. 69–70, para. (6) of the commentary to article 3 [5].

⁴⁶ *Ibid.*, p. 265.

⁴⁷ *Ibid.*, pp. 276–277; see also Murphy, "The *ELSI* case: an investment dispute at the International Court of Justice", p. 392.

⁴⁸ See footnote 21 above.

⁴⁹ Brownlie, *op. cit.*, 5th ed., pp. 490–491; and Watts, "Nationality of claims: some relevant concepts", pp. 432–433.

⁵⁰ *I.C.J. Reports 1970* (see footnote 3 above), p. 42, para. 70.

⁵¹ *Ibid.*, para. 71.

over 30 years' standing—the *South West Africa* case.⁶⁷ *Barcelona Traction* is not sacrosanct, untouchable. The Commission may therefore, after careful consideration, decide not to follow it. Such a decision might be based on criticisms of the kind described above levelled at the decision; on the apparent failure of the Court thoroughly to debate the issues involved;⁶⁸ or on the fact that the Court was not codifying international law but resolving a particular dispute, with the result that its “rule” is to be seen as a judgement on particular facts and not as a general rule applicable to all situations. The last reason for declining to follow *Barcelona Traction* receives some support from the decision of an ICJ Chamber itself in the *ELSI* case.⁶⁹

5. THE *ELSI* CASE

25. Although *Barcelona Traction* rules that a State whose nationals hold the majority of shares in a company may not present a claim for damage suffered to the company itself, in the *ELSI* case, an ICJ Chamber allowed the United States to bring a claim against Italy in respect of damage suffered by an Italian company whose shares were wholly owned by two American companies. (The Chamber, however, rejected the United States claim on the merits, in that on the facts of the case Italy's conduct did not constitute a breach of the treaty of friendship, commerce and navigation⁷⁰ in question.) Surprisingly, the Chamber avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction* despite the fact that Italy formally objected that the company whose rights were alleged to have been violated was Italian, and the United States sought to protect the rights of shareholders in the company.⁷¹

26. That *Barcelona Traction* was relevant to *ELSI* was emphasized by Judge Oda who, in a separate opinion, argued that the American companies which owned the Italian company were mere shareholders of the Italian company, with the result that the United States could not offer them diplomatic protection.⁷² It is generally agreed that the ICJ Chamber by its silence did not accept this argument—despite the fact that it is based on *Barcelona Traction*.⁷³

⁶⁷ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6. See *Yearbook ... 2001*, vol. II (Part Two), commentary to article 48, p. 127, footnote 725.

⁶⁸ See the criticism of the discussions in the Court in *Barcelona Traction* in the separate opinion of Judge Fitzmaurice, *I.C.J. Reports 1970* (footnote 3 above), p. 86, para. 37.

⁶⁹ *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

⁷⁰ Treaty of friendship, commerce and navigation between the United States of America and Italy (Rome, 2 February 1948), United Nations, *Treaty Series*, vol. 79, No. 1040, p. 171.

⁷¹ *I.C.J. Reports 1989* (see footnote 69 above), p. 64, para. 106, and p. 79, para. 132.

⁷² *Ibid.*, pp. 87–88.

⁷³ See the dissenting opinion of Judge Schwebel, *ibid.*, p. 94; Jennings and Watts, eds., *Oppenheim's International Law*, p. 520; Murphy, *loc. cit.*, p. 420; McCorquodale “Expropriation rights under a treaty—exhausted and naked”, p. 199; Kubiawski, “The case of Elettronica Sicula S.p.A.: toward greater protection of shareholders' rights in foreign investments”, p. 234; and Mann, “Foreign investment in the International Court of Justice: the *ELSI* case”, p. 100.

27. The failure of *ELSI* to distinguish *Barcelona Traction* can be explained on a number of grounds.⁷⁴ First, the ICJ Chamber was not here concerned with an evaluation of customary international law (as in *Barcelona Traction*), but with the interpretation of a treaty of friendship, commerce and navigation⁷⁵ which, like a bilateral investment treaty, provided for the protection of United States shareholders abroad. Had the Chamber found the United States claim inadmissible on the ground that the United States might not protect American companies holding shares in an Italian company, this would have imperilled the value of bilateral investment treaties which, *inter alia*, aim to protect national shareholders that control companies incorporated in the host State of the investment.⁷⁶ Secondly, this case possibly involved the infringement of the direct rights of shareholders—an exception recognized by *Barcelona Traction*.⁷⁷ Thirdly, it might have been argued that this was a case in which the company had ceased to exist because it had gone into liquidation—another exception to the general rule recognized by *Barcelona Traction*. Fourthly, it may be contended⁷⁸ that in this case the Chamber gave an affirmative answer to the question left open in *Barcelona Traction*, whether the shareholders' national State might protect them when the company was injured by the State of incorporation.

28. Although the failure of *ELSI* to apply the rule expounded in *Barcelona Traction* may be explained, the incontestable fact is that the ICJ Chamber declined to follow the rule, reasoning and philosophy of *Barcelona Traction*. Understandably, it has been hailed as a retreat from *Barcelona Traction*.⁷⁹

6. *BARCELONA TRACTION* THIRTY YEARS ON

29. *Barcelona Traction* is undoubtedly a significant judicial decision, albeit one whose significance is not matched either by the persuasiveness of its reasoning or by its concern for the protection of foreign investment. The Commission might therefore feel compelled to depart from it and to formulate a rule that accords more fully with the realities of foreign investment and encourages foreign investors to turn to the procedures of diplomatic protection for redress rather than to the protection of bilateral investment treaties. On the other hand, it must be acknowledged that, despite its shortcomings, *Barcelona Traction* is today, 30 years on, widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations, but as a true reflection of customary international law. The practice of States in the diplomatic protection of corporations is today guided by *Barcelona Traction*.⁸⁰ This was clearly demonstrated by

⁷⁴ See, generally, on this decision, Stern, “La protection diplomatique des investissements internationaux: de *Barcelona Traction* à *Elettronica Sicula* ou les glissements progressifs de l'analyse”.

⁷⁵ See footnote 70 above.

⁷⁶ Gill, “*Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*”, pp. 257–258. See also Mann, “Foreign investment ...”.

⁷⁷ *I.C.J. Reports 1970* (see footnote 3 above), p. 36, para. 47. See also on this, Lowe, “Shareholders' rights to control and manage: from *Barcelona Traction* to *ELSI*”. See further Watts, *loc. cit.*, p. 435, footnote 56.

⁷⁸ Dinstein, “Diplomatic protection of companies under international law”, p. 512.

⁷⁹ Murphy, *loc. cit.*, pp. 419–420.

⁸⁰ See the rules issued by the British Government in 1987, published in Warbrick, *loc. cit.*. Rule IV, in providing that the United

the response of delegates in the Sixth Committee to the question whether the rule in *Barcelona Traction* should be reconsidered.⁸¹ Of the 15 delegates who spoke on this subject, only one⁸² suggested that *Barcelona Traction* should be reconsidered. Regrettably all but one of the delegates who spoke on this subject represented developed States. However, it is unlikely that developing States would show much enthusiasm for a rule replacing *Barcelona Traction* that accords more protection to shareholders of foreign companies.⁸³ The writings of “the most highly qualified publicists”, to use the language of Article 38, paragraph 1 (d) of the ICJ Statute, do not, in general, display an uncritical acceptance of *Barcelona Traction*. They do, however, treat it as the seminal decision on the diplomatic protection of corporations, the starting point of any discussion on the subject.⁸⁴

C. Options open to the Commission

30. Before proposing the formulation of a rule or rules on the subject of the nationality of corporations and the diplomatic protection of companies and/or shareholders,

Kingdom may take up the claim of a company incorporated in the United Kingdom, expressly states, in the commentary thereto, that it is founded on *Barcelona Traction* (p. 1007).

⁸¹ The following questions were put to States on this subject:

“In the *Barcelona Traction* case, ICJ held that the State in which a company is incorporated and where the registered office is located is entitled to exercise diplomatic protection on behalf of the company. The State of nationality of the shareholders is not entitled to exercise diplomatic protection, except, possibly, where:

“(a) The shareholders’ own rights have been directly injured;

“(b) The company has ceased to exist in its place of incorporation;

“(c) The State of incorporation is the State responsible for the commission of an internationally wrongful act in respect of the company.

“Should the State of nationality of the shareholders be entitled to exercise diplomatic protection in other circumstances? For instance, should the State of nationality of the majority of shareholders in a company have such a right? Or should the State of nationality of the majority of the shareholders in a company have a secondary right to exercise diplomatic protection where the State in which the company is incorporated refuses or fails to exercise diplomatic protection?”

(*Yearbook ... 2002* (see footnote 2 above), p. 13, para. 28)

⁸² The Netherlands described the decision in *Barcelona Traction* as “not entirely satisfactory” and urged the grant of a subsidiary right of protection to shareholders (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 16th meeting* (A/C.6/57/SR.16), paras. 54 and 56). See also, generally, Germany, *ibid.*, 20th meeting (A/C.6/57/SR.20), paras. 25–26. The United States, while supporting *Barcelona Traction*, stated that it takes the nationality of shareholders into account in deciding whether to exercise diplomatic protection, and urged that shareholders be protected where the State of nationality is itself responsible for injury to the company (*ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 52).

⁸³ Abi-Saab, “The international law of multinational corporations: a critique of American legal doctrines”, pp. 121–122.

⁸⁴ Jennings and Watts, eds., *op. cit.*, pp. 517–522; Daillier and Pellet, *Droit international public* (Nguyen Quoc Dinh), p. 773; Shaw, *International Law*, p. 566; Brownlie, *op. cit.*, 5th ed., pp. 491–495; Koopmans, *Internationaal Publiekrecht in Vogelvlucht*, p. 116; Shearer, *Starke’s International Law*, pp. 286–287; and Caffisch, “The protection of corporate investments abroad in the light of the *Barcelona Traction* case”.

the Special Rapporteur considers it necessary to clarify the options open to the Commission. They are:

(a) The State of incorporation, subject to the exceptional circumstances envisaged by *Barcelona Traction* for the protection of shareholders;

(b) The State in which the company is incorporated and with which it has a genuine connection (usually in the form of economic control), again subject to the exceptional cases envisaged by *Barcelona Traction* for the protection of shareholders;

(c) The State of the *siège social* or domicile;

(d) The State in which the economic control of the company is located;

(e) Both the State of incorporation and the State of economic control. This would permit a form of dual protection similar to that which applies in the case of dual nationality of natural persons;

(f) The State of incorporation in the first instance, with the State of economic control enjoying a secondary right of protection in the event of failure on the part of the State of incorporation to exercise protection;

(g) The States of nationality of all shareholders.

These options will be considered in greater detail below.

1. OPTION (a): THE STATE OF INCORPORATION

31. The State in which the company is incorporated alone has the right to exercise diplomatic protection in respect of an injury to the company, subject to the exceptions expounded in *Barcelona Traction* in which the State of nationality of the shareholders of the company may exercise diplomatic protection on their behalf. This option may be described as the rule in *Barcelona Traction*. The advantages and disadvantages of such a rule have been considered above.

2. OPTION (b): THE STATE OF INCORPORATION AND THE STATE OF GENUINE LINK

32. The State in which the company is incorporated and with which it enjoys a “genuine link” of the kind described in *Nottebohm*⁸⁵ may exercise diplomatic protection on behalf of the company, subject to the exceptions in favour of shareholders’ claims recognized in *Barcelona Traction*. To some extent such a proposal reflects State practice because many States will not exercise diplomatic protection on behalf of a company with which they do not have a genuine connection, in the form of dominant shareholding, economic control or *siège social*.⁸⁶ The main disadvantage of such a rule is that many companies are incorporated in States with which they have no real connection, in order to secure tax advantages. Such

⁸⁵ See footnote 21 above.

⁸⁶ See further Harris, “The protection of companies in international law in the light of the *Nottebohm* case”.

companies will, for the purposes of diplomatic protection, be rendered stateless. This consequence did not seem to trouble Judges Padilla Nervo,⁸⁷ Petré or Onyeama.⁸⁸ On the other hand, it would clearly run counter to the reasoning of ICJ in *Barcelona Traction*, which was premised on the notion that one State—Canada—had the right to protect the company,⁸⁹ and to “the current trend of international law, which is towards greater protection of the rights of individuals”.⁹⁰ Another difficulty with such a rule is that raised by Staker:

The existence of a genuine link rule would also give rise to the question of the point in time at which the genuine link must exist. Is a genuine link with the State of incorporation required only at the time of incorporation, or only at the time that its existence is in issue (so that it will be recognized if there is a genuine link at the time of injury and of the bringing of the claim, even if there was none at the time of actual incorporation), or is a genuine connection required continuously from the time of incorporation to the time of bringing the claim?⁹¹

3. OPTION (c): THE STATE OF THE *SIÈGE SOCIAL* OR DOMICILE

33. There is support among the authorities for the view that a corporation should take the nationality of its *siège social*⁹² or place of domicile, tests normally employed by civil law (*siège social*) and common law (domicile) countries to link a corporation with a State for the purposes of the conflict of laws.⁹³ Doubts have been expressed as to whether it would be appropriate to apply such *private* law tests to a problem of *public* international law.⁹⁴ In addition, as the decisions of arbitral tribunals have shown, there is usually a close correlation between *siège social* or domicile and the place of incorporation.⁹⁵

4. OPTION (d): THE STATE OF ECONOMIC CONTROL

34. There is considerable support for the position that the State of economic control should be entrusted with

the role of diplomatic protection. Unfortunately this view draws heavily for support on legislation and decisions, mainly after the First World War, which employed the test of *effective* control for determining the enemy character of corporations.⁹⁶ As O’Connell states, “as an analogue for purposes of determining diplomatic protection the theory of control for purposes of economic warfare is practically valueless”,⁹⁷ a view shared by ICJ in *Barcelona Traction*.⁹⁸

35. Despite this misplaced analogy there are sound reasons for proposing the State of *economic* control as the State entitled to exercise diplomatic protection. It accords more with the economic realities of foreign investment, in which the State of nationality of shareholders will usually have a greater interest in securing reparation than the State of incorporation, which, as in the case of Canada in the *Barcelona Traction* proceedings, may only have a marginal interest in obtaining redress. The ever-present threat in this branch of the law that the State will decline to exercise diplomatic protection in the exercise of its discretion is thereby substantially reduced. Acceptance of the State of economic control as the protector of the corporation will constitute recognition of the importance of an effective or genuine link between the protecting State and the injured legal person—a consideration in respect to which ICJ was sensitive in *Barcelona Traction*.⁹⁹ Moreover, by limiting diplomatic intervention to one State, this test avoids the problem of a multiplicity of claims that might arise if the State of nationality of every shareholder were permitted to exercise diplomatic protection. Human rights considerations also support the economic control test, as the foreign investor should not be without a claim to protection.

36. Defining control is not an easy task, as has been observed by legal scholars.¹⁰⁰ Two standards compete for acceptance here: majority shareholding, that is, ownership of more than 50 per cent of the shares, and preponderance of shares. If the former standard is accepted, the rule may create a stateless corporation in respect of which no State might make a claim. Thus the test of preponderance, which would give to the State whose nationals hold the greatest number of shares in the company the right to exercise diplomatic protection, is to be preferred. Alternatively a test might be formulated which takes account of both majority shareholders and a preponderance of shares in assessing control. Orrego Vicuña, in his interim

⁸⁷ *I.C.J. Reports 1970* (see footnote 3 above), p. 254.

⁸⁸ *Ibid.*, p. 52, Joint Declaration by Judges Petré and Onyeama.

⁸⁹ *Ibid.*, p. 48, para. 94, where the Court states: “[C]onsiderations of equity cannot require more than the possibility for some protector State to intervene.” See also the Declaration by Judge Lachs (*ibid.*, p. 53), where he states that the existence of Canada’s right to protect the company “is an essential premise of the Court’s reasoning”.

⁹⁰ Staker, “Diplomatic protection of private business companies: determining corporate personality for international law purposes”, p. 159.

⁹¹ *Ibid.*, p. 163.

⁹² *I.C.J. Reports 1970* (see footnote 3 above), p. 42, para. 70.

⁹³ O’Connell, *International Law*, p. 1041; Levy, *La nationalité des sociétés*, pp. 183–196; and Harris, *loc. cit.*, pp. 295–301.

⁹⁴ O’Connell, *International Law.*, pp. 1041–1042.

⁹⁵ This is the conclusion reached by Schwarzenberger, *International Law*, pp. 393–397, after an examination of the *Canevaro* case (Italy v. Peru), award of 3 May 1912 (UNRIAA, vol. XI (Sales No. 1961.V.4), p. 397); *La Suédoise Grammont v. Roller*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1921), vol. III, p. 570; *Mexico Plantagen G.m.b.h.*, case No. 135, *Annual Digest of Public International Law Cases, 1931–1932* (London, Butterworths, 1938); *F. W. Flack, on behalf of the estate of the late D. L. Flack (Great Britain) v. United Mexican States* (UNRIAA, vol. V (Sales No. 1952.V.3), decision of 6 December 1929), p. 61; *The Madera Company (Ltd.) (Great Britain) v. United Mexican States*, *ibid.*, decision of 13 May 1931, p. 156; *The Interoceanic Railway of Mexico (Acapulco to Veracruz) (Limited), and the Mexican Eastern Railway Company (Limited) (Great Britain v. United Mexican States)*, *ibid.*, decision of 18 June 1931, p. 178.

⁹⁶ Seidl-Hohenveldern, *Corporations in and under International Law*, pp. 27–29; McNair and Watts, *The Legal Effects of War; and Daimler Company, Limited v. Continental Tyre and Rubber Company (Great Britain), Limited, The Law Reports, House of Lords, Judicial Committee of the Privy Council* (London, 1916), p. 307. A similar test has also been employed by the United Nations in respect of its resolution imposing economic sanctions against the Libyan Arab Jamahiriya (Security Council resolution 883 (1993) of 11 November 1993). See further the discussion of the resolution by Mr. Václav Mikulka, Special Rapporteur, in the fourth report on nationality in relation to the succession of States, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/489, p. 304, paras. 15–17.

⁹⁷ *International Law*, p. 1042.

⁹⁸ *I.C.J. Reports 1970*, pp. 39–40, para. 60.

⁹⁹ *Ibid.*, p. 42, paras. 70–71.

¹⁰⁰ Brownlie, *op. cit.*, 5th ed., pp. 488–489; O’Connell, *International Law*, p. 1042; and Levy, *op. cit.*, pp. 200–224.

report on “The changing law of nationality of claims” to the International Law Association Committee on Diplomatic Protection of Persons and Property, has suggested that a rule in favour of diplomatic protection for the State of control might be drafted as follows:

Control of a foreign company by shareholders of a different nationality, expressed in a 50% ownership of its capital stock or such other proportion needed to control the company, may entitle the State of nationality of such shareholders to exercise diplomatic protection on their behalf or otherwise to consider the company as having its nationality.¹⁰¹

State practice is not uniform. Some treaties define control in terms of majority shareholding.¹⁰² Others simply refer to control and leave it to the relevant tribunal to determine this requirement in all the circumstances, including shareholding.¹⁰³

37. Economic control as the test for the nationality of a corporation for the purposes of diplomatic protection is open to several criticisms in addition to that of imprecision in relation to the concept of control. It will inevitably present problems of proof, both in respect of fact and in respect of law. *Barcelona Traction* itself shows how difficult it is to identify with certainty the shareholding of a

¹⁰¹ *Loc. cit.*, p. 647.

¹⁰² See the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Algiers Declaration), ILM, vol. 20 (1981), pp. 230–233, which includes as nationals corporations organized under the laws of either country if nationals of such country directly or indirectly hold an interest in the corporation “equivalent to fifty per cent or more of its capital stock” (p. 233, art. VII, para. 1). See, on the application of this provision: *Sola Tiles Inc. v. Government of the Islamic Republic of Iran*, ILR, vol. 83 (1990), pp. 465–467, and *Iran-United States Claims Tribunal Reports*, vol. 14, pp. 226–228; *Morrison-Knudsen Pacific Ltd. v. Ministry of Roads and Transportation*, *ibid.*, vol. 7, p. 54, and *American Journal of International Law*, vol. 79 (1985), p. 146; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, ILR, vol. 84, p. 484, and *Iran-United States Claims Tribunal Reports*, vol. 15, p. 23; *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, *ibid.*, vol. 4, p. 122, and ILM, vol. 23 (1984), p. 1106. See also the Agreement between the United States of America and Peru relating to the settlement of certain claims (Lima, 19 February 1974), United Nations, *Treaty Series*, vol. 944, No. 13455, art. I, p. 148, and *American Journal of International Law*, vol. 68 (1974), p. 584; and the Convention between His Majesty and the President of the United Mexican States for the Settlement of British Pecuniary Claims in Mexico arising from Loss or Damage from Revolutionary Acts between November 20, 1910, and May 31, 1920, *Treaty Series No. 11* (London, HM Stationery Office, 1928), art. 3, p. 5.

¹⁰³ Article VII, paragraph 2, of the Algiers Declaration (see footnote 102 above), p. 233, defines claims of nationals of the United States as “claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement”. See on the interpretation of this provision: *Pomeroy Corporation v. The Government of the Islamic Republic of Iran*, *Iran-United States Claims Tribunal Reports*, vol. 2, pp. 395–396; and *The Management of Alcan Aluminium Limited v. Ircable Corporation*, *ibid.*, p. 298, and ILR, vol. 72, p. 726 (claimants failed as they were unable to show that they owned more than 50 per cent of Alcan’s shares). See further Brower and Brueschke, *The Iran-United States Claims Tribunal*, pp. 45–51; and Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 47–54.

company.¹⁰⁴ In addition there are problems of burden of proof¹⁰⁵ and presumptions of evidence that are likely to further complicate control,¹⁰⁶ whether in the form of a majority of shareholding or of a preponderance of shareholding, as the acceptable standard for the diplomatic protection of corporations.

38. For the Commission the adoption of a rule in favour of economic control presents serious difficulties. While it may be true that before *Barcelona Traction* it enjoyed more support than the test of incorporation,¹⁰⁷ it is doubtful whether it then represented a rule of customary international law. *A fortiori* its status is today weaker as a customary rule after 30 years of living with *Barcelona Traction*. Bilateral investment treaties may, in the meantime, have given support to the notion of shareholder protection but these treaties are themselves not uniform in respect of the subject of protection. (Moreover, in the years since *Barcelona Traction* these treaties have been seen as belonging to the realm of *lex specialis* and therefore have not disturbed the authority of *Barcelona Traction*.) Even if these treaties are to be seen as evidence of State practice, it is doubtful whether a rule in favour of economic control enjoys the support of most States in today’s world. While some developed States may endorse a rule in favour of shareholders’ claims under the banner of economic control, there is no evidence that such a rule enjoys the support of developing nations. On the contrary, it has been argued that such a rule would increase the number of claims by developed nations on behalf of their nationals holding shares in companies doing business in developing States.¹⁰⁸ This is probably only conjecture, but it does suggest that a rule of this kind does not enjoy the acceptance of developing States.

39. If the Commission elects to formulate a rule in favour of economic control, it will act by way of progressive development rather than by way of codification. Whether this is warranted in the light of the difficulties surrounding such a rule is for the Commission to decide.

5. OPTION (e): THE STATE OF INCORPORATION AND THE STATE OF ECONOMIC CONTROL

40. International law recognizes the possibility of diplomatic protection by either or both States of nationality in the case of an injury to a dual national.¹⁰⁹ Similarly international law recognizes that an officer of an international organization may be protected by either his or her

¹⁰⁴ *I.C.J. Reports 1970* (see footnote 3 above), pp. 219–220 (Judge Jessup). See also cases before the Iran-United States Claims Tribunal: *The Management of Alcan Aluminium Ltd. v. Ircable Corporation* (footnote 103 above), p. 729; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran* (footnote 102 above), p. 484; and Caffisch, “The protection of corporate investments ...”, p. 180.

¹⁰⁵ *I.C.J. Reports 1970* (see footnote 3 above) (Judge Jessup), p. 202.

¹⁰⁶ *Ibid.*, p. 207.

¹⁰⁷ Brownlie, *op. cit.*, 5th ed., p. 487.

¹⁰⁸ See *Abi-Saab, loc. cit.*, pp. 121–122.

¹⁰⁹ See article 5 [7] of the draft articles on diplomatic protection adopted by the Commission in 2002, *Yearbook ... 2002* (footnote 2 above), p. 72.

State of nationality or the organization or by both.¹¹⁰ Why then, the question may be asked, should dual protection of a company and the State of economic control not be recognized so as to allow either the State of incorporation of the company or the State of economic control to exercise diplomatic protection? Is it not enough simply to state, as does ICJ in *Barcelona Traction*,¹¹¹ that there is no analogy between the above cases of dual protection and the case of a company and its controlling shareholders?

41. The possibility of dual protection of this kind receives support from the separate opinion of Judges Tanaka¹¹² and Jessup¹¹³ in *Barcelona Traction*. According to Judge Tanaka:

It is true that there is no rule of international law which allows two kinds of diplomatic protection to a company and its shareholders respectively, but there is no rule of international law either which prohibits double protection. It seems that a lacuna of law exists here; it must be filled by an interpretation which emanates from the spirit of the institution of diplomatic protection itself.¹¹⁴

There is no danger in such a case of double protection that the defendant State will be compelled to pay reparation twice over since “[i]f a claim of one State is realized, the claim of the other State will be extinguished to this extent by losing its object”.¹¹⁵

42. The Commission should give serious attention to the possibility of dual protection. If, however, it finds the criticisms levelled at the test of economic control in paragraphs 34–35 above to be persuasive, it would make no sense to approve such a test in the context of dual protection.

6. OPTION (f): THE STATE OF INCORPORATION, FAILING WHICH THE STATE OF ECONOMIC CONTROL

43. Related to option (e) is the possibility of a secondary right of diplomatic protection vested in the State of economic control which arises if, and only if, the State of incorporation waives its right to diplomatic protection or fails to exercise this right over a long period of time, as did Canada in *Barcelona Traction*. Such a possibility was contemplated by Judge Fitzmaurice in his separate opinion in *Barcelona Traction* when he stated that where the State of incorporation fails to exercise diplomatic protection “for reasons of its own that have nothing to do with the interests of the company ... even though there may be a good, or apparently good case in law for doing so, and the interests of the company require it”, the State of nationality of the shareholders ought to be able to act—in

¹¹⁰ *Reparation for Injuries Suffered in the Service of the United Nations* (see footnote 64 above), p. 186. After this decision recognizing that two claims might be presented on behalf of an injured official, the General Assembly authorized the Secretary-General to negotiate agreements to reconcile action by the United Nations with the rights of the State of which the injured person was a national (Assembly resolution 365 (IV) of 1 December 1949, para. 2). See further the separate opinion of Judge Jessup, *I.C.J. Reports 1970* (footnote 3 above), p. 199.

¹¹¹ *I.C.J. Reports 1970* (see footnote 3 above), p. 38, para. 53, and p. 50, para. 98.

¹¹² *Ibid.*, pp. 130–133.

¹¹³ *Ibid.*, pp. 199–202.

¹¹⁴ *Ibid.*, p. 131. See also the separate opinion of Judge Wellington Koo in *I.C.J. Reports 1964* (footnote 4 above), pp. 59–61.

¹¹⁵ *I.C.J. Reports 1970* (see footnote 3 above), pp. 130–131, Judge Tanaka. See also Judge Jessup, *ibid.*, p. 200.

the same way that “on the domestic plane an analogous failure or refusal on the part of the management of the company would normally enable the shareholders to act”, either against the management or a third party.¹¹⁶

44. Support for the notion of a secondary right to protection is to be found in the UNCC procedures which provide that:

Each Government may submit claims on behalf of corporations or other entities that, on the date on which the claim arose, were incorporated or organized under its law. Claims may be submitted on behalf of a corporation or other entity by only one Government. A corporation or other entity would be required to request the State of its incorporation or organization to submit its claim to the [United Nations Compensation] Commission. In the case of a corporation or other private legal entity whose State of incorporation or organization fails to submit, within the deadline established in paragraph 29, such claims falling within the applicable criteria, the corporation or other private legal entity may itself make a claim to the Commission within three months thereafter.¹¹⁷

45. This option is open to the same objection as option (e). If the test of economic control is unsatisfactory, it should not be contemplated either as a secondary or as a primary test of nationality. There is, however, a more compelling objection. As was pointed out by ICJ in *Barcelona Traction*, a secondary right only comes into existence when the original right ceases to exist and it will be difficult in practice to determine when such a right is extinguished, as a State may simply decline to exercise its discretion to protect a corporation without any intention of abandoning its claim, as appeared to be the position of Canada in *Barcelona Traction*.¹¹⁸ While this objection might be overcome by setting a prescribed time limit for the exercise of the primary right, this would not overcome another obstacle raised by the Court, that is, the difficulty that would arise if the State of incorporation settled a claim in a manner unsatisfactory to the company’s shareholders. Could the State of economic control then lodge a secondary claim to give effect to the demands of the shareholders?

7. OPTION (g): THE STATES OF NATIONALITY OF ALL SHAREHOLDERS

46. The suggestion that the States of nationality of all shareholders in a company be permitted to exercise diplomatic protection was dismissed by ICJ in *Barcelona Traction* in the following terms:

The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.¹¹⁹

¹¹⁶ *Ibid.*, p. 76. See also the separate opinion of Judge Wellington Koo, *I.C.J. Reports 1964* (footnote 4 above), p. 59.

¹¹⁷ Decision of the UNCC Governing Council of 17 March 1992 (S/AC.26/1991/7/Rev.1), para. 26.

¹¹⁸ *I.C.J. Reports 1970* (see footnote 3 above), pp. 49–50, paras. 96–97.

¹¹⁹ *Ibid.*, p. 49, para. 96. See also the separate opinion of Judge Padilla Nervo, pp. 263–264.

47. That another position, one in favour of multiple protection, is tenable was emphasized by Judge Tanaka,¹²⁰ in arguing that in principle every shareholder should have the right of diplomatic protection. He did not anticipate that this would result in chaos, first because of the discretionary nature of diplomatic protection, and secondly because it was likely that in practice there would be joint action on the part of States concerned. A similar stance was adopted by Judge Fitzmaurice, who argued that a multiplicity of claims was a problem only for the “*quantum* of reparation recoverable by the various governments”. He continued:

[O]nce the principle of claims on behalf of shareholders had been admitted for such circumstances, it would not be difficult to work out ways of avoiding a multiplicity of *proceedings*, which is what would really matter.¹²¹

¹²⁰ *Ibid.*, pp. 127–131.

¹²¹ *Ibid.*, p. 77, footnote 21. This view is endorsed by Higgins, *loc. cit.*, p. 339. See also “Panel—nationality of claims: individuals, corporations, stockholders”, *Proceedings of the American Society of International Law at its Sixty-Third Annual Meeting held at Washington, D.C., 24–26 April 1969*, pp. 30–53.

48. Judges Tanaka and Fitzmaurice are correct that a multiplicity of proceedings might be avoided by negotiations among the concurrent shareholders followed by joint action. Nevertheless the likelihood of confusion and chaos remains a possibility. In 1949, Jones warned of such dangers when he wrote that if the State of nationality of each shareholder were permitted to exercise diplomatic protection:

[T]he results would be just as chaotic on the international plane as they would be under municipal law if any group of shareholders were allowed to sue in any case where the company has sustained damage ...

[S]hareholders are not infrequently corporations themselves, and the process of identifying individual shareholders might be prolonged *ad infinitum*; such a process is in any case difficult in practice.¹²²

The *Barcelona Traction* case itself provides abundant proof of the difficulty in identifying shareholders in the case of a multinational corporation.¹²³

¹²² “Claims on behalf of nationals who are shareholders in foreign companies”, pp. 234–235.

¹²³ See the comment of Judge Jessup, *I.C.J. Reports 1970*, pp. 219–220.

CHAPTER II

Proposed articles on diplomatic protection of corporations and shareholders

49. *Barcelona Traction* may be faulted on several grounds. Nevertheless, it enjoys widespread acceptance on the part of States.¹²⁴ In the light of this acceptance, and the objections to other tests for determining the nationality of corporations,¹²⁵ the wisest course seems to be to formulate articles that give effect to the principles expounded in *Barcelona Traction*. The following articles endorse both the primary rule in *Barcelona Traction*—namely that the State of incorporation of a company enjoys the right to exercise diplomatic protection on behalf of the company—and the exceptions to this rule, recognized, to a greater or lesser extent, by ICJ.

PART THREE. LEGAL PERSONS

Article 17

1. A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.

2. For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office].

Article 18

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist in the place of its incorporation; or

(b) The corporation has the nationality of the State responsible for causing injury to the corporation.

Article 19

Articles 17 and 18 are without prejudice to the right of the State of nationality of shareholders in a corporation to protect such shareholders when they have been directly injured by the internationally wrongful act of another State.

Article 20

A State is entitled to exercise diplomatic protection in respect of a corporation which was incorporated under its laws both at the time of the injury and at the date of the official presentation of the claim [; provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation].

A. Article 17

1. ARTICLE 17, PARAGRAPH 1

A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.

50. Article 17, paragraph 1, reaffirms the principle expounded in *Barcelona Traction*.¹²⁶ It mirrors article 3, paragraph 1, of the draft articles adopted by the Commission on first reading, which declares that “[t]he State

¹²⁴ See paragraph 28 *et seq.* above.

¹²⁵ See paragraphs 31–38 above.

¹²⁶ *I.C.J. Reports 1970*, pp. 42, para. 70, and 46, para. 88.

entitled to exercise diplomatic protection is the State of nationality”.¹²⁷

51. Article 2 of the draft articles affirms the “right”¹²⁸ of the State to exercise diplomatic protection. It is under no obligation to do so—a principle which applies with equal force to natural and legal persons. This was emphasized by ICJ in *Barcelona Traction* when it declared:

[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.¹²⁹

52. It is for the State of incorporation of a company to decide whether it will exercise diplomatic protection on behalf of the company. Where there is no real link between a State and a company holding its nationality, for example, where the company has been incorporated in that State for tax benefits, it is unlikely that the national State will exercise diplomatic protection on its behalf. In this respect the relationship between State and corporation is similar to that between a State and a ship flying its flag of convenience. It is more likely that a State will exercise diplomatic protection where there is some real link between State and company, as where the majority of the shareholders of the company are nationals of that State. Indeed a State may declare in advance that it will only exercise diplomatic protection in circumstances of this kind.¹³⁰ An additional requirement of this kind serves to guide a State in the exercise of its discretion and is not the concern of international law. International law, as reflected in *Barcelona Traction*, entitles (but does not require) a State to exercise diplomatic protection on behalf of a company incorporated under its laws.

¹²⁷ *Yearbook ... 2002* (see footnote 2 above), p. 67, para. 280.

¹²⁸ *Ibid.*

¹²⁹ *I.C.J. Reports 1970*, p. 44, paras. 78–79.

¹³⁰ The British Government has issued rules relating to international claims which indicate that Her Majesty’s Government may take up the claim of a company incorporated in the United Kingdom (rule IV). However, the comment on this rule provides: “In determining whether to exercise its right of protection, HMG [Her Majesty’s Government] may consider whether the company has in fact a real and substantial connexion with the United Kingdom” (Warbrick, *loc. cit.*, p. 1007). In its intervention in the Sixth Committee debate on diplomatic protection in 2002, the United States likewise declared that the United States “Government took the nationality of shareholders into consideration in deciding whether to extend diplomatic protection to a corporation” (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 23rd meeting (A/C.6/57/SR.23), para. 52).

53. The discretionary right to exercise diplomatic protection, completely uncontrolled by rules of international law, provides little security to shareholders who invest in the company in the expectation that their investment will be protected by the State of nationality when the company does business abroad. For this reason investors will prefer the security of bilateral investment treaties and encourage the State of nationality of the corporation to enter into such agreements with countries that offer both high profits and high risks. This entails an acceptance of the pessimistic assessment of the situation by Kokott: “[I]n the context of foreign investment, the traditional law of DP [diplomatic protection] has been to a large extent replaced by a number of treaty-based dispute settlement procedures.”¹³¹ Some support for this view is to be found in the ICJ judgment when it stated:

Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures.¹³²

2. ARTICLE 17, PARAGRAPH 2

For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office].

54. This provision echoes the dictum by ICJ in *Barcelona Traction* that:

The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.¹³³

55. The dictum cited in the preceding paragraph sets two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. In practice the laws of most States require a company incorporated under its laws to maintain a registered office in its territory.¹³⁴ Thus the additional requirement of registered office seems superfluous. Nevertheless ICJ made it clear that both conditions should be met when it stated: “These

¹³¹ “Interim report ‘on the role of diplomatic protection in the field of the protection of foreign investment’”, p. 277.

¹³² *I.C.J. Reports 1970* (see footnote 3 above), p. 47, para. 90.

¹³³ *Ibid.*, p. 42, para. 70.

¹³⁴ The Special Rapporteur cannot claim to have carried out a thorough comparative study on this subject. A brief survey of the subject shows, however, that this is the position in Ireland (Forde, *Company Law*, p. 45); South Africa (Meskin, ed., *Henochsberg on the Companies Act*, p. 254); Spain (Minguela, *Spanish Corporation Law and Limited Liability Company Law: an English Translation*); and the United Kingdom.

two criteria have been confirmed by long practice and by numerous international instruments.”¹³⁵ Possibly the Court sought to recognize in the requirement of registered office the need for some tangible connection, however small, between State and company. This is confirmed by the emphasis it placed on the fact that Barcelona Traction’s registered office was in Canada and that this created, together with other factors, the “close and permanent connection”¹³⁶ between Canada and Barcelona Traction. In practice it would seem that the Court’s insistence on the requirement of a registered office is misplaced. The presence of a registered office in the State of incorporation is a consequence of incorporation and not independent evidence of a connection with that State. Indeed, where a company registers in a State solely to obtain tax advantages, which not infrequently occurs, the registered office will be little more than a mailing address. There is no harm in retaining this requirement *ex abundanti cautela* and to follow the language of *Barcelona Traction* faithfully. On the other hand, the Commission may prefer to omit the reference to the need for a registered office in addition to incorporation.

56. ICJ in *Barcelona Traction* made it clear that there are no rules of international law on the incorporation of companies.¹³⁷ Consequently it was necessary to have recourse to the municipal law to ascertain whether the conditions for incorporation had been met. The Court stated:

All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.¹³⁸

57. In *Barcelona Traction* Judge Morelli suggested that the law of the defendant State should determine this matter.¹³⁹ This view cannot be accepted for the following reasons given by Staker:

[I]t is fundamentally difficult to assert that a State is completely free to decide, as property is brought into its territory, in whom that property vests, irrespective of the municipal laws of any other State. Logically, if this is the case, not only would it be possible (to use the example of the *Barcelona Traction* case) for Spain to deny recognition to a company validly incorporated under the laws of Canada by nationals of Belgium (and recognize the Belgian shareholders as being the actual owners), but it could, for instance, “recognize” property brought into its territory by a group of Belgian nationals as belonging to a Canadian company, even though under Canadian law no such company exists. If this were the case, every State could avoid possible diplomatic claims in respect of assets brought to its territory by foreigners by “recognizing” them as the property of companies of third States having no

¹³⁵ *I.C.J. Reports 1970* (see footnote 3 above), p. 42, para. 70.

¹³⁶ *Ibid.*, para. 71.

¹³⁷ Cf. Staker’s suggestion that rules of international law might recognize as a juridical person for the purposes of diplomatic protection “an entity that does not have juridical personality under the municipal law of any State on the basis of a general principle of law that a collectivity which in reality exists as an entity distinct from its constitutive members should be recognized as having a separate personality in law” (*loc. cit.*, p. 169).

¹³⁸ *I.C.J. Reports 1970* (see footnote 3 above), pp. 33–34, para. 38; see also page 37, para. 50.

¹³⁹ *Ibid.*, pp. 235–236. See also Caffisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public*, p. 19.

interest in protecting them. By “recognizing” a non-existent Canadian company, Spain would in effect itself be creating the company and conferring Canadian nationality on it. This runs counter to the well-established rule that one State cannot confer the nationality of another.¹⁴⁰

Therefore there seems little doubt that it is to the law of the incorporating State that a court should turn to ascertain that the company has been properly incorporated.

58. The word “incorporated” is preferred to that of “registration”. In practice the two terms are virtually synonymous. In order to acquire a separate corporate existence a company must submit its founding instruments to and be registered with the relevant national authorities. Once it is registered in this way it is incorporated and may obtain a certificate of incorporation. To draw an analogy with a natural person, the process of registration is the gestation of a company; its incorporation, following the completion of this process, is its birth; and the issue of a certificate of incorporation is its birth certificate.¹⁴¹ For this reason the term incorporation is preferred.

B. Article 18

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist in the place of its incorporation; or

(b) The corporation has the nationality of the State responsible for causing injury to the corporation.

59. ICJ in *Barcelona Traction* recognizes that there are “special circumstances” that “on the international plane” may “justify the lifting of the [corporate] veil in the interest of shareholders”.¹⁴² It does, however, limit such intervention to two cases: (a) where the company has “ceased to exist”; and (b) where the company’s national State lacks “capacity to take action on its behalf”.¹⁴³

¹⁴⁰ *Loc. cit.*, pp. 166–167.

¹⁴¹ Section 64 of the South African Companies Act, No. 61 of 1973, makes this process clear:

“(1) Upon the registration of the memorandum and articles of a company the Registrar shall endorse thereon a certificate under his hand and seal that the company is incorporated.

“(2) A certificate of incorporation given by the Registrar in respect of any company shall upon its mere production, in the absence of proof of fraud, be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto, have been complied with, and that the company is a company duly incorporated under this Act.”

(Meskin, ed., *op. cit.*, p. 98)

See also Davies, ed., *Gower’s Principles of Modern Company Law*, p. 111:

“If the Registrar is satisfied that the requirements for registration are met and that the purpose for which the incorporators are associated is ‘lawful’, he issues a certificate of incorporation signed by him or authenticated under his official seal. This states that the company is incorporated and, in the case of a limited company that it is limited; it is, in effect, the company’s certificate of birth as a body corporate on the date mentioned in the certificate.”

¹⁴² *I.C.J. Reports 1970* (see footnote 3 above), p. 39, para. 58.

¹⁴³ *Ibid.*, p. 40, para. 64.

1. ARTICLE 18, SUBPARAGRAPH (a)

The State of nationality of the shareholders may intervene when “the corporation has ceased to exist in the place of its corporation”.

60. This provision raises two issues that require careful scrutiny: first, the meaning of the term “ceased to exist” and whether it is the appropriate test to be employed; and secondly, whether the death of the company is to be judged by the law of the incorporating State or the law of the State in which the company has been injured.

61. Before *Barcelona Traction* it was accepted that the State of nationality of the shareholders might intervene when the company was no longer able to act on their behalf. Although there was support for the view that the test to be adopted was whether the company had ceased to exist,¹⁴⁴ the weight of authority seemed to favour a less stringent test, one that permitted intervention on behalf of shareholders when the company was “practically defunct”. This latter test, first formulated in 1899, in the *Delagoa Bay Railway* case,¹⁴⁵ was followed in State practice¹⁴⁶ and enjoyed the support of writers.¹⁴⁷

62. ICJ in *Barcelona Traction* set a higher threshold for determining the demise of a company. The paralysis or “precarious financial situation” of a company was dismissed as inadequate.¹⁴⁸ The test of “practically defunct” was likewise rejected as one “which lacks all legal precision”.¹⁴⁹ Only the “company’s status in law” was considered relevant. The Court stated:

Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the

¹⁴⁴ See the reply of the United Kingdom to the United States in the *Romano-Americana Company* dispute:

“[I]t is not until a Company has ceased to have an active existence or has gone into liquidation that the interest of its shareholders ceases to be merely the right to share in the Company’s profits and becomes a right to share in its actual surplus assets.”

(Hackworth, *Digest of International Law*, p. 843)

The Mexican Government adopted a similar position in the *Mexican Eagle (El Águila)* dispute (see Jones, *loc. cit.*, p. 241). Jiménez de Aréchaga, writing in 1968, on the eve of *Barcelona Traction*, required the loss of legal personality as a precondition for intervention by shareholders (“International responsibility”, pp. 579–580).

¹⁴⁵ In 1887, the Portuguese Government cancelled the concession granted to a company incorporated under the laws of Portugal, but owned by British and American shareholders, to build a railway line from Lourenço Marques (now Maputo) to the Transvaal border, and seized its assets. Both Britain and the United States protested against this action and claimed that they were entitled to intervene on behalf of their shareholders as the Portuguese company was “practically defunct”. This principle was later conceded by Portugal and an arbitration tribunal was established to decide on the question of compensation only (*Delagoa Bay Railway* case, Moore, *A Digest of International Law*, p. 648). For a full examination of this case, see Jones, *loc. cit.*, pp. 229–231. This approach was approved in the *El Triunfo* claim (Moore, *op. cit.*, p. 649).

¹⁴⁶ See the *Baasch & Römer* claim (1903), UNRIIA, vol. X (Sales No. 1960.V.4), p. 723 (discussed in Jones, *loc. cit.*, pp. 244–246); and Mann, “The protection of shareholders’ interests ...”, pp. 267–268 (citing the argument of Virally for Belgium in *Barcelona Traction*).

¹⁴⁷ Brownlie, *op. cit.*, p. 401.

¹⁴⁸ *I.C.J. Reports 1970* (see footnote 3 above), pp. 40–41, paras. 65–66.

¹⁴⁹ *Ibid.*, p. 41, para. 66.

company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.¹⁵⁰

This approach was endorsed by Judge Padilla Nervo, who in his separate opinion declared:

It is only when a company has been dissolved and consequently ceases to exist as a separate legal entity that the shareholders take its place and are entitled to receive the balance of its property, after the corporate debt has been deducted. Thus it is only the “legal death” of the corporate person that may give rise to new rights appertaining to the shareholders as successors to the company.¹⁵¹

Other judges were less convinced about the correctness of this test: Judges Jessup¹⁵² and Fitzmaurice¹⁵³ and Judge *ad hoc* Riphagen¹⁵⁴ inclined towards the test of “practically defunct”.

63. Much of the criticism directed at the ICJ adoption of the “ceased to exist” test is that it was not properly applied by the Court *to the facts* in *Barcelona Traction*.¹⁵⁵ This does not detract from the value of the test itself: it is more precise than that of the “practically defunct” test, but inevitably opinion will differ as to whether it has been correctly applied in a particular case.

64. The “ceased to exist” test was endorsed in 1995 by the European Court of Human Rights in the *Agrotexim* case when it refused to find that a company was unable to act *qua* company because, although in a process of liquidation, it “had not ceased to exist as a legal person”.¹⁵⁶ It also obtains support from the United Kingdom’s 1985 rules applying to international claims, which contemplate intervention only “where the company is defunct”.¹⁵⁷

65. Unfortunately ICJ in *Barcelona Traction* did not expressly state that the company must have ceased to exist *in the place of incorporation* as a precondition to shareholders’ intervention.¹⁵⁸ Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain¹⁵⁹—a view shared by Judges Fitzmaurice¹⁶⁰ and Jessup¹⁶¹—but

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, p. 256; see also the separate opinion of Judge Ammoun, pp. 319–320.

¹⁵² *Ibid.*, p. 193, citing Brownlie, *op. cit.*, p. 401, in favour of “practically defunct” as the correct test.

¹⁵³ *Ibid.*, pp. 74–75.

¹⁵⁴ *Ibid.*, p. 345.

¹⁵⁵ See the criticism of Mann, “The protection of shareholders’ interests ...”, p. 268.

¹⁵⁶ *Agrotexim and Others v. Greece*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 330–A, Judgment of 24 October 1995 (Strasbourg, Council of Europe, 1996), p. 25, para. 68.

¹⁵⁷ Rule V, reproduced in Warbrick, *loc. cit.*, p. 1007.

¹⁵⁸ This led Mann to comment (“The protection of shareholders’ interests ...”, p. 265): “[T]he court does not indicate the legal system upon which its conclusions are based. Is it Canadian or Spanish law? Or is it international law, particularly that branch of it which relates to diplomatic protection?”

¹⁵⁹ *I.C.J. Reports 1970* (see footnote 3 above), p. 40, para. 65.

¹⁶⁰ *Ibid.*, p. 75.

¹⁶¹ *Ibid.*, p. 194.

emphasized that this did not affect its continued existence in Canada, the State of incorporation:

In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist.¹⁶²

66. A company is “born” in the State of incorporation when it is registered and incorporated. Conversely, it “dies” when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

2. ARTICLE 18, SUBPARAGRAPH (b)

The State of nationality of the shareholders may intervene when “the corporation has the nationality of the State responsible for causing injury to the corporation”.

67. The most important exception to the rule that the State of nationality of a corporation may alone exercise diplomatic protection on behalf of the company is that which allows the State of nationality of the shareholders to intervene where “the corporation has the nationality of the State responsible for causing injury to the corporation” (art. 18 (b)). A capital-importing State will not infrequently require a foreign consortium wishing to do business in its territory to do so through the instrument of a company incorporated under its law.¹⁶³ If such a State then confiscates the assets of the company or injures it in some other way, the only relief for the company on the international plane lies in action taken by the State of nationality of the shareholders. According to Jones, in his seminal article on this subject, “Claims on behalf of nationals who are shareholders in foreign companies”, written in 1949:

In such cases intervention on behalf of the corporation is not possible under the normal rule of international law, as claims cannot be brought by foreign states on behalf of a national against its own Government. If the normal rule is applied foreign shareholders are at the mercy of the state in question; they may suffer serious loss, and yet be without redress. This is an extension in the international field of the situation which may arise in municipal law when those who should be defending the interest of the corporation fraudulently or wrongfully fail to do so (e.g. *Foss v. Harbottle*).¹⁶⁴

68. The existence of such a rule is not free from controversy. Moreover, there are suggestions that it is only to be recognized either where the injured company was compelled to incorporate in the wrongdoing State or where the company is “practically defunct”.

69. ICJ in *Barcelona Traction* raised the possibility of such a rule but declined to give an answer on either its existence or its scope. The present report will examine

the status of such an exception before *Barcelona Traction*, the judgment of the Court in this case, the differing separate opinions attached to that judgment, subsequent developments and the present status of the exception.

3. PRE-BARCELONA TRACTION: PRACTICE, JURISPRUDENCE AND DOCTRINE

70. There is evidence in support of such an exception before *Barcelona Traction* in State practice, arbitral awards and doctrine, all of which are comprehensively examined by Caffisch in *La protection des sociétés commerciales et des intérêts indirects en droit international public*. State practice and arbitral decisions are, however, far from clear, as illustrated by the different assessments of the evidence by Jones¹⁶⁵ and Jiménez de Aréchaga.¹⁶⁶

71. Jones points to several disputes in which the United Kingdom and/or the United States asserted the existence of such an exception, notably the cases concerning the *Delagoa Bay Railway*,¹⁶⁷ the *Tlahualilo Company*,¹⁶⁸ the *Romano-Americana*¹⁶⁹ and the *Mexican Eagle*.¹⁷⁰ None of these cases, however, provides conclusive evidence in support of such an exception. In the *Delagoa Bay Railway* case the United Kingdom and the United States both strongly asserted the existence of such a principle when they intervened to protect their nationals who were shareholders in a Portuguese company injured by Portugal itself, but the arbitral tribunal that considered the dispute was limited to fixing the compensation to be awarded. At best it can be said that Portugal acknowledged such a principle when it accepted the validity of the United Kingdom/United States claim.¹⁷¹ In both *Tlahualilo* and *Mexican Eagle* the Government of Mexico rejected the existence of the exception and “the final solution was found by common agreement through corporate remedies”.¹⁷² Furthermore, in the *Romano-Americana* dispute between the United States and the United Kingdom, the latter denied the existence of such an exception.¹⁷³ It is difficult not to agree with Jiménez de Aréchaga that “[n]o certain argument may be made, therefore, on the basis of such limited and contradictory state practice”.¹⁷⁴

¹⁶⁵ *Loc. cit.*

¹⁶⁶ “International responsibility”, pp. 580–581.

¹⁶⁷ See footnote 145 above.

¹⁶⁸ Jones, *loc. cit.*, p. 237; and Caffisch, *op. cit.*, pp. 194–197.

¹⁶⁹ Hackworth, *op. cit.*, p. 841.

¹⁷⁰ Whiteman, *Digest of International Law*, pp. 1272–1274; and Jones, *loc. cit.*, p. 241.

¹⁷¹ Jones, *loc. cit.*, pp. 230–231.

¹⁷² Jiménez de Aréchaga, “International responsibility”, p. 580.

¹⁷³ Hackworth, *op. cit.*, p. 842.

¹⁷⁴ “International responsibility”, p. 580. Cf. the conclusion of Caffisch:

“Nous constatons en premier lieu que le principe même de la protection des participations étrangères dans des sociétés relevant de l’État défendeur, admis par la jurisprudence internationale, est confirmé par la pratique des États. D’une part, cette protection n’a été que rarement refusée par l’État national de la personne titulaire de l’intérêt indirect; d’autre part, nous ne connaissons pas de cas où un État défendeur qui s’est opposé à admettre la protection des intérêts indirects ait finalement eu gain de cause.”

(*Op. cit.*, p. 203)

¹⁶² *Ibid.*, p. 41, para. 67.

¹⁶³ See Beckett, “Diplomatic claims in respect of injuries to companies”, pp. 188–189.

¹⁶⁴ *Loc. cit.*, p. 236.

72. Judicial decisions are likewise inconclusive. The *Alsop*,¹⁷⁵ *Cerruti*,¹⁷⁶ *Orinoco Steamship*¹⁷⁷ and *Melilla—Ziat, Ben Kiran*¹⁷⁸ claims, sometimes cited in support of an exception in favour of shareholder claims, do not really provide such support.¹⁷⁹ The *Baasch and Römer*¹⁸⁰ and *Kunhardt*¹⁸¹ claims are at best unclear, but possibly against the proposed exception, as in these and other claims,¹⁸² “the Venezuelan Mixed Commissions rejected claims on behalf of shareholders of corporations of Venezuelan nationality”.¹⁸³ The *El Triunfo* claim¹⁸⁴ does, however, provide some support for the exception as in that case a majority of the arbitrators concurred in the award of damages in favour of the United States against El Salvador, which was responsible for an injury to a company incorporated in El Salvador with American shareholders. There the arbitrators stated:

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in *El Triunfo* Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood *Delagoa Bay Railway* Arbitration.¹⁸⁵

73. Respect for the *Delagoa Bay Railway*¹⁸⁶ principle was also expressed in *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, in which the tribunal stated that in the *Delagoa Bay Railway* and *El Triunfo* cases the shareholders were exercising “not their own rights but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce; and ... they were therefore seeking to enforce not direct and personal rights, but indirect and substituted rights”.¹⁸⁷

74. In summary, it may be said that while the authorities do not clearly proclaim the right of a State to take up the

case of its nationals,¹⁸⁸ as shareholders in a corporation, for acts affecting the company, against the State of nationality of a company, the language of some of these awards lends some support, albeit tentative, in favour of such a right.¹⁸⁹

75. Significantly, the strongest support for intervention on the part of the State of nationality of the shareholders comes from the three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway, Mexican Eagle* and *El Triunfo*. While there is no suggestion in the language of these claims that intervention is to be limited to such instances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.¹⁹⁰

76. Writers in the pre-*Barcelona Traction* period were divided on the question whether international law recognized a right of diplomatic intervention on behalf of shareholders in a company incorporated in the wrongdoing State. Beckett,¹⁹¹ Charles De Visscher,¹⁹² Jones,¹⁹³ Paul De Visscher,¹⁹⁴ Petré,¹⁹⁵ Kiss¹⁹⁶ and Caffisch¹⁹⁷ favoured such a rule, while Jiménez de Aréchaga¹⁹⁸ and O’Connell¹⁹⁹ opposed it. Judge Wellington Koo, in his separate opinion in *Barcelona Traction* in 1964, declared that:

State practice, treaty regulation and international arbitral decisions have come to recognize the right of a State to intervene on behalf of its nationals, shareholders of a company which has been injured by the State of its own nationality, that is to say, a State where it has been incorporated according to its laws and therefore is regarded as having assumed its nationality.²⁰⁰

4. BARCELONA TRACTION

77. In *Barcelona Traction*, Spain, the respondent State, was not the State of nationality of the injured company.

¹⁷⁵ *The Alsop Claim* (Chile, United States) (5 July 1911), UNRIAA, vol. XI (Sales No. 1961.V.4), p. 349; and *American Journal of International Law*, vol. 5 (1911), p. 1079.

¹⁷⁶ *Affaire Cerruti* (Colombia, Italy) (6 July 1911), UNRIAA (see footnote 175 above), p. 377; and RGDIP, vol. VI (1899), p. 533.

¹⁷⁷ *Orinoco Steamship Company* case (1903–1905), UNRIAA, vol. IX (Sales No. 1959.V.5), p. 180.

¹⁷⁸ *Affaire des biens britanniques au Maroc espagnol* (Spain v. United Kingdom) (1 May 1925), *ibid.*, vol. II (Sales No. 1949.V.1), p. 729.

¹⁷⁹ Jones, *loc. cit.*, pp. 243–244; Jiménez de Aréchaga, “International responsibility”, pp. 580–581; and Caffisch, *op. cit.*, pp. 173 and 183–187.

¹⁸⁰ *Baasch and Römer* case (1903), UNRIAA, vol. X (Sales No. 1960.V.4), p. 723.

¹⁸¹ *Kunhardt & Co.* case (1903–1905), *ibid.*, vol. IX (Sales No. 1959.V.5), p. 171.

¹⁸² *J. N. Henriquez* case (1903), *ibid.*, vol. X (Sales No. 1960.V.4), p. 713; and *Brewer, Moller and Co.* (second case), *ibid.*, p. 433.

¹⁸³ Jiménez de Aréchaga, “International responsibility”, p. 581.

¹⁸⁴ *Claim of the Salvador Commercial Company* (“*El Triunfo Company*”) (8 May 1902), UNRIAA, vol. XV (Sales No. 66.V.3), p. 467; Moore, *op. cit.*, p. 649; and *Papers relating to the Foreign Relations of the United States, with the annual message of the President transmitted to Congress: December 2, 1902* (Washington, Government Printing Office, 1904), pp. 838–852.

¹⁸⁵ UNRIAA, p. 479, and *Papers relating to the Foreign Relations of the United States* ..., p. 873 (see footnote 184 above).

¹⁸⁶ See footnote 145 above.

¹⁸⁷ *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (United States, Reparation Commission) (5 August 1926), UNRIAA, vol. II (Sales No. 1949.V.1), p. 790.

¹⁸⁸ Jiménez de Aréchaga, “International responsibility”, p. 580.

¹⁸⁹ Jones, *loc. cit.*, pp. 251 and 257; and Caffisch, *op. cit.*, p. 192.

¹⁹⁰ Whiteman, *op. cit.*, pp. 1273–1274.

¹⁹¹ *Loc. cit.*, pp. 188–194. Beckett deduces such a rule from general principles of law in the absence of a customary international law rule.

¹⁹² “De la protection diplomatique des actionnaires d’une société contre l’État sous la législation duquel cette société s’est constituée”, p. 651.

¹⁹³ *Loc. cit.*, p. 236.

¹⁹⁴ “La protection diplomatique des personnes morales”, pp. 478–479.

¹⁹⁵ “La confiscation des biens étrangers et les réclamations internationales auxquelles elle peut donner lieu”, pp. 506 and 510.

¹⁹⁶ “La protection diplomatique des actionnaires dans la jurisprudence et la pratique internationales”.

¹⁹⁷ *Op. cit.*

¹⁹⁸ “International responsibility”, pp. 580–581.

¹⁹⁹ *International Law*, pp. 1043–1047.

²⁰⁰ *I.C.J. Reports 1964* (see footnote 4 above), p. 58, para. 20.

Consequently, the exception under discussion was not before ICJ. Nevertheless the Court did make passing reference to this exception:

It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.²⁰¹

78. That ICJ was sympathetic to the notion of protection by the State of nationality of shareholders when equity and reason so required is clear from the passages of the Court's judgment which immediately follow the above pronouncement:

On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection.²⁰²

79. Judges Fitzmaurice,²⁰³ Tanaka²⁰⁴ and Jessup²⁰⁵ expressed full support for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation. Judge Fitzmaurice stated:

It seems that, actually, in only one category of situation is it more or less definitely admitted that intervention by the government of foreign shareholders is allowable, namely where the company concerned has the nationality of the very State responsible for the acts or damage complained of, and these, or the resulting circumstances, are such as to render the company incapable *de facto* of protecting its interests and hence those of the shareholders.²⁰⁶

80. Judge Fitzmaurice conceded that this type of situation was most likely to arise where the company's nationality did not result "from voluntary incorporation" but was "imposed on it by the government of the country or by a provision of its local law as a condition of operating there, or of receiving a concession".²⁰⁷ Nevertheless, he was not prepared to limit the right of the State of nationality of shareholders to intervene to such circumstances as it was "[t]he fact of local incorporation, but with foreign

shareholding" that mattered and not the motivation or process that brought it about.²⁰⁸

81. Judge Jessup stated that the rationale for this exception "seems to be based largely on equitable considerations and the result is so reasonable it has been accepted in State practice".²⁰⁹ Like Judge Fitzmaurice, he accepted that "[t]he equities are particularly striking when the respondent State admits foreign investment only on condition that the investors form a corporation under its law",²¹⁰ but he did not limit the exception to such circumstances.

82. Judges Padilla Nervo,²¹¹ Morelli²¹² and Ammoun,²¹³ on the other hand, were vigorously opposed to such an exception. Judge Padilla Nervo declared that the ICJ pronouncement on this subject "should not be interpreted as an admission that such 'theory' might be applicable in other cases where the State whose responsibility is invoked is the national State of the company".²¹⁴

83. The ICJ statement on this subject was clearly *obiter dictum*,²¹⁵ as was its more famous *obiter dictum* in the same judgment on obligations *erga omnes*.²¹⁶ Nevertheless it may be argued that by referring to such an exception in the context of principles of equity and reason the Court wished to signal its support for such an exception, as it clearly did in the case of obligations *erga omnes*.²¹⁷

5. POST-BARCELONA TRACTION DEVELOPMENTS

84. Developments relating to the proposed exception in the post-*Barcelona Traction* period have occurred mainly in the context of investment treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.

85. In the *ELSI* case²¹⁸ an ICJ Chamber allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. As shown above,²¹⁹ the Court avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction*, or on the proposed exception left open in *Barcelona Traction*, despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to

²⁰⁸ *Ibid.*, para. 16.

²⁰⁹ *Ibid.*, pp. 191–192.

²¹⁰ *Ibid.*, p. 192.

²¹¹ *Ibid.*, pp. 257–259.

²¹² *Ibid.*, pp. 240–241.

²¹³ *Ibid.*, p. 318.

²¹⁴ *Ibid.*, p. 257.

²¹⁵ See the comment of Caffisch in "Round table ...", p. 347. Caffisch did, however, make it clear that international law recognizes such an exception.

²¹⁶ *I.C.J. Reports 1970* (see footnote 3 above), p. 32, paras. 33–34.

²¹⁷ Such an inference is drawn by Seidl-Hohenveldern, "Round table ...", p. 347; and *op. cit.*, pp. 9–10.

²¹⁸ See footnote 69 above.

²¹⁹ Paras. 25–28.

²⁰¹ *I.C.J. Reports 1970* (see footnote 3 above), p. 48, para. 92. Cf. the comment by Mann that *Barcelona Traction* might have had the "functional nationality" of Spain, in which case this exception might have been relevant ("The protection of shareholders' interests ...", pp. 271–272).

²⁰² *I.C.J. Reports 1970* (see footnote 3 above), p. 48, paras. 93–94.

²⁰³ *Ibid.*, pp. 72–75.

²⁰⁴ *Ibid.*, p. 134.

²⁰⁵ *Ibid.*, pp. 191–193.

²⁰⁶ *Ibid.*, p. 72, para. 14.

²⁰⁷ *Ibid.*, p. 73, para. 15.

protect the rights of shareholders in the company.²²⁰ This silence might be explained on a number of grounds,²²¹ particularly the fact that the Chamber was not concerned with the evaluation of customary international law, but with the interpretation of a bilateral treaty of friendship, commerce and navigation²²² which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber, as is shown by the exchange between Judges Oda and Schwebel in their separate opinions. Judge Oda stated, in respect of the attempt on the part of the United States to protect the interests of two American corporations, Raytheon and Machlett, in ELSI, an Italian company:

Raytheon and Machlett certainly could, in Italy, “organize, control and manage” corporations in which they held 100 per cent of the shares—as in the case of ELSI—but this cannot be taken to mean that those United States corporations, as shareholders of ELSI, can lay claim to any rights other than those rights of shareholders guaranteed to them under Italian law as well as under the general principles of law concerning companies. The rights of Raytheon and Machlett as shareholders of ELSI remained the same and were not augmented by the FCN [Friendship, Commerce and Navigation] Treaty. Those rights which Raytheon and Machlett could have enjoyed under the FCN Treaty were not breached by the requisition order, because that order did not affect the “direct rights” of those United States corporations, as shareholders of an Italian company, but was directed at the Italian company of which they remained shareholders.²²³

To this Judge Schwebel responded:

[T]he Judgment largely construes the Treaty of Friendship, Commerce and Navigation between the United States and Italy in ways which sustain rather than constrain it as an instrument for the protection of the rights of the nationals, corporations and associations of the United States in Italy and the rights of nationals, corporations and associations of Italy in the United States. Arguments were pressed on the Chamber which, if accepted, would have deprived the Treaty of much of its value. In particular, it was maintained that the Treaty was essentially irrelevant to the claims of the United States in this case, since the measures taken by Italy (notably, the requisition of ELSI’s plant and equipment) directly affected not nationals or corporations of the United States but an Italian corporation, ELSI, whose shares happened to be owned by United States corporations whose rights as shareholders were largely outside the scope of the protection afforded by the Treaty. The Chamber did not accept this argument.²²⁴

Writers on the Court’s decision are in general agreement with Judge Schwebel that the Chamber rejected Judge Oda’s position.²²⁵

86. It is difficult to know exactly what inference is to be drawn from the judgment in *ELSI*. Nevertheless there is substance in the view expressed by Dinstein that “ELSI removes a certain question mark from *Barcelona Traction* and strengthens the outlook of the majority of the Judges who expressed their opinions in the earlier case”²²⁶ in favour of the proposed exception.

87. In their interpretation of the 1981 Algiers Declaration, providing for the settlement of United States-Iran

claims,²²⁷ and the Convention on the settlement of investment disputes between States and nationals of other States, tribunals have been prepared to extend the protection of shareholders in a company to claims against the State of incorporation of the company.²²⁸

6. PRESENT STATUS OF THE EXCEPTION

88. Before *Barcelona Traction* there was support for the proposed exception, although opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. The *obiter dictum* in *Barcelona Traction* and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend. Moreover, both the United States²²⁹ and the United Kingdom²³⁰ have declared their support for the exception.

89. Writers remain divided on the issue. Some writers, like Judge Morelli,²³¹ stress that it is “illogical” and “anomalous”²³² to hold a State responsible for an injury to its own nation. Brownlie argues that:

It is arbitrary to allow the shareholders to emerge from the carapace of the corporation in this situation but not in others. If one accepts the general considerations of policy advanced by the Court then this alleged exception to the rule is disqualified.²³³

Other writers, like Judge Jessup,²³⁴ support the exception on grounds of equity, reason and justice.²³⁵ Oppenheim

²²⁷ See footnote 102 above.

²²⁸ See *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran* (footnote 102 above), p. 496 (interpreting article VII, paragraph 2, of the Algiers Declaration); *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia*, United States District Court for the Southern District of New York, 12 December 1986, ILM, vol. 26 (1987), pp. 652–654 (interpreting article 25 of the Convention on the settlement of investment disputes between States and nationals of other States).

²²⁹ In the Sixth Committee debate of 2002 on the report of the Commission, the representative of the United States stated that “[his] Government took the nationality of shareholders into consideration in deciding whether to extend diplomatic protection to a corporation and believed that States could do so in respect of unrecovered losses to shareholders’ interests in a corporation which was registered or incorporated in another State and was expropriated or liquidated by the State of registration or incorporation, or of other unrecovered direct losses” (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 23rd meeting (A/C.6/57/SR.23), para. 52).

²³⁰ According to its 1985 rules applying to international claims: “Where a UK [United Kingdom] national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, HMG [Her Majesty’s Government] may intervene to protect the interests of that UK national.”

(Rule VI, reprinted in Warbrick, *loc. cit.*, p. 1007)

²³¹ According to Judge Morelli, the proposed exception would “make havoc with the system of international rules regarding the treatment of foreigners. It would, furthermore, be a wholly illogical and arbitrary deduction” (*I.C.J. Reports 1970* (see footnote 3 above), pp. 240–241).

²³² Brownlie, *op. cit.*, 5th ed., p. 495. See also Jiménez de Aréchaga, “International law in the past third of a century”, pp. 290–291; Díez de Velasco, “La protection diplomatique des sociétés et des actionnaires”, pp. 165–166; and Abi-Saab, *loc. cit.*, p. 116.

²³³ *Op. cit.*, 5th ed., p. 495.

²³⁴ *I.C.J. Reports 1970* (see footnote 3 above), pp. 191–192.

²³⁵ Seidl-Hohenveldern, *op. cit.*, pp. 9–10; Caffisch, “Round table ...”, pp. 347; and Sacerdoti, “*Barcelona Traction* revisited: foreign-owned and controlled companies in international law”, p. 703.

²²⁰ *I.C.J. Reports 1989* (see footnote 69 above), pp. 64, para. 106, and 79, para. 132.

²²¹ See paragraph 27 above.

²²² See footnote 70 above.

²²³ *I.C.J. Reports 1989* (see footnote 69 above), pp. 87–88.

²²⁴ *Ibid.*, p. 94.

²²⁵ See the authors cited in footnote 73 above.

²²⁶ *Loc. cit.*, p. 512. Cf. Stern, *loc. cit.*, pp. 925–926, who expresses regret that the Chamber failed to give a clear answer on this question.

declines to take a firm position on the subject, but adds that “a majority of the ICJ”²³⁶ supported such an exception.

90. As indicated above,²³⁷ it is sometimes suggested that the exception is only to be recognized either where the injured company was compelled to incorporate in the wrongdoing State or where the company is “practically defunct”. Neither of these qualifications is necessary. Writers in support of the exception on occasion refer to the fact that the reasons for the exception become even stronger when the company has been forced to incorporate in the wrongdoing State, but none limit it to such a case.²³⁸ Nor did ICJ in its discussion of this matter in *Barcelona Traction*.²³⁹ As to the other suggested qualification, it is true that the exception has sometimes been invoked in circumstances in which the company was “practically defunct”.²⁴⁰ On the other hand, most commentators maintain that it would be wrong to limit the exception in this way because it shows no understanding of the reason for the exception. As Jones states:

It seems as if, in the earlier arbitral decisions, excessive or mistaken emphasis was laid on the corporation being in a state of dissolution (e.g. *Delagoa Bay* case) rather than on the factor, always also present, that the injury was done by the state of which the corporation was a national, coupled with the additional factor of the absence of any local effective remedy. The fact that a corporation is “defunct”, as it was put in the *Delagoa Bay* case, is really only relevant in so far as it precludes the possibility of *effective remedy* by corporate action. This consideration really lies at the basis of the exception allowing intervention where the corporation is a national of the state oppressing it.²⁴¹

7. RECOMMENDATION

91. The Special Rapporteur supports the exception contained in article 18 (b) without qualification. It enjoys a wide measure of support in State practice, judicial pronouncements and doctrine. Moreover, it seems warranted on grounds of equity, reason and justice. At the very least it should be accepted where the company has been compelled to incorporate in the wrongdoing State, in which case incorporation makes it what some writers have described as a “Calvo corporation”,²⁴² a corporation whose incorporation, like the Calvo clause, is designed to protect it from the rules of international law relating to diplomatic protection. Here it is necessary to repeat the warning given by the British Government in *Mexican Eagle*:

If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.²⁴³

²³⁶ Jennings and Watts, eds., *op. cit.*, p. 520, footnote 14.

²³⁷ Para. 68.

²³⁸ See, for example, Seidl-Hohenveldern, *op. cit.*, pp. 9–10.

²³⁹ *I.C.J. Reports 1970* (see footnote 3 above), p. 48, para 92. See also the separate opinions of Judges Fitzmaurice, *ibid.*, p. 73, and Jessup, *ibid.*, p. 192.

²⁴⁰ See the *Delagoa Bay Railway* case (footnote 145 above); and O’Connell, *International Law*, p. 1045.

²⁴¹ *Loc. cit.*, p. 257. See also Beckett, *loc. cit.*, pp. 190–191; Cafilisch, *op. cit.*, pp. 203–204; and the separate opinion of Judge Wellington Koo, *I.C.J. Reports 1964* (footnote 4 above), p. 58, para. 21.

²⁴² Reuter, *Droit international public*, p. 249; Seidl-Hohenveldern, *op. cit.*, p. 10; and Diez de Velasco, *loc. cit.*, p. 166.

²⁴³ Whiteman, *op. cit.*, pp. 1273–1274.

C. Article 19

Articles 17 and 18 are without prejudice to the right of the State of nationality of shareholders in a corporation to protect such shareholders where they have been directly injured by the internationally wrongful act of another State.

92. Article 19 is a savings clause designed to protect shareholders whose own rights, as opposed to those of the company, have been injured. That such shareholders qualify for diplomatic protection in their own right was recognized by ICJ in *Barcelona Traction* when it stated:

[A]n act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.

The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder’s rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.²⁴⁴

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

93. The issue of the protection of the direct rights of shareholders was, so it has been argued,²⁴⁵ before the ICJ Chamber in the *ELSI* case.²⁴⁶ However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the treaty of friendship, commerce and navigation²⁴⁷ that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international law on this subject. In *Agrotexim*,²⁴⁸ the European Court of Human Rights, like ICJ in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.²⁴⁹

²⁴⁴ *I.C.J. Reports 1970* (see footnote 3 above), p. 36, paras. 46–47.

²⁴⁵ Lowe, *loc. cit.*, p. 269; and Watts, *loc. cit.*, p. 435, footnote 56.

²⁴⁶ See footnote 69 above.

²⁴⁷ See footnote 70 above.

²⁴⁸ *Agrotexim and Others v. Greece* (see footnote 156 above).

²⁴⁹ There the Court stated:

“The Court notes at the outset that the applicant companies did not complain of a violation of the rights vested in them as shareholders of Fix Brewery, such as the right to attend the general meeting and to vote. Their complaint was based exclusively on the proposition that the alleged violation of the Brewery’s right to the peaceful enjoyment of its possessions had adversely affected their own financial interests because of the resulting fall in the value of their shares. They considered that the financial losses sustained by the company and the latter’s rights were to be regarded as their own, and that they were therefore victims, albeit indirectly, of the alleged violation. In sum, they sought to have the company’s corporate veil pierced in their favour.”

(*Ibid.*, pp. 23–24, para. 62)

94. The proposed article leaves two questions unanswered: first, the content of the rights, or when such a direct injury occurs; secondly, the legal order required to make this determination.

95. ICJ in *Barcelona Traction* mentions the most obvious rights of shareholders: the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation. This list is not, however, exhaustive, as the Court itself indicated. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders' rights and corporate rights, particularly in respect of the right to participate in the management of corporations. As Lowe has warned, it is necessary to avoid

the conflation of shareholders' rights with corporate rights, and the elision of the freedom of shareholders to exercise managerial rights under the law of the State of incorporation with the supposed right of shareholders to managerial freedom as a matter of international law.²⁵⁰

96. In the discussion on article 18 (a), dealing with the dissolution of a corporation, the question was raised²⁵¹ as to the legal system best qualified to make this determination: that of the incorporating State, the wrongdoing State or international law. Similar questions arise in respect of the law to determine whether the direct rights of a shareholder have been violated. The law of the wrongdoing State is no more the appropriate regime to make such a determination than it is to determine whether a company has ceased to exist. In most cases it seems that this is a matter to be decided by the law of the State of incorporation, as with the dissolution of a corporation.²⁵² That ICJ had municipal law, and not international law, in mind as the governing legal order is clear from its own dictum. This may, however, be a case for the invocation of general principles of law,²⁵³ particularly where the company is incorporated in the wrongdoing State, to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.

D. Article 20 (Continuous nationality of corporations)

Article 20

A State is entitled to exercise diplomatic protection in respect of a corporation which was incorporated under its laws both at the time of injury and at the date of the official presentation of the claim [; provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation].

²⁵⁰ *Loc. cit.*, p. 283.

²⁵¹ See paragraph 65 above.

²⁵² Lowe, *loc. cit.*, pp. 278–279, states that the law of the State of incorporation is to determine the legal rights of the investor to control the company.

²⁵³ In his separate opinion in *ELSI*, Judge Oda spoke of “the general principles of law concerning companies” in the context of shareholders' rights, *I.C.J. Reports 1989* (see footnote 69 above), pp. 87–88.

97. State practice, jurisprudence and doctrine on the subject of the requirement of continuous nationality for the presentation of a diplomatic claim are mainly concerned with the requirement insofar as it relates to natural persons.²⁵⁴ It will be recalled that the Commission adopted the following draft article on this subject at its fifty-fourth session in 2002:

Article 4 [9]. Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.²⁵⁵

98. The reason for this special concern with the requirement of continuous nationality in respect of natural persons is understandable. Natural persons change nationality more frequently and more easily than corporations, as a result of naturalization, voluntary or involuntary (as, possibly, in the case of marriage or adoption), and State succession. In addition, too rigid an insistence on a rule of continuous nationality from the time of injury to the time of the presentation of the claim may cause great hardships in individual cases where the change of nationality is unrelated to the bringing of a diplomatic claim. This consideration prompted the exception to the rule contained in paragraph 2 of the above draft article.

99. Similar considerations do not apply in the case of corporations, *if* the proposal contained in article 17, paragraph 2, of the present draft articles is accepted. According to this provision, a corporation takes the nationality of the State in which it is incorporated, and not the State in which it is domiciled or in which it has its *siège social* or by which it is economically controlled. Consequently it may not change its nationality for the purposes of diplomatic protection by relocating its headquarters, domicile or place of control.²⁵⁶ It may only change its nationality by reincorporation in another State, in which case it assumes a new personality, thereby breaking the continuity of nationality of the corporation. This principle was recognized in the *Orinoco Steamship* case.²⁵⁷ Wherein a company incorporated in the United Kingdom, the Orinoco Shipping and Trading Company Ltd., transferred

²⁵⁴ See further on this subject, *Yearbook ... 2000* (footnote 1 above), pp. 239–246.

²⁵⁵ *Yearbook ... 2002* (see footnote 2 above), p. 67, para. 280.

²⁵⁶ This is another reason for preferring the State of incorporation as the State of nationality. The adoption of the State of the *siège social*, domicile or economic control as the State of nationality would give rise to serious problems of continuity of nationality, as shown by Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international*, pp. 105–108.

²⁵⁷ UNRIAA (see footnote 177 above).

its claim against the Venezuelan Government to a successor company, the Orinoco Steamship Company, incorporated in the United States. As the treaty establishing the Venezuelan-American Mixed Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, *Umpire Barge* made it clear that, but for the treaty, the claim would not have been allowed:

[I]t is true that, according to the admitted and practiced rule of international law, in perfect accordance with the general principles of justice and perfect equity, claims do not change nationality by the fact that their consecutive owners have a different citizenship, because a state is not a claim agent, but only, as the infliction of a wrong upon its citizens is an injury to the state itself, it may secure redress for the injury done to its citizens, and not for the injury done to the citizens of another state.

Still, this rule may be overseen or even purposely set aside by a treaty.²⁵⁸

100. The Venezuelan Commissioner, Mr. Grisanti, in dissent, was more forceful on this rule when he stated:

It is a principle of international law, universally admitted and practiced, that for collecting a claim protection can only be tendered by the Government of the nation belonging to the claimant who originally acquired the right to claim, or in other words, that an international claim must be held by the person who has retained his own citizenship since said claim arose up to the date of its final settlement, and that only the government of such person's country is entitled to demand payment for the same, acting on behalf of the claimant. Furthermore, the original owner of the claims we are analyzing was the Orinoco Shipping and Trading Company (Limited), an English company, and that which demands the payment is the Orinoco Steamship Company (Limited), an American company; and as claims do not change nationality for the mere fact of their future owners having a different citizenship, it is as clear as daylight that this Venezuelan-American Mixed Commission has no jurisdiction for entertaining said claims.²⁵⁹

...

The fact is that limited companies owe their existence to the law in conformity to which they have been organized, and consequently their nationality can be no other than that of said law. The conversion of said company, which is English, into the present claimant company, which is North American, can have no retroactive effect in giving this tribunal jurisdiction for entertaining claims which were originally owned by the first-mentioned company, as that would be to overthrow or infringe fundamental principles.²⁶⁰

101. Only in one instance may a corporation, possibly, change nationality without changing legal personality, and that is in the case of State succession.²⁶¹ However, here too there may be problems relating to the survival of the corporation and the application of the continuity rule. This is illustrated by the *Panevezys-Saldutiskis Railway* case,²⁶² in which Estonia claimed that it had succeeded to a Tsarist Russian corporation operating in its territory and that this enabled it to bring a claim against Lithuania. Although PCIJ failed to give a decision on the subject,²⁶³

²⁵⁸ *Ibid.*, p. 192.

²⁵⁹ *Ibid.*, p. 184.

²⁶⁰ *Ibid.*, p. 186.

²⁶¹ See generally on this subject O'Connell, *State Succession in Municipal Law and International Law*, pp. 537–542. See also *Yearbook ... 1998* (footnote 96 above), fourth report on nationality in relation to the succession of States, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

²⁶² *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 4.

²⁶³ *Ibid.*, p. 17. The Court attached this matter to the merits but then

it highlighted some of the difficulties inherent in such a situation in the following passage:

The ground on which the Company claims the railway is that it is the same as, or the successor to, the Russian company. The issue as to whether or not it is so involves a decision with regard to the effect of the events and the legislation in Russia at the time of the Bolshevik revolution, for it has been argued that the events and the legislation in Russia put an end to the company's existence and left the devolution of its property outside Russia to be governed by the law of the country in which the property was situated. This question, however, closely affects also the question whether or not there was in existence at the time of the Lithuanian acts giving rise to the present claim an Estonian national whose cause the Estonian Government was entitled to espouse.²⁶⁴

102. In all the circumstances it seems appropriate to require that a State which exercises diplomatic protection on behalf of a corporation must prove that the corporation was a national under its laws both at the time of injury and at the date of the official presentation of the claim. This leaves one question unanswered, however: if the corporation ceases to exist in its place of incorporation as a result of an injury caused by the internationally wrongful act of another State, must a claim against the wrongdoing State be brought by the State of nationality of the shareholders, in accordance with proposed article 18 (a), or may it be brought by the State of nationality of the defunct corporation? To put the question in the context of *Barcelona Traction*: if the Barcelona Traction company had ceased to exist in Canada as a result of the injury caused to the company by Spain, would the claim have passed completely to Belgium, the national State of the shareholders? Or would Canada have retained its right to claim on behalf of its defunct corporation? Alone? Or together with Belgium?

103. The difficulties inherent in such a situation for both company and shareholders were alluded to in *Barcelona Traction* by Judges Jessup and Gros and Judge *ad hoc* Riphagen. Judge Jessup highlighted the anomaly of the case in which a foreign corporation was destroyed by the confiscatory act of a State, followed by a consequent dissolution in its own State. "Here", he said, "some doctrine would say that ordinarily State A, the State of incorporation, should be the one to extend diplomatic protection. But by hypothesis the corporate life has been extinguished by State A, so that ... a claim can not be pressed for the corporation."²⁶⁵ Consequently the State of incorporation could not meet the requirements of the continuity rule that the corporation be a national both at the time of the injury and at the time of the presentation of the claim. Nor, however, could the shareholders meet these requirements, as "at the time of the unlawful act ('confiscation') they did not have ... a property interest and therefore under the rule of continuity the claim did not have in origin the appropriate nationality on that basis".²⁶⁶

upheld a preliminary objection based on the failure to exhaust local remedies.

²⁶⁴ *Ibid.* See also the dissenting opinion of Judge van Eysinga, *ibid.*, pp. 33 and 35; and the separate opinion of Judge Fitzmaurice in *Barcelona Traction, I.C.J. Reports 1970* (footnote 3 above), pp. 101–102.

²⁶⁵ *I.C.J. Reports 1970* (see footnote 3 above), p. 193.

²⁶⁶ *Ibid.*

104. Judge Gros argued that the only way out of this dilemma was to allow both the State of incorporation and the State of nationality of the shareholders to exercise diplomatic protection:

[T]he Judgment's view which admits the possibility of action by the State of the shareholders in the event of the disappearance of the company is lacking in logic for, in such an eventuality, if the company's State had started an action it could not be nonsuited through the disappearance of the company. And even if such action had been instituted after the disappearance of the company, it is difficult to see why the State of the company should be unable to make a claim in respect of the unlawful act which was the root cause of the disappearance. If then, in this case, both States can act, does this not mean that the general rule conferring the right of action on the State of the company is not an exclusive rule?²⁶⁷

105. Judge *ad hoc* Riphagen found the ICJ decision that the right of the shareholders to claim only came into existence on the demise of the company to be unrealistic and unsatisfactory. He stated:

On the level of municipal private law, it is not the company's going into liquidation which causes a right to arise for each shareholder, namely a right to a part of the company's property: it is only at the end of the liquidation that any *surplus* there may be is distributed among the shareholders. Furthermore, the liquidation was always *subsequent* to the measures taken by the State which was held responsible on the international plane, so that those measures could not have infringed the rights of the shareholders on the municipal private law plane.

....

The Judgment observes (paragraph 66) that "only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company". The Judgment does not explain how in such a case, after the legal demise of the company, the action of a government *other* than "the company's government" might be compatible with the rule of continuity! In reality, the legally protected interest of such other State, and consequently also the obligations towards it of the State which took the measures of which complaint is made must exist on the international plane before and independently of the company's demise on the plane of municipal law, a demise which is but one of the *possible* subsequent consequences of those measures.²⁶⁸

106. Difficulties of the kind raised above have also troubled courts²⁶⁹ and scholars.²⁷⁰

107. It is suggested that the solution to this problem does not lie in a technical, logical rule²⁷¹ that seeks to determine the precise moment of corporate death at which the right of the State of nationality to exercise diplomatic protection in respect of a company gives way to the State of nationality of the shareholders. Instead an equitable rule should be sought which takes account of the customary long lapse of time between the date of injury and the date of presentation of the claim and of the difficulty in

²⁶⁷ *Ibid.*, p. 277.

²⁶⁸ *Ibid.*, p. 345.

²⁶⁹ See the *Kunhardt & Co.* case, UNRIAA (footnote 181 above), and particularly the dissenting opinion of the Venezuelan Commission, Mr. Paúl, p. 180; *F. W. Flack, on behalf of the estate of the late D. L. Flack*, *ibid.* (footnote 95 above), p. 63. Wyler argues that the *ELSI* case (see footnote 69 above) might also have raised problems of this kind, *op. cit.*, pp. 200–201.

²⁷⁰ Beckett, *loc. cit.*, p. 191; Caffisch, *op. cit.*, pp. 206–207; and Wyler, *op. cit.*, pp. 197–202.

²⁷¹ See the separate opinions in *Barcelona Traction* of Judges Fitzmaurice (*I.C.J. Reports 1970* (footnote 3 above), pp. 101–102) and Jessup (*ibid.*, pp. 202–203) in support of such an approach.

determining the precise moment at which the company's rights are replaced by those of the shareholders. Moreover, such a rule should be without prejudice to the interests of either company or shareholders. The proviso to article 20 contains such a rule as it would allow the State of nationality of the company to continue to protect the company after its demise occasioned by the injury to the company. The consequence of this proviso would not, however, be to exclude the right of the State of nationality of the shareholders to initiate a claim when the company ceased to exist, despite the fact that a strict application of the continuity rule might bar such a State from protecting shareholders if (as will usually be the case) the injury occurred before the dissolution of the company.

108. A necessary consequence of this proposal is that there will be a grey area in time in which both the State of nationality of the company and the State of nationality of the shareholders might bring diplomatic claims. In theory no fault can be found with such a duality of claims. The diplomatic protection of dual nationals by two States and of international civil servants by both organization and State shows that such a solution is not out of line with existing rules.²⁷² Nor is it likely to raise problems in practice. Both protecting States are likely to behave with caution in taking up the claims of their nationals in the grey area in time. Moreover, as Judge Jessup observed in *Barcelona Traction*:

In the case of two different but simultaneous justifiable diplomatic interpositions regarding the same alleged wrongful act, the Respondent can eliminate one claimant by showing that a full settlement had been reached with the other.²⁷³

109. Article 20 (including the proviso) is concerned with the continuity rule in respect of *corporations*. Article 4 of the present draft articles deals with the continuity rule in respect of natural persons. The latter rule will cover shareholders when they are natural as opposed to corporate persons. It therefore seems unnecessary to draft a separate continuity rule for shareholders. Where a State of nationality of shareholders seeks to intervene on behalf of its nationals in the circumstances set out in articles 18 (b) and 19 and, in most instances, those of article 18 (a) (subject to the grey zone scenario described in paragraph 108 above), it will have to comply with the requirements of the continuity rule prescribed in article 4.

E. Article 21 (*Lex specialis*)

Article 21. *Lex specialis*

These articles do not apply where the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States, is governed by special rules of international law.

110. The present report draws attention to the fact that today foreign investment is largely regulated and protected by BITs.²⁷⁴ The number of BITs has grown

²⁷² See paragraph 38 above. See also Caffisch, "The protection of corporate investments ...", p. 193.

²⁷³ *I.C.J. Reports 1970* (see footnote 3 above), p. 200.

²⁷⁴ Para. 19 above.

considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence.²⁷⁵

111. BITs provide two routes for the settlement of investment disputes as alternatives to domestic remedies in the host State. First, they may provide for the direct settlement of the investment dispute between the investor and the host State, before either an *ad hoc* tribunal or a tribunal established by ICSID under the Convention on the settlement of investment disputes between States and nationals of other States. Secondly, they may provide for the settlement of an investment dispute by means of arbitration between the State of nationality of the investor (corporation or individual) and the host State over the interpretation or application of the relevant provision of the BIT. The second procedure is usually available in all cases, with the consequence that it acts as a reinforcement of the investor-State dispute resolution mechanism.

112. Where the dispute resolution procedures provided for in a BIT or ICSID are invoked, customary law rules relating to diplomatic protection are excluded.²⁷⁶ Both BITs²⁷⁷ and the Convention on the settlement of investment disputes between States and nationals of other States make this clear.²⁷⁸

113. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration and they avoid the political uncertainty inherent in the discretionary nature of diplomatic protection.²⁷⁹

114. The existence of a special regime of the kind described above was acknowledged by ICJ in *Barcelona Traction*:

Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral

²⁷⁵ See Kokott, *loc. cit.*, p. 263. See also Vandeveld, “The economics of bilateral investment treaties”, p. 469.

²⁷⁶ See Kokott, *loc. cit.*, pp. 265–266; and Peters, “Dispute settlement arrangements in investment treaties”.

²⁷⁷ See the Agreement between the Federal Republic of Germany and the Republic of the Philippines for the promotion and reciprocal protection of investments (Bonn, 18 April 1997) (United Nations, *Treaty Series*, vol. 2108, No. 36656), which provides in article 9, paragraph (3): “Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or comply with the award rendered by the International Centre for Settlement of Investment Disputes.” (Cited by Kokott, *loc. cit.*, p. 265, footnote 184.)

²⁷⁸ Article 27, paragraph (1), of the Convention provides:

“No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”

²⁷⁹ See Kokott, *loc. cit.*, pp. 276–277, cited in paragraph 19 above.

treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures.²⁸⁰

115. ICJ preferred to see arrangements of this kind as constituting a *lex specialis* between parties designed to create a special regime of investment protection.²⁸¹

116. Article 21 aims to make it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. It serves the same function as article 55 of the Commission’s draft articles on the responsibility of States for internationally wrongful acts²⁸² and reflects the maxim *lex specialis derogat legi generali*. For this principle to apply, “it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other”.²⁸³ There is a clear inconsistency between the rules of customary international law on the diplomatic protection of corporate investment, which envisage protection only at the discretion of the national State and only, subject to limited exceptions, in respect of the corporation itself, and the special regime for foreign investment established by bilateral and multilateral investment treaties, which confers rights on the foreign investor, either as a corporation or as a shareholder, determinable by an international arbitration tribunal. For this reason a provision along the lines of article 21 is indispensable in the present set of draft articles.

F. Article 22 (Legal persons)

Article 22. Legal persons

The principles contained in articles 17 to 21 in respect of corporations shall be applied *mutatis mutandis* to other legal persons.

117. The present report is devoted entirely to a particular species of legal person, the corporation. Article 22 applies the rules expounded in respect of corporations to other legal persons, allowing for the changes that must be made (*mutatis mutandis*) in the cases of other legal persons depending upon their nature, aims and structure. The comment on this article explains why the focus of attention is, and should be, upon the corporation in the present set of articles and why it is not possible to draft further articles dealing with the diplomatic protection of each kind of legal person.

²⁸⁰ *I.C.J. Reports 1970* (see footnote 3 above), p. 47, para. 90.

²⁸¹ *Ibid.*, pp. 40–41, paras. 62–63. Cf. Gunawardana, “The inception and growth of bilateral investment promotion and protection treaties”, pp. 549–550.

²⁸² *Yearbook ... 2001* (see footnote 67 above), p. 30.

²⁸³ *Ibid.*, p. 140, para. (4) of the commentary to article 55. No attempt is made to discuss the jurisprudence on this subject, as it may be found in *ibid.*, para. (5). See also Simma, “Self-contained regimes”.

118. In the ordinary sense of the word, “person” is a human being. In the legal sense, however, a “person” is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. Legal personality is “not a natural phenomenon but a creature of law”.²⁸⁴ A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

119. In Roman law there were two types of juristic person: the *universitas personarum* and the *universitas rerum*. The former was an association of persons, corresponding more or less to the modern corporation, which included the *fiscus*, municipalities and *collegia fabrorum* (craft guilds). The latter was an aggregate of assets and liabilities which formed a separate legal entity without being connected with any particular person or persons: the *hereditas jacens* (estate without an owner) and *pia causa* (charitable foundation—a complex of assets set aside by a donor or testator for a charitable purpose). In most legal systems based on Roman law, the *universitas personarum* has become the corporation, and the *universitas rerum* has become the foundation (Dutch *stichting*, German *Stiftung*).²⁸⁵ The *universitas personarum* was, however, restricted mainly to municipalities and guilds throughout the Middle Ages, and it was only in the sixteenth century that the link-up between trading companies and corporate personality came about as a result of the emergence of the joint-stock company.²⁸⁶

120. There is jurisprudential debate about the legal nature of juristic personality²⁸⁷ and, in particular, about the manner in which a legal person comes into being. The fiction theory (associated with von Savigny) maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand (associated with Gierke), corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes, without requiring grant of legal personality by the State.²⁸⁸ Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice and ICJ. In the *Daily Mail* case on freedom of establishment, the European Court of Justice stated: “[I]t should be borne in mind that, unlike natural persons, companies are creatures of the law ... They exist only by virtue of

the varying national legislation which determines their incorporation and functioning.”²⁸⁹ In the *Barcelona Traction* case ICJ declared:

In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.²⁹⁰

121. Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with differing characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, NGOs and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public²⁹¹ and private²⁹² international law largely confine their consideration of legal persons in the context of international law to the corporation—the commercial, profit-making enterprise whose capital is represented by shares, in respect of which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter.²⁹³ There is, however, a further explanation for this approach on the part of jurists. This is the fact that it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection²⁹⁴ and why the present set of draft articles do—and should—concern themselves largely with this entity.

122. While the corporation is the principal legal person for the purposes of diplomatic protection, it is not the only legal person that may require such protection.

²⁸⁹ *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, case 81/87, *European Court Reports* 1988, para. 19.

²⁹⁰ *I.C.J. Reports* 1970 (see footnote 3 above), pp. 33–34, para. 38.

²⁹¹ See, for example, Brownlie, *op. cit.*, 5th ed., pp. 425 and 486; Daillier and Pellet, *op. cit.*, p. 492; Jennings and Watts, eds., *op. cit.*, pp. 517 and 859; O’Connell, *International Law*, pp. 1039 *et seq.*; and Fatouros, “National legal persons in international law”, p. 495.

²⁹² See, for example, Collins, ed., *Dacey and Morris on the Conflict of Laws*, pp. 1101 *et seq.*; and North and Fawcett, *Cheshire and North’s Private International Law*, pp. 171 *et seq.*

²⁹³ For a description of these common features of a corporation, see *I.C.J. Reports* 1970 (footnote 3 above), p. 34, paras. 40–41.

²⁹⁴ According to Brownlie, *op. cit.*, 5th ed.: “A major issue concerning corporations is the right to exercise diplomatic protection in respect of the corporation and its shareholders” (p. 426).

²⁸⁴ Beale, *Selections from a Treatise on the Conflict of Laws*, p. 653, para. 120.2.

²⁸⁵ Hahlo and Kahn, *The South African Legal System and its Background*, pp. 104–105.

²⁸⁶ For example, the Muscovy Company (1555), with a monopoly of trade with Russia, the English East India Company (1600) and the Dutch East India Company (1602).

²⁸⁷ According to Wolff there are 16 theories on this subject (“On the nature of legal persons”, p. 496).

²⁸⁸ Hahlo and Kahn, *op. cit.*, p. 107. See also “Notes—what we talk about when we talk about persons: the language of a legal fiction”, *Harvard Law Review*, vol. 114, No. 6 (April 2001), pp. 1745–1768.

123. PCIJ case law shows that a commune²⁹⁵ (municipality) or university²⁹⁶ may in certain circumstances qualify nationals of a State as legal persons. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State. As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State,²⁹⁷ will not qualify for diplomatic protection.

124. Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it had been created. NGOs engaged in worthy causes abroad would appear to fall into the same category as foundations. Doehring, however, has argued otherwise.²⁹⁸ He notes that:

[T]he non-governmental organization is a legal subject, a juristic person, which obtained its personality from a national legal order. The members of the non-governmental organization are not the States or their governments but private persons having the nationality of a foreign State, or national associations registered in a foreign State, or enterprises registered in foreign States. The non-governmental organization itself is normally registered in the State in which its administration or headquarters exercises its functions so that it possesses the nationality of this State. This incorporation of the non-governmental organization into a national legal order is an unavoidable prerequisite of its capacity to act as a legal person when administering its own affairs, e.g. when buying materials or renting a residence. This way the non-governmental organization possesses a nationality in spite of the fact that its tasks are of international concern. But, since the organization is not a subject of international law we are forced to go back to its national status when its legal relations are at stake.²⁹⁹

However, he then argues that such an NGO has insufficient connection with its State of registration to qualify for diplomatic protection. Its worldwide membership and activities, he claims, result in a situation in which an injury to an NGO cannot, in terms of the *Mavrommatis*³⁰⁰ rule,

²⁹⁵ In *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 73–75, PCIJ held that the commune of Ratibor fell within the category of “German national” within the meaning of the Convention relating to Upper Silesia, signed by Germany and Poland in Geneva on 15 May 1922 (League of Nations, *Treaty Series*, vol. IX (1922), p. 465).

²⁹⁶ In *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, pp. 227–232, PCIJ held that the Peter Pázmány University was a Hungarian national in terms of article 250 of the Peace Treaty of Trianon and therefore entitled to the restitution of property belonging to it.

²⁹⁷ Private universities such as those found in the United States would qualify for diplomatic protection; as would private schools, if they enjoyed legal personality under municipal law.

²⁹⁸ “Diplomatic protection of non-governmental organizations”.

²⁹⁹ *Ibid.*, p. 572.

³⁰⁰ *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*.

be seen as an injury to the State of registration.³⁰¹ This is a controversial line of reasoning which pays too much attention to *Nottebohm*³⁰² and too little attention to *Barcelona Traction*. Nevertheless it highlights the fact that different legal persons present different issues and perspectives which cannot be codified in a single provision.

125. The infinite variety of forms that legal persons may take is probably best represented by the partnership. In most legal systems partnerships are not legal persons and “it is the interests of the individual partners which are protected by international law”.³⁰³ In some legal systems, however, the partnership enjoys legal personality,³⁰⁴ in which case it might be suggested that the individual partners should be treated in much the same manner as shareholders. The problem is illustrated by the European Economic Interest Grouping (EEIG), created by European Community law.³⁰⁵ According to article 1, paragraph 2, of the regulations creating that entity: “A grouping so formed shall, from the date of its registration as provided for in Article 6, have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued.”³⁰⁶ Article 1, paragraph 3, then stipulates: “The Member States shall determine whether or not groupings registered at their registries, pursuant to Article 6, have legal personality.”³⁰⁷ The *same* types of entities, endowed with *equal* legal capacities by a *uniform* statute, may therefore be granted legal personality in one European Union member State and left without it in another.

126. Although the common law treats companies and partnerships as entirely separate creatures, some legal systems recognize hybrid forms. Germany, for instance, knows the *Kommanditgesellschaft auf Aktien* (KGaA) which has shareholders, as in the case of a public company (*Aktiengesellschaft* (AG)), but one or more of them have unlimited liability and are usually the directors or managers. The KGaA has legal personality and must have at least one general partner; while the shareholders as between themselves are governed by the rules relating to the AG.³⁰⁸

127. This brief survey of some of the species of legal person is designed to show the impossibility of drafting separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons—subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. Most cases involving the diplomatic pro-

³⁰¹ *Ibid.*, pp. 571–580.

³⁰² See footnote 21 above.

³⁰³ O’Connell, *International Law*, p. 1049.

³⁰⁴ Dorresteijn, Kuiper and Morse, *European Corporate Law*, p. 13. Some European countries recognize a form of “modified legal personality” in which partners do not enjoy limited liability (*ibid.*).

³⁰⁵ Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), *Official Journal L* 199 (31 July 1985), p. 1.

³⁰⁶ *Ibid.*, p. 4.

³⁰⁷ *Ibid.*, p. 5.

³⁰⁸ Dorresteijn, Kuiper and Morse, *op. cit.*, pp. 25–26.

tection of legal persons other than corporations will be covered by draft article 17, which is currently before the Drafting Committee in the following revised form:

“For the purposes of diplomatic protection of corporations, a State of nationality means a State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.”³⁰⁹

In terms of article 22, a State will have to prove some connection of the kind described in article 17 between itself and the injured legal person as a precondition for the exercise of diplomatic protection. The language of article 17 is, it is believed, wide enough to cover all cases of legal persons, however different they may be in structure

or purpose. Articles 18 and 19 will not apply to legal persons without shareholders, while article 20, dealing with the principle of continuous nationality, will apply.

128. Latin maxims have largely fallen into disfavour. The maxim “*mutatis mutandis*” is, however, a useful drafting device.³¹⁰ Of course it would be possible to say: “The principles contained in articles 17 to 21 in respect of corporations shall be applied to other legal persons, allowing for the adjustments that must be made to cover the different characteristics of each such legal person.” The use of the maxim “*mutatis mutandis*” does, however, convey the same meaning in a more economical and elegant manner.

³⁰⁹ ILC(LV)/DC/DP/WP.1.

³¹⁰ Garner, in *A Dictionary of Modern Legal Usage*, p. 578, states that “*mutatis mutandis* ... is a useful Latinism in learned writing, for the only English equivalents are far wordier”.

RESERVATIONS TO TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/535 and Add.1

Eighth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: English/French]
[27 May and 10 July 2003]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	31
Works cited in the present report	32
<i>Chapter</i>	<i>Paragraphs</i>
INTRODUCTION.....	1–32 33
A. Seventh report on reservations to treaties and the outcome	2–16 33
1. Consideration of the seventh report by the Commission.....	2–6 33
2. Consideration of chapter IV of the report of the Commission in the Sixth Committee	7–16 34
B. Recent developments with regard to reservations to treaties	17–28 35
C. General presentation of the eighth report	29–32 37
I. WITHDRAWAL AND MODIFICATION OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS.....	33–68 37
A. Enlargement of the scope of reservations.....	34–48 37
B. Withdrawal and modification of interpretative declarations.....	49–68 40
1. Withdrawal of interpretative declarations.....	50–56 40
2. Modification of interpretative declarations.....	57–68 40
II. FORMULATION OF OBJECTIONS TO RESERVATIONS AND INTERPRETATIVE DECLARATIONS—THE “RESERVATIONS DIALOGUE”	69–106 42
<i>Section 1.</i> Formulation of objections to reservations	73–79 43
A. Definition of objections to reservations.....	75–79 43
1. Content of objections	80–106 44
“Generic” object of objections to reservations	82–106 44
Model letter addressed to the chairpersons of the human rights bodies	51

ANNEX

Model letter addressed to the chairpersons of the human rights bodies	51
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Multilateral instruments cited in the present report

Source

Convention on the International Maritime Organization (Geneva, 6 March 1948)	United Nations, <i>Treaty Series</i> , vol. 289, No. 4214, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.

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Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 516, No. 7477, p. 205.
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Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965)	<i>Ibid.</i> , vol. 658, No. 9432, p. 163.
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Optional Protocol to the International Covenant on Civil and Political Rights (New York, 19 December 1966)	<i>Ibid.</i>
Convention on road signs and signals (Vienna, 8 November 1968)	<i>Ibid.</i> , vol. 1091, No. 16743, p. 3.
European Agreement supplementing the Convention on road signs and signals (Geneva, 1 May 1971)	<i>Ibid.</i> , vol. 1142, No. 17935, p. 225.
Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals (Geneva, 1 March 1973)	<i>Ibid.</i> , vol. 1394, No. 23345, p. 263.
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Introduction

1. The seventh report on reservations to treaties presents a concise summary of the International Law Commission's earlier work on the subject.¹ This seemed appropriate since the Commission was entering a new five-year period. As in the earlier reports, it will be sufficient this year to summarize briefly the lessons which can be drawn from the consideration of the seventh report both by the Commission itself and by the Sixth Committee of the General Assembly and to give a concise account of the main developments with regard to reservations that occurred during the past year and were brought to the attention of the Special Rapporteur, before proceeding with a general presentation of this report.

A. Seventh report on reservations to treaties and the outcome

1. CONSIDERATION OF THE SEVENTH REPORT BY THE COMMISSION

2. At its fifty-fourth session in 2002 the Commission adopted the draft guidelines submitted in the sixth report of the Special Rapporteur,² and a draft submitted in the first part of the seventh report,³ which had been referred to the Drafting Committee in 2001⁴ and at the beginning of the fifty-fourth session⁵ with the commentaries pertaining thereto.⁶

3. In spite of their number (11), these guidelines deal only with the formulation of reservations and interpretative declarations. They are far from covering all the questions which should be covered in part III of the Guide to Practice (Formulation and withdrawal of reservations, acceptances and objections) pursuant to the provisional plan of the study which the Special Rapporteur proposed in his second report⁷ and which has been followed consistently since then.

4. The seventh report strove to fill some of these gaps by presenting a set of draft guidelines dealing with the form and procedure for the withdrawal of reservations, with the exception, however, of the rules applying to unilateral declarations by which a State or an international organization seeks to enlarge the scope of previous reservations. These drafts were referred to the Drafting Committee⁸ with the exception of those dealing with the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty.⁹

5. With regard to the latter issue, some members of the Commission felt that the first subparagraph of the draft

⁷ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4.477 and Add.1, p. 48, para. 37.

⁸ *Yearbook ... 2002* (see footnote 5 above), p. 24, para. 101.

⁹ Draft guidelines 2.5.4 and 2.5.11 *bis*, which the Special Rapporteur had suggested should be combined in a draft guideline 2.5.X (see the seventh report, *Yearbook ... 2002* (footnote 1 above), pp. 23–24, paras. 106–114 and pp. 41–42, paras. 213–216). Draft guideline 2.5.X reads as follows:

“1. The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.

“2. Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation.”

¹ *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3, pp. 7–14, paras. 2–47.

² *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3, p. 137.

³ *Yearbook ... 2002* (see footnote 1 above), draft guideline 2.1.7 *bis*, p. 14, para. 46.

⁴ *Yearbook ... 2001*, vol. II (Part Two), p. 177, para. 155.

⁵ *Yearbook ... 2002*, vol. II (Part Two), p. 16, para. 49.

⁶ *Ibid.*, pp. 28–48, para. 103.

or drafts in question stated the obvious, while the second implied that the findings of monitoring bodies had a binding effect. Although he was unconvinced by these arguments (and remains so), the Special Rapporteur, recognizing that the consideration of this draft—which dealt mainly with the powers of monitoring bodies with regard to impermissible reservations—was probably premature, withdrew it.¹⁰

6. Owing to lack of time, the Drafting Committee was unable to consider the draft guidelines referred to it; it will need to do so during the fifty-fifth session in 2003.

2. CONSIDERATION OF CHAPTER IV OF THE REPORT OF THE COMMISSION IN THE SIXTH COMMITTEE

7. Chapter IV of the report of the Commission on the work of its fifty-fourth session is devoted to reservations to treaties. A very brief summary of the topic is provided in chapter II¹¹ and the specific issues on which comments would be of particular interest to the Commission are set out in chapter III. As regards reservations to treaties, the Commission posed two questions to States.¹²

8. The first question arose in the context of the second reading of the draft Guide to Practice (as it is not possible to review drafts already adopted from one year to the next). It dealt with draft guideline 2.1.6, paragraph 4, adopted on first reading in 2002, which reads as follows:

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In this case, the communication is considered as having been made on the date of the electronic mail or facsimile.¹³ The Commission wished “to know whether this provision reflects the usual practice and/or seems appropriate”.¹⁴

9. Many delegations replied to this question, which may seem minor, but which is of considerable practical importance. The vast majority approved the provisions of draft guideline 2.1.6.¹⁵ One delegation suggested that it would

be useful to set a time limit for such confirmation;¹⁶ such a specification could indeed be considered, but the question would then arise of the consequences of not observing the time limit. Other delegations, however, considered that there was no reason for a reservation to produce effects on a date prior to that of receipt of written confirmation by the depositary,¹⁷ while others contested the very principle of notification by electronic mail or facsimile.¹⁸

10. Broadening the discussion, some delegations suggested that consideration should be given to using modern means of communication for all communications relating to reservations and, more broadly still, to treaties themselves.¹⁹ Others specified that all communications should be made in one of the authentic languages of the treaty.²⁰

11. The Commission further stated that it would “welcome comments by States on [draft guideline 2.5.X]”²¹ so that it could take them into account when it again dealt with the question of the fate of reservations held to be impermissible by a body monitoring the implementation of a treaty, when it addressed the question of the consequences of the inadmissibility of a reservation, or when it reconsidered its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.²²

12. Several delegations approved the withdrawal of the draft at the current stage and felt that the Commission should revert to the questions posed therein when it considered the issues relating to the admissibility of reservations.²³ Others felt that the withdrawal of a reservation was a sovereign right of States,²⁴ unrelated to the activities of monitoring bodies,²⁵ and asked what conduct States should adopt following a finding by a monitoring body that a reservation was impermissible, while stressing that the withdrawal of the reservation was only one of the possibilities to be considered.²⁶ Several delegations drew attention to the various powers of the bodies in question²⁷ and stressed that, in principle, they did not have the

¹⁰ See the summary of the debate and the Special Rapporteur’s conclusions in *Yearbook ... 2002* (footnote 5 above), pp. 20–21, paras. 71–76, and pp. 23–24, paras. 95–100.

¹¹ *Ibid.*, p. 11, para. 14. The Special Rapporteur continues to have the greatest doubts as to the utility of these “summaries” which are scarcely informative and risk giving harried readers a poor excuse for not consulting the relevant chapters.

¹² *Ibid.*, p. 13, para. 26.

¹³ *Ibid.*, p. 38.

¹⁴ *Ibid.*, p. 13, para. 26 (a).

¹⁵ See the views of Australia (which indicated that the draft reflected its practice—*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 23rd meeting (A/C.6/57/SR.23), para. 72; Belarus, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 57; Chile, *ibid.*, 27th meeting (A/C.6/57/SR.27), para. 6; China, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 35; Cyprus, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 6; Greece, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 26; Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 57; Italy, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 3; Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 46; Nigeria, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 83; Republic of Korea (which stated, however, that the draft did not reflect its usual practice—*ibid.*, para. 67); Sierra Leone, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 51; and Sweden on behalf of the Nordic countries, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 84. The Russian Federation was more reticent in its approval, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 66. Once again, the Special Rapporteur regrets that the summaries were sent to him in English only.

¹⁶ Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 57.

¹⁷ In this connection, see the views of Chile, *ibid.*, 27th meeting (A/C.6/57/SR.27), para. 8, the Russian Federation, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 66, or Sweden, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 84.

¹⁸ See the United States of America, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 51, and, to a lesser extent, New Zealand, *ibid.*, para. 29.

¹⁹ See Chile, *ibid.*, 27th meeting (A/C.6/57/SR.27), para. 6.

²⁰ See the views of Austria, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 76.

²¹ *Yearbook ... 2002* (see footnote 5 above), p. 13, para. 26 (b).

²² *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

²³ See Israel, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/57/SR.21), para. 58; Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 46; New Zealand, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 28; Sweden, on behalf of the Nordic countries, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 83. Against: Belarus, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 57.

²⁴ See Algeria, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 40; China, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 34; Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 58; Japan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 40; Republic of Korea, *ibid.*, 26th meeting (A/C.6/57/SR.26), paras. 68–69.

²⁵ See Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 58.

²⁶ See France, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 91.

²⁷ See China, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 33.

competence to judge the admissibility of reservations;²⁸ others, however, felt that the reserving State had an obligation to reconsider its position in good faith in the light of the findings of the monitoring body.²⁹ One delegation stressed its attachment to the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.³⁰

13. The other draft guidelines adopted by the Commission at its fifty-fourth session were generally approved and elicited relatively few comments,³¹ some of which, however, are highly useful and will not fail to be taken into consideration by the Commission when it takes up its consideration of the draft Guide to Practice on second reading.

14. Numerous comments were made, however, on the role of the depositary and, more specifically, on draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations).³² Generally speaking, and despite some opinions to the contrary,³³ the delegations which intervened on this issue expressed their attachment to the purely mechanical role conferred on the depositary by the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention)³⁴ and their hesitations concerning the possibility afforded to the depositary of drawing the attention of the author of the reservation to what is, in his view, the manifestly impermissible character of the reservation.³⁵

15. Moreover, as usual, some speakers outlined the positions of their Government on general issues relating to the right of reservations.³⁶

16. One such issue which drew the most attention is that of conditional interpretative declarations.³⁷ Several delegations expressed the view that they should be treated in the same manner as reservations and that the draft guidelines devoted to them should be abandoned.³⁸ In so

doing, they shared the concerns of some members of the Commission. In accordance with the position outlined in the seventh report of the Special Rapporteur,³⁹ it is very likely that there is no need for the legal regime applying to conditional interpretative declarations to differ from the regime applying to reservations; nevertheless, the Commission will take a final position in this regard only after deciding on the issues relating to the permissibility of reservations and interpretative declarations and their effects. In the meantime, the Special Rapporteur will continue to pose questions concerning the rules applying to conditional interpretative declarations.

B. Recent developments with regard to reservations to treaties

17. During its fifty-fourth session in 2002, the Commission requested its Chairman and the Special Rapporteur on reservations to treaties to contact the human rights monitoring bodies in an effort to increase exchanges of views on the topic of reservations to human rights treaties.⁴⁰ To that end, letters⁴¹ co-signed by the Chairman and the Special Rapporteur were sent on 13 August 2002 to the chairpersons of the following bodies: Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination against Women; Committee on the Rights of the Child; Committee against Torture and to the Chairman of the Sub-Commission on the Promotion and Protection of Human Rights and to Ms. Françoise Hampson, who has been entrusted by the Sub-Commission with the preparation of a working paper on reservations to human rights treaties.⁴² A copy of the preliminary conclusions adopted by the Commission in 1997 was again⁴³ attached to these letters.

18. Thus far, only one reply has been received; in a letter received by the Secretariat on 28 March 2003, the Chairman of the Committee on the Elimination of Racial Discrimination transmitted the preliminary opinion of the Committee on the issue of reservations to treaties on human rights, as revised on 13 March 2003.⁴⁴ In addition, a joint meeting with the members of the Committee against Torture is planned for the beginning of the Commission's current session so that an exchange of views can be held on this topic. The Special Rapporteur strongly hopes that the members of the Committee on Economic, Social and Cultural Rights, which he believes is also meeting in Geneva during this period, will also be able to

²⁸ See Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 46, the Russian Federation, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 64, and the United Kingdom, *ibid.*, para. 33.

²⁹ See Switzerland, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 34.

³⁰ See Japan, *ibid.*, para. 40. Against: Greece, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 27.

³¹ See the still valuable "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session" (A/CN.4/529), paras. 85–91 and 101–102.

³² *Ibid.*, paras. 61–72.

³³ See, for example, the views of Chile, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 27th meeting* (A/C.6/57/SR.27), para. 4, and Romania, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 48.

³⁴ See Australia, *ibid.*, para. 74; Brazil, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 67; China, *ibid.*, para. 32; Cuba, *ibid.*, para. 60; Islamic Republic of Iran, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 5; Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 59; Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 45; Nigeria, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 82; and the Republic of Korea, *ibid.*, para. 66.

³⁵ See Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 59.

³⁶ A/CN.4/529 (see footnote 31 above), paras. 50–60.

³⁷ *Ibid.*, paras. 81–84.

³⁸ See Japan, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 25th meeting* (A/C.6/57/SR.25), para. 40; the Netherlands, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 11; Switzerland, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 33; and the United Kingdom, *ibid.*, 23rd meeting (A/C.6/57/SR.23),

para. 34.

³⁹ *Yearbook ... 2002* (see footnote 1 above), pp. 13–14, para. 43.

⁴⁰ See *Yearbook ... 2002* (footnote 5 above), pp. 16–17, paras. 53–54, and p. 20, para. 67.

⁴¹ The text of the model letter is reproduced in the annex to the present report.

⁴² E/CN.4/Sub.2/2001/40.

⁴³ See footnote 22 above. This document had first been sent to the human rights bodies shortly after its adoption. Replies were few and rather thinly argued. On these replies, see the third report on reservations to treaties (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 231, paras. 15–16) and the fifth report (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4, paras. 10–15).

⁴⁴ CERD/C/62/Misc.20/Rev.3.

participate in this meeting; to that end, he has asked the Commission's secretariat to contact the Committee's secretariat. It would be useful to schedule similar meetings with the other universal human rights bodies.

19. Only a very brief commentary on the particularly stimulating document which the Chairman of the Committee on the Elimination of Racial Discrimination transmitted can be included in this report.⁴⁵ The document begins by stating that the International Convention on the Elimination of All Forms of Racial Discrimination provides a specific mechanism for determining the compatibility of a reservation with the object and purpose of the Convention,⁴⁶ but that this mechanism had proved inoperative. Interestingly, however, the document also notes that, in practice, States hardly ever invoke their (generally old) reservations during the Committee's consideration of periodic reports.

20. The Committee on the Elimination of Racial Discrimination makes the extremely significant statement that when considering the reports of States parties, it has better things to do than "opening a legal struggle with all the reservation States and insisting that some of their reservations have no legal effect ... which could detract the Committee from its main task" of promoting, to the extent possible, "a complete and uniform application of the Convention, and could detract States parties from issues concerning its implementation. A fruitful dialogue between the reservation State and the Committee may be much more beneficial for promoting the implementation of the Convention by the respective State".⁴⁷

21. These extremely sensible views confirm the impression that can be formed from the report prepared by the Secretariat at the request of the Committee on the Elimination of Discrimination against Women and submitted to the Committee at its twenty-fifth session in 2001:⁴⁸ the human rights treaty bodies reviewed are more anxious to engage in a dialogue with the States authors of the reservations to encourage them to withdraw the reservations when these appear to be abusive rather than to rule on their impermissibility.⁴⁹

22. The Special Rapporteur has no knowledge of other important recent developments in the matter of reservations during 2002. In particular, it appears that the Committee on the Elimination of Discrimination against Women did not resume its discussion of the question of reservations to treaties at its twenty-sixth, twenty-seventh or twenty-eighth sessions.

23. At its twenty-third session (4–5 March 2002), however, the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe decided to enlarge the scope of the European Observatory on

Reservations to International Treaties to include treaties relating to the fight against terrorism.⁵⁰ As part of its role as an observatory of reservations, CAHDI has continued its consideration of declarations and reservations to international treaties and has begun to consider those relating to treaties concluded outside the Council of Europe.⁵¹

24. It should also be noted that on 4 July 2001, the Grand Chamber of the European Court of Human Rights delivered a judgement which the Special Rapporteur did not mention in his previous report, but which raises an interesting question concerning reservations.⁵² The application was brought by several Moldovan nationals who had been sentenced to death or to terms of imprisonment by the "Supreme Court of the Moldovan Republic of Transnistria"; the application was brought against the Russian Federation and the Republic of Moldova. In ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Moldova had declared that it would be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region was finally settled.⁵³

25. In considering the difficult issue of its competence and of the admissibility of the application, the European Court of Human Rights enquired into the nature of this declaration; the Government of Moldova maintained that it had to be interpreted as a reservation within the meaning of the present article 57 (formerly art. 64) of the European Convention on Human Rights. Noting that "Moldova's declaration does not refer to any particular provision of the Convention" and that it "does not refer to a specific law in force in Moldova", the Grand Chamber concluded that "the aforementioned declaration cannot be equated with a reservation within the meaning of the Convention, so that it must be deemed invalid". *Prima facie*, this position appears incompatible with draft guideline 1.1.3, which the Commission adopted in 1998.⁵⁴ However, insofar as the Court refers exclusively to the specific provisions of article 57 of the Convention, it might be excessive to draw overly categorical conclusions.

26. On 13 August 2002, at the fifty-fourth session of the Sub-Commission on the Promotion and Protection

⁵⁰ See the document prepared by the secretariat of the Directorate General of Legal Affairs of the Council of Europe for the 25th meeting of CAHDI (CAHDI (2002) 11 rev.), and the report on the 24th meeting of CAHDI, held in Bratislava on 9–10 September 2002 (Secretariat memorandum drafted by the Directorate General of Legal Affairs (CAHDI (2002) 16)), paras. 23–29.

⁵¹ CAHDI (2002) 16 (see footnote 50 above), paras. 14–22; see also the list of outstanding reservations and declarations to international treaties, prepared for the 25th meeting of CAHDI held in Strasbourg, France, on 17–18 March 2003 (CAHDI (2003) 2).

⁵² Application No. 48787/99, *Ilie Ilașcu and Others v. Moldova and the Russian Federation*, European Court of Human Rights, Grand Chamber decision of 4 July 2001 (unreported).

⁵³ See United Nations, *Treaty Series*, vol. 2045, No. 2889, p. 28.

⁵⁴ *Yearbook ... 1998*, vol. II (Part Two), p. 99. Draft guideline 1.1.3 on reservations having territorial scope states that "[a] unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation".

⁴⁵ *Ibid.*

⁴⁶ Under article 20, a reservation is held to be incompatible with the object and purpose of the Convention if at least two thirds of the States parties object to it.

⁴⁷ See footnote 44 above.

⁴⁸ CEDAW/C/2001/II/4.

⁴⁹ See the seventh report on reservations to treaties, *Yearbook ... 2002* (footnote 1 above), p. 15, para. 50.

of Human Rights, Ms. Hampson presented a preparatory working paper⁵⁵ the annex to which included a chart (hardly going beyond the information contained in the United Nations publication, *Multilateral Treaties Deposited with the Secretary-General*) showing the reservations to the six United Nations human rights treaties. In its resolution 2001/17 of 16 August 2001, adopted without a vote, the Sub-Commission took note of Commission on Human Rights decision 2001/113 of 25 April 2001 and decided to entrust Ms. Françoise Hampson with the task of preparing an expanded working paper on reservations to human rights treaties and of submitting it to the Sub-Commission at its fifty-fourth session.⁵⁶ The Commission on Human Rights makes no mention of the matter in its resolution 2003/59 of 24 April 2003 on the work of the Sub-Commission.⁵⁷ Ms. Hampson did not reply to the letter dated 13 August 2003 from the Chairman of the International Law Commission and the Special Rapporteur; however, the meeting of the Sub-Commission in Geneva, which will partly overlap with the second part of the International Law Commission's session, might provide an opportunity for an exchange of views between the two bodies.

27. The Special Rapporteur also wishes to inform the members of the Commission that in early May 2003, he finally received from the Legal Service of the European Commission a reply to section I of the questionnaire on reservations.⁵⁸ He welcomes this development and thanks

⁵⁵ E/CN.4/Sub.2/2002/34 of 8 August 2002.

⁵⁶ E/CN.4/2002/2-E/CN.4/Sub.2/2001/40.

⁵⁷ *Official Records of the Economic and Social Council, Commission on Human Rights, Fifty-ninth Session, Supplement No. 3 (E/2003/23-E/CN.4/2003/135)*, p. 223. On previous "episodes" of the difficult relations between the Commission on Human Rights and the Sub-Commission regarding this plan, see the sixth report of the Special Rapporteur on reservations to treaties, *Yearbook ... 2001* (footnote 2 above), pp. 142–143, paras. 21–27, and his seventh report, *Yearbook ... 2002* (footnote 1 above), p. 15, paras. 52–53.

⁵⁸ *Yearbook ... 1996* (see footnote 7 above), annex III, p. 107. On this questionnaire, see also *Yearbook ... 2002* (footnote 1 above), p. 9, para. 17. The reply from the Commission of the European Communities brings the number of international organizations which have replied

the authors; he is convinced that this carefully prepared document will be of great help to him in his continued work. The cover letter states that the Legal Service's replies to section II of the questionnaire are forthcoming, and he awaits them with the greatest impatience.

28. The Special Rapporteur again urges the members of the Commission and any reader of this report to kindly provide him with any information on recent developments with regard to reservations to treaties which may have escaped him.

C. General presentation of the eighth report

29. As has too often been the case, in his seventh report the Special Rapporteur had been unable to cover all the objectives which he had set himself.⁵⁹ Thus, the first task will be to complete the section of the Guide to Practice on "Procedure" with regard to reservations.

30. The first chapter of the report will therefore endeavour to conclude the study on the modification of reservations and interpretative declarations by considering first the issue of modifications to reservations which enlarge their scope and then that of changes to interpretative declarations.

31. Chapter II will be devoted to the procedure for formulating acceptances of reservations and to the formulation of objections.

32. If time permits, the Special Rapporteur plans to include a third chapter on the basic problems which he sees in connection with the "permissibility" or "validity" of reservations.⁶⁰

to the questionnaire to 25; once again, the Special Rapporteur thanks them. There has been no new response from States since last year.

⁵⁹ *Yearbook ... 2002* (footnote 1 above), pp. 15–16, paras. 56–59.

⁶⁰ On the problems raised by the use of these terms, which the Commission has decided to set aside for the moment, see *Yearbook ... 2002* (footnote 5 above), p. 46, para. (7) of the commentary to draft guideline 2.1.8.

CHAPTER I

Withdrawal and modification of reservations and interpretative declarations

33. Most of the seventh report on reservations to treaties was devoted to a consideration of withdrawal and modification of reservations.⁶¹ Two questions remain to be examined: (a) enlargement of the scope of a reservation; and (b) withdrawal and modification of an interpretative declaration—if the notion makes sense. The purpose of this chapter is to fill those gaps.

A. Enlargement of the scope of reservations

34. As stated in the seventh report:

The question of the modification of reservations should be posed in connection with the questions of withdrawal and late formulation of

reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the "initial reservation"⁶², which poses no problem in principle, being subject to the general rules concerning withdrawals, as set forth above ...⁶³ If, on the other hand, the effect of the modification is to strengthen an existing

⁶² While the expression "initial reservation" is used for convenience, it is improper; it would be more accurate to speak of a reservation "as it was initially formulated". As its name indicates, a "partial withdrawal" does not substitute one reservation for another, but rather one formulation for another.

⁶³ This led the Special Rapporteur to propose the following wording for a draft guideline 2.5.11:

"1. The partial withdrawal of a reservation is subject to respect for the same formal and procedural rules as a total withdrawal and takes effect in the same conditions.

⁶¹ *Yearbook ... 2002* (footnote 1 above), pp. 16–42, paras. 61–221.

(Continued on next page.)

reservation, it would seem logical to start from the notion that what is being dealt with is the late formulation of a reservation, and to apply to it the rules applicable in this regard.⁶⁴

35. Those rules are set forth in draft guidelines 2.3.1–2.3.3 adopted in 2001:

2.3.1 *Late formulation of a reservation*⁶⁵

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 *Acceptance of late formulation of a reservation*⁶⁶

Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 *Objection to late formulation of a reservation*⁶⁷

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

36. If, after expressing its consent to be bound, along with a reservation, a State or an international organization wishes to “enlarge” the reservation, in other words, to modify in its favour the legal effect of the provisions of the treaty to which the reservation refers, such provisions shall be fully applicable, for the same reasons:

(a) It is essential not to encourage the late formulation of limitations on the application of the treaty;

(b) On the other hand, there may be legitimate reasons why a State or an international organization would wish to modify an earlier reservation, and in some cases it may be possible for the author of the reservation to denounce the treaty in order to re-ratify it with an “enlarged reservation”;

(c) It is always possible for the parties to a treaty to modify it at any time by unanimous agreement,⁶⁸ it

(Footnote 63 continued.)

“2. The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.”

(*Yearbook ... 2002* (footnote 1 above), pp. 40–41, para. 210)

⁶⁴ *Ibid.*, para. 185.

⁶⁵ For the commentary on this provision, see *Yearbook ... 2001* (footnote 4 above), pp. 185–189.

⁶⁶ See commentary, *ibid.*, pp. 189–190.

⁶⁷ *Ibid.*, pp. 190–191. The Special Rapporteur is still dissatisfied with the use of the word “objection” to refer to the opposition expressed by a Contracting Party to the late formulation of a reservation (*ibid.*, p. 189, footnote 1076).

⁶⁸ See article 39 of the 1969 Vienna Convention and of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects in their application to that party.

37. Practical examples are rare, but the legal literature, to the meagre extent that it deals with the problem, is unanimous on this point.

38. Aust, for example, states very clearly that “[a] revision which would change the character or scope of the original [reservation] would not be permissible”.⁶⁹

39. Polakiewicz, Deputy Head of the Legal Advice Department and Treaty Office of the Council of Europe, notes that within the Council framework

There have been instances where states have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations ... Allowing such modifications would create a dangerous precedent which would jeopardise legal certainty and impair the uniform implementation of European treaties.⁷⁰

40. The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it subsequently with enlarged reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.⁷¹

41. On the universal level, however, such a conclusion is undoubtedly too rigid. In any case, regardless of the answer to that question, it would not prevent the alignment of practice in the matter of enlarging the

⁶⁹ *Modern Treaty Law and Practice*, p. 130. See also Polakiewicz, *Treaty-Making in the Council of Europe*, p. 96, and, for a contrary opinion, Imbert, *Les réserves aux traités multilatéraux*, p. 293.

⁷⁰ *Op. cit.*, p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos et al. v. Turkey*, *Decisions and Reports*, Applications Nos. 15299/89, 15300/89 and 15318/89, vol. 68 (Strasbourg, 1993), pp. 216–253.

⁷¹ Polakiewicz, *op. cit.*. One can interpret in this sense the Swiss Federal Supreme Court decision of 17 December 1992 in the case of *F. v. R. and the Council of State of Thurgau Canton*, *Journal des tribunaux* (1995), pp. 523–537; see also the seventh report on reservations to treaties, *Yearbook ... 2002* (footnote 1 above), pp. 38–39, paras. 199–200. On the same point, see Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l’article 6 § 1”, p. 303. In this regard, it might be noted that on 26 May 1998, Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights and ratified it again the same day with a new reservation (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (United Nations publication, Sales No. E.03.V.3), vol. I, chap. IV.5, p. 214, note 3). After several objections and a decision by the Human Rights Committee dated 2 November 1999 (Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258—see the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 43 above), para. 12. Trinidad and Tobago again denounced the Optional Protocol on 27 March 2000 (*Multilateral Treaties ...*, p. 216). What was involved, however, was not the modification of an existing reservation but the formulation of an entirely new reservation.

scope of reservations with that regarding late formulation of reservations,⁷² which appears to be a very logical approach.

42. Depositaries treat enlarging modifications in the same way as late reservations. Faced with such a request by one of the parties, they consult all the other parties and accept the new formulation of the reservation only if none of the parties opposes it within the time limit set in which to respond.

43. For example, Finland on 1 April 1985, upon acceding to the Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals, formulated a reservation to a technical provision of the instrument.⁷³ Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than that originally mentioned.⁷⁴

In keeping with the practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged. None of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is, on 19 March 1996.⁷⁵

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations⁷⁶—except that now the time limit envisaged would be 12 months rather than 90 days.⁷⁷

44. As another example, the Government of Maldives notified the Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that:

⁷² Gaja gives the example of the “rectification” by France on 11 August 1982 of the reservation formulated in its instrument of approval of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), which it deposited with the IMO Secretary-General on 25 September 1981 (“Unruly treaty reservations”, pp. 311–312). This is a somewhat unusual case, since at the time of the “rectification” the MARPOL Convention Protocol had not yet entered into force with respect to France; in this instance the depositary does not appear to have made acceptance of the new wording dependent on the unanimous consent of the other parties, some of whom did in fact object to the modified reservation (see *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999* (J/7339), p. 77).

⁷³ In its original reservation with respect to the annex, paragraph 6, Finland reserved “the right to use yellow colour for the continuous line between the opposite directions of traffic” (*Multilateral Treaties ...* (see footnote 71 above), chap. XI.B.25, p. 793).

⁷⁴ *Ibid.*, “the reservation made by Finland also applies to the barrier line”.

⁷⁵ *Ibid.*, note 3, p. 794.

⁷⁶ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 43 above), p. 193, paras. 297–298, or *Yearbook ... 2001* (footnote 4 above), p. 187, paras. (11) and (13) of the commentary on draft guideline 2.3.1 (Late formulation of a reservation).

⁷⁷ See *Yearbook ... 2000* (footnote 43 above), p. 198, paras. 319–323.

reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification.⁷⁸

45. However, just as it did not object to the formulation of the original reservation by Maldives in opposing its entry into force as between the two States, so Germany did not formally oppose the modification as such. This reinforces the doubts of the Special Rapporteur as to the advisability of using the term “objection” to refer to the opposition of States to late modification of reservations. A State might well find the modification *procedure* acceptable while objecting to the *content* of the modified reservation.⁷⁹ Since, however, contrary to his advice, the Commission decided to retain the word “objection” to refer to the opposition of States to late formulation of reservations in draft guidelines 2.3.2 and 2.3.3,⁸⁰ he will refrain from suggesting a different terminology at this point.

46. Since enlargement of the scope of a reservation can be viewed as late formulation of a reservation, it seems inevitable that the same rules should apply. It is sufficient simply to refer to the relevant guidelines already adopted by the Commission. Draft guideline 2.3.5 could then read as follows:

“2.3.5 *Enlargement of the scope of a reservation*

“The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3].”

47. The reference in square brackets would not be necessary if, as the Special Rapporteur suggests, the above draft guideline is included under section 2.3 of the Guide to Practice, entitled “Late formulation of a reservation”.⁸¹

48. Moreover, it should be sufficient to explain in the commentary on this provision what is meant by “enlargement” of the scope of a reservation. If the Commission thinks otherwise, it would be possible to add to draft guideline 2.3.5 a second paragraph reading as follows:

“Enlargement of the scope of a reservation means a modification for the purpose of excluding or modifying the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.”

⁷⁸ See *Multilateral Treaties ...* (footnote 71 above), chap. IV.8, p. 253, note 42. For Germany’s original objection, see page 240. Finland also objected to the modified Maldivian reservation, *ibid.* The German and Finnish objections were made more than 90 days after the notification of the modification, the time limit set at that time by the Secretary-General.

⁷⁹ See footnote 67 above.

⁸⁰ See the text of these draft guidelines in paragraph 35 above.

⁸¹ *Yearbook ... 2001* (see footnote 4 above), p. 184.

B. Withdrawal and modification of interpretative declarations

49. As with many questions relating to interpretative declarations, the question of whether States or international organizations that are parties to a treaty can withdraw or modify such declarations after the entry into force of the treaty must be framed differently depending on whether these declarations are or are not “conditional” in the sense of the definition given in draft guideline 1.2.1.⁸² For ease of explanation, the issues relating to the withdrawal of interpretative declarations and conditional interpretative declarations will be distinguished from those relating to their modification.

1. WITHDRAWAL OF INTERPRETATIVE DECLARATIONS

50. It follows from draft guideline 2.4.3 that, except where a treaty provides otherwise,⁸³ a “‘simple’ interpretative declaration ... may ... be formulated at any time”.⁸⁴ It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure.

51. While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, the Government of Italy notified the Secretary-General that “it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Convention relating to the Status of Refugees] were recognized by it as recommendations only”.⁸⁵ Likewise, “[o]n 20 April 2001, the Government of Finland informed the Secretary-General that it had decided to withdraw its declaration in respect of article 7 (2) made upon ratification” of the 1969 Vienna Convention (ratified by that country in 1977).⁸⁶

52. It is sufficient to endorse this practice, which is compatible with the very informal nature of interpretative

⁸² “A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.” For the commentary on this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

⁸³ See *Yearbook ... 2001* (footnote 4 above), p. 194, draft guideline 2.4.6.

⁸⁴ *Ibid.*, p. 192, draft guideline 2.4.3.

⁸⁵ *Multilateral Treaties ...* (see footnote 71 above), chap. V.2, p. 340, note 23. There are also withdrawals of “statements of non-recognition” (see, for example, the withdrawal of the declarations by Egypt in respect of Israel concerning the International Convention on the Elimination of All Forms of Racial Discrimination or the Single Convention on Narcotic Drugs, 1961, following the Camp David Agreement (Framework for peace in the Middle East agreed at Camp David, signed in Washington, D.C. on 17 September 1978, United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39), *Multilateral Treaties ...*, chap. IV.2, p. 149, note 18, and chap. VI.15, p. 393, note 18), but such statements are “outside the scope of the ... Guide to Practice” (*Yearbook ... 1999* (see footnote 82 above), p. 114, draft guideline 1.4.3).

⁸⁶ *Multilateral Treaties ...* (see footnote 71 above), vol. II, chap. XXIII.1, p. 302, note 13. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties.

declarations, by adopting a guideline which could read as follows:

“2.5.12 *Withdrawal of an interpretative declaration*

“Unless the treaty provides otherwise, an interpretative declaration may be withdrawn at any time following the same procedure as is used in its formulation and applied by the authorities competent for that purpose [in conformity with the provisions of guidelines 2.4.1 and 2.4.2].”

53. The question arises of whether to include the phrase in square brackets in the draft guideline. This is simply a matter of expediency; it might be deemed useful to do so in order to facilitate the use of the Guide to Practice, or it might be considered that this makes the wording needlessly cumbersome and that it is sufficient to make this reference in the commentary.

54. Conditional interpretative declarations, meanwhile, are governed insofar as their formulation is concerned by the legal regime of reservations: they must be formulated when the State or international organization expresses its consent to be bound,⁸⁷ except if none of the other Contracting Parties objects to their late formulation.

55. It follows inevitably that the rules applicable to the withdrawal of conditional interpretative declarations are necessarily identical to those applying to reservations in this regard, which can only strengthen the position of those members of the Commission who consider it unnecessary to devote specific draft guidelines to such declarations. The Special Rapporteur is inclined to share those views. Nevertheless, he believes that it would be premature to take a final decision in this regard as long as this “hunch” has not been verified in respect of the rules concerning the validity of both reservations and interpretative declarations.⁸⁸

56. There is no need to dwell on this subject, however; it is probably sufficient to transpose, *mutatis mutandis*, to a provisional draft guideline on the withdrawal of conditional interpretative declarations the corresponding draft guidelines concerning reservations. Such a draft guideline could read as follows:

“2.5.13 *Withdrawal of a conditional interpretative declaration*

“The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of a reservation to a treaty [given in guidelines 2.5.1 to 2.5.9].”

2. MODIFICATION OF INTERPRETATIVE DECLARATIONS

57. There would, however, be little point in extending to interpretative declarations the rules applying to the *partial* withdrawal of reservations. By definition, an interpretative declaration (whether or not it is conditional) “purports to specify or clarify the meaning or

⁸⁷ See draft guideline 1.2.1 (footnote 82 above).

⁸⁸ See paragraph 16 above.

scope attributed by the declarant to a treaty or to certain of its provisions”.⁸⁹ A declaration cannot be partially withdrawn: at the very most, the author may modify it or cease to make it a condition for the entry into force of the treaty.

58. The Special Rapporteur is not aware of any precedent whereby a party to a treaty has ceased to make an interpretative declaration a condition for its participation in the treaty while maintaining the declaration “simply”⁹⁰ as an interpretation. That being the case, it is probably not helpful to devote a draft guideline to this academic hypothesis—particularly since this scenario would, in reality, amount to the withdrawal of the declaration in question as a conditional interpretative declaration and it would thus be a case of withdrawal pure and simple. It will therefore be sufficient to point this out in the commentary on draft guideline 2.5.13.

59. On the other hand, there is no question that an interpretative declaration, whether or not it is conditional, may be modified. Nevertheless, whereas in the case of reservations it is generally relatively easy to determine whether their modification may be interpreted as a partial withdrawal (the object of draft guidelines 2.5.10–2.5.11⁹¹) or consists in enlarging their scope (the object of draft guideline 2.3.5 suggested above⁹²), this is virtually impossible in the case of modifications made by States to their interpretative declarations. Some declarations can no doubt be deemed more restrictive than others (and the withdrawal of one declaration in favour of another, more restrictive, one can be considered to “enlarge” it); nevertheless, this remains very subjective and it hardly seems appropriate to adopt a draft guideline which would transpose to interpretative declarations draft guideline 2.3.5 concerning the enlargement of the scope of reservations.

60. Consequently, there is no need to distinguish between modifications of interpretative declarations which have the effect of limiting the scope of the initial declaration or, on the contrary, enlarging it.⁹³ However, the distinction between conditional interpretative declarations and other interpretative declarations re-emerges in relation to the time at which a modification may be made.

⁸⁹ See draft guideline 1.2, *Yearbook ... 1999* (footnote 82 above), p. 92.

⁹⁰ There are, however, examples of statements specifying that interpretative declarations do not constitute reservations. See, for example, the “communication received subsequently” (the date is not given) by which the Government of France indicated that the first paragraph of the “declaration” made upon ratification of the International Convention on the Elimination of All Forms of Racial Discrimination “did not purport to limit the obligations under the Convention in respect of the French Government, but only to record the latter’s interpretation of article 4 of the Convention” (*Multilateral Treaties ...* (see footnote 71 above), chap. IV.2, p. 149, note 19). See also, for example, the statements by Indonesia and Malaysia concerning the declarations which accompanied their ratifications of the Convention on the International Maritime Organization, *ibid.*, vol. II, chap. XII.1, p. 9, notes 14 and 16, or India’s position with respect to the same Convention (*ibid.*, note 13); see also Schachter, “The question of treaty reservations at the 1959 General Assembly”.

⁹¹ *Yearbook ... 2002* (see footnote 1 above), p. 34, para. 169 and pp. 40–41, para. 210.

⁹² Para. 46.

⁹³ In this respect, the legal regime of conditional interpretative declarations differs from that applying to reservations.

61. Conditional interpretative declarations may not be modified at will: in principle, they may only be formulated (or confirmed) when a State or an international organization expresses its consent to be bound⁹⁴ and any late formulation is precluded “except if none of the other contracting parties objects”.⁹⁵ Any modification is thus similar to a late formulation which also must not be opposed by any of the other Contracting Parties. A draft guideline could so specify:

“**2.4.10** *Modification of a conditional interpretative declaration*

“A State or an international organization may not modify a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late modification of the conditional interpretative declaration.”

62. It will be noted that the wording of this draft guideline is modelled very exactly on that of draft guideline 2.4.8 concerning the late formulation of a conditional interpretative declaration. If the Commission agrees to revise this draft guideline, adopted in 2001,⁹⁶ a more elegant solution could consist in combining the two draft guidelines in the following manner:

“**2.4.8** *Late formulation or modification of a conditional interpretative declaration*

“A State or an international organization may not formulate *or modify* a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation *or modification* of the conditional interpretative declaration.”

The commentaries would of course need to be amended accordingly.

63. The problem may be stated differently in the case of “simple” interpretative declarations, those which constitute mere clarifications of the meaning of the treaty provisions, but on which the author’s participation in the treaty does not depend. Such declarations may be formulated at any time⁹⁷ (unless the treaty provides otherwise⁹⁸) and are not subject to the requirement of confirmation.⁹⁹ Consequently, there is nothing to prevent such declarations from being modified at any time, in the absence of a treaty provision indicating that the interpretation must be given at a specified time. This could be the object of a draft guideline 2.4.9:

⁹⁴ See draft guidelines 1.2.1 (footnote 82 above) and 2.4.5 (*Yearbook ... 2001* (footnote 4 above), p. 179).

⁹⁵ *Yearbook ... 2002* (see footnote 5 above), p. 28, draft guideline 2.4.8.

⁹⁶ *Yearbook ... 2001* (footnote 4 above), p. 180.

⁹⁷ *Ibid.*, p. 192, draft guideline 2.4.3.

⁹⁸ *Ibid.*, p. 194, draft guideline 2.4.6.

⁹⁹ *Ibid.*, p. 193, draft guideline 2.4.4.

“2.4.9 Modification of interpretative declarations

“Unless the treaty provides that an interpretative declaration may be made [or modified] only at specified times, an interpretative declaration may be modified at any time.”

64. The expression in square brackets envisages a fairly unlikely scenario (and one which the Special Rapporteur has not encountered), where a treaty would expressly limit the possibility of *modifying* interpretative declarations. It could no doubt be safely omitted from the text of the draft guideline and simply be mentioned in the commentary.

65. Here again, the Commission will perhaps prefer to make minor revisions to the text of draft guidelines 2.4.3 and 2.4.6 (and the commentaries thereon) adopted in 2001¹⁰⁰ so as to accommodate modification alongside the formulation of interpretative declarations. In that case, the two draft guidelines would read as follows:

“2.4.3 Time at which an interpretative declaration may be formulated or modified

“Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated *or modified* at any time.

“2.4.6 Late formulation of an interpretative declaration

“Where a treaty provides that an interpretative declaration may be made [*or modified*] only at specified times, a State or an international organization may not formulate *or modify* an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation *or modification* of the interpretative declaration.”

66. There are few clear examples illustrating these draft guidelines. Mention may be made, however, of the modification by Mexico, in 1987, of the declaration concerning

¹⁰⁰ *Ibid.*, pp. 192–193 and 194–195.

article 16 of the International Convention against the taking of hostages, made upon accession in 1987.¹⁰¹

67. The modification by a State of unilateral statements made under an optional clause¹⁰² or providing for a choice between the provisions of a treaty¹⁰³ also comes to mind; but such statements are “outside the scope of the ... Guide to Practice”.¹⁰⁴ Also, on 7 March 2002, Bulgaria amended a declaration made upon signature and confirmed upon deposit of its instrument of ratification (in 1994) of the European Convention on Mutual Assistance in Criminal Matters;¹⁰⁵ however, strictly speaking, it might be considered that this was more a case of interpreting a reservation than modifying an interpretative declaration.¹⁰⁶

68. For all that, and despite the paucity of convincing examples (known to the Special Rapporteur), the proposed draft guidelines above seem to flow logically from the very definition of interpretative declarations.

¹⁰¹ See *Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XVIII.5, p. 109.

¹⁰² See, for example, the modification by Australia and New Zealand of the declarations made under article 24, paragraph 2 (ii), of the Agreement establishing the Asian Development Bank upon ratification of the said Agreement (*ibid.*, vol. I, chap. X.4, p. 491, notes 10–11).

¹⁰³ See, for example, the note by the Ambassador of Mexico to The Hague dated 24 January 2002 informing the depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of the modification of Mexico’s requirements with respect to the application of article 5 of the said Convention (www.hcch.net/).

¹⁰⁴ *Yearbook ... 2000*, vol. II (Part Two), p. 107, draft guidelines 1.4.6 and 1.4.7.

¹⁰⁵ United Nations, *Treaty Series*, vol. 2182, No. A–6841, p. 51.

¹⁰⁶ See also the modification, in 1988, of the Swiss “interpretative declaration” of 1974 concerning article 6, paragraph 1, of the European Convention on Human Rights following the *Belilos* judgement of 29 April 1988. However, the European Court of Human Rights had classed this “declaration” as a reservation and Switzerland simply withdrew its declaration retroactively following the decision of the Swiss Federal Supreme Court of 17 December 1992 in the case of *F. v. R. and the Council of State of Thurgau Canton* (see footnote 71 above).

CHAPTER II

Formulation of objections to reservations and interpretative declarations—the “reservations dialogue”

69. In his second report on reservations to treaties, the Special Rapporteur presented a “provisional general outline of the study”.¹⁰⁷ This outline, which was endorsed by the Commission¹⁰⁸ and has been followed consistently thus far, divides part III (Formulation and withdrawal of reservations, acceptances and objections) into three sections, concerning formulation and withdrawal of reservations (A), formulation of acceptances of reservations (B) and formulation and withdrawal of objections to reservations (C). Upon reflection, this order seems illogical; it

¹⁰⁷ *Yearbook ... 1996* (see footnote 7 above), pp. 48–49, para. 37. This outline was also reproduced in the seventh report, *Yearbook ... 2002* (see footnote 1 above), p. 9, para. 18.

¹⁰⁸ *Yearbook ... 1997* (see footnote 22 above), pp. 52–53, paras. 116–123.

follows from article 20, paragraph 5, of the 1969 Vienna Convention that in most cases, acceptance of a reservation results from the absence of an objection. It seems preferable, therefore, to begin by describing the procedure for formulating objections—which presupposes active conduct with regard to the reservation on the part of the other Contracting Parties—before tackling acceptances, which are generally reflected in the parties’ silence.

70. Moreover, section C, as envisaged in the outline, contemplates only two issues linked to the formulation of objections, namely, the procedure for their formulation—which is covered in part by article 23, paragraphs 1 and 3, of the 1969 and 1986 Vienna Conventions—and their withdrawal, for which guidelines are given in article 22, paragraphs 2 and 3 (b), and article 23, paragraph 4, of

the same Conventions. This ignores the whole intermediate procedure, which may or may not culminate in withdrawal or in an intermediate solution, consisting of a dialogue between the reserving State and its partners which are urging it to abandon the reservation. This procedure, which may be termed the “reservations dialogue” and which is probably the most striking innovation of modern procedure for the formulation of reservations, will be the subject of a subsequent report; section 1 below is devoted to the formulation of objections to reservations. A subsequent section will, in due course, deal with their withdrawal, and another with equivalent issues linked to interpretative declarations.

71. As in the preceding reports, each of the questions dealt with in this chapter will be presented in the following manner:

(a) To the extent that they are covered by express provisions of the 1969 and 1986 Vienna Conventions, these provisions will be discussed in the light of the *travaux préparatoires*;

(b) Such provisions, which should be reproduced in the Guide to Practice,¹⁰⁹ will then be supplemented on the basis of an in-depth study,¹¹⁰ as far as possible, of practice, jurisprudence and legal doctrine, with a view to:

(c) Drafting guidelines which are sufficiently clear to enable users of the Guide to find answers to any questions they may have.

72. It should also be noted that only questions relating to the form and procedure for formulating objections to reservations will be addressed. In accordance with the provisional general outline,¹¹¹ issues relating to the validity and effects of reservations will be covered in subsequent chapters.

Section 1

Formulation of objections to reservations

73. Five provisions of the 1969 and 1986 Vienna Conventions are relevant to the formulation of objections to treaty reservations:

(a) Article 20, paragraph 4 (b), mentions “in passing” the potential authors of an objection;

(b) Article 20, paragraph 5, gives ambiguous indications as to the period in which an objection may be formulated;

(c) Article 21, paragraph 3, confirms the obligation imposed by article 20, paragraph 4 (b), on the author of an objection to state whether the latter therefore opposes the entry into force of the treaty between the author of the objection and the author of the reservation;

(d) Article 23, paragraph 1, requires that, like reservations themselves, objections be formulated in writing and communicated to the same States and international organizations as reservations; and

(e) Article 23, paragraph 3, states that an objection made previously to confirmation of a reservation does not itself require confirmation.

74. These various issues will be covered by future chapters in a different order. The plan of this section follows, *mutatis mutandis*, the one adopted in section 2.1 of the Guide to Practice concerning the form and notification of reservations.¹¹² Nevertheless, whereas the definition of reservations is the subject of several draft guidelines,¹¹³ objections are not at present defined therein, any more than they are in the 1969 and 1986 Vienna Conventions; the first part of this section will endeavour to fill this gap (and will include comments on the author and content of objections). Subsequent parts will be devoted, respectively, to the form and notification of objections and to the period in which the latter can or should be formulated.

A. DEFINITION OF OBJECTIONS TO RESERVATIONS

75. The definition of reservations provided in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 1.1 of the Guide to Practice, contains five elements:

(a) The first concerns the nature of the act (“a unilateral statement”);

(b) The second concerns its name (“however phrased or named”);

(c) The third concerns its author (“made by a State or an international organization”);

(d) The fourth concerns when it should be made (when “expressing consent to be bound”¹¹⁴); and

(e) The fifth concerns its content or object (whereby it “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization”¹¹⁵).

It seems reasonable to start with these elements in elaborating a definition of objections to reservations.

76. This does not mean, however, that the definition of objections should necessarily include all of them. It appears, in particular, that it would be better not to

¹⁰⁹ See *Yearbook ... 1998* (footnote 54 above), p. 99, para. (1) of the commentary on draft guideline 1.1 (Definition of reservations).

¹¹⁰ The Special Rapporteur, eager to expedite the study of the topic and to respond to the wishes of States and of many of his colleagues in the Commission—wishes he is not certain that he shares, since speed does not seem to satisfy a particular need in relation to such a topic, which it seems to him should preferably be studied tranquilly and in depth, in order to put an end once and for all to the uncertainties and ambiguities that are impeding practice—has nonetheless resigned himself to proceeding in a less exhaustive manner than previously.

¹¹¹ Part IV (Effects of reservations, acceptances and objections), sects. B–C (footnote 107 above).

¹¹² *Yearbook 2002* (see footnote 5 above), p. 28.

¹¹³ *Ibid.*, p. 24, draft guideline 1.1 of the Guide to Practice.

¹¹⁴ *Ibid.*, draft guideline 1.1.2.

¹¹⁵ *Ibid.*, see also draft guideline 1.1.1.

mention the moment when an objection can be formulated; the matter is not clearly resolved in the 1969 and 1986 Vienna Conventions, and it is probably preferable to examine it separately and seek to respond to it in a separate draft guideline.

77. Conversely, two of the elements in the definition of reservations should certainly be reproduced in the definition of objections, which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

78. With regard to the first element, the provisions of the 1969 and 1986 Vienna Conventions leave not the slightest doubt: an objection emanates from *a* State or *an* international organization and can be withdrawn at any time.¹¹⁶ It does not follow, however, that, like a reservation,¹¹⁷ an objection cannot be formulated jointly by several States or international organizations. This possibility can be considered at the same time as the more general question of the author of the objection.

79. With regard to the second element, it is sufficient to recall that the law of treaties, as enshrined in the 1969 Vienna Convention, is wholly permeated by the notion that the intentions of States take precedence over the terminology which they use to express them. This is apparent from the definition given in the Convention of the term¹¹⁸ “treaty”, which “means an international agreement ... whatever its particular designation”.¹¹⁹ Likewise, a reservation is defined therein as “a unilateral statement, however phrased or named”,¹²⁰ and the Commission used the same term to define interpretative declarations.¹²¹ The same should apply to objections: here again, it is the intention which counts. The question remains, however, which intention and by whom it can be expressed.

1. CONTENT OF OBJECTIONS

80. The word “objection” has nothing mysterious about it. In its common meaning, it designates a “reason which one opposes to a statement in order to counter it”.¹²² From a legal perspective, it means, according to the *Dictionnaire de droit international public*, the “opposition

¹¹⁶ Art. 20, para. 4 (b), art. 21, para. 3, and art. 22, paras. 2 and 3 (b). On this subject, see Baratta, *Gli effetti delle riserve ai trattati*, p. 341, or Szafarz, “Reservations to multilateral treaties”, p. 313.

¹¹⁷ See *Yearbook ... 2002* (see footnote 5 above), p. 24, draft guideline 1.1.7.

¹¹⁸ In the view of the Special Rapporteur, it is improper to use the term “expression” where the locution so designated consists of a single word. This terminological inflection is, however, enshrined by custom and it does not seem advisable to question it.

¹¹⁹ Art. 2, para. 1 (a). See also, for example, the ICJ judgment of 1 July 1994 in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 120, para. 23: “[I]nternational agreements may take a number of forms and be given a diversity of names.”

¹²⁰ Art. 2, para. 1 (d), of the 1969 and 1986 Vienna Conventions.

¹²¹ See draft guideline 1.2 and the commentary thereon in *Yearbook ... 1999* (footnote 82 above), in particular, p. 100, paras. (14)–(15), and the examples of “renaming” (*ibid.*, and in the commentary on draft guideline 1.3.2 (Phrasing and name), *ibid.*, pp. 109–111).

¹²² *Grand Larousse encyclopédique*, vol. 7 (Paris, Larousse, 1963).

expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject”.¹²³ The same work defines “objection to a reservation” as follows:

Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States.¹²⁴

81. This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which add to the usual definition of objections to reservations an additional requirement (or opportunity), since this provision invites the author of the objection to indicate whether it opposes the entry into force of the treaty between it and the author of the reservation.

“Generic” object of objections to reservations

82. Any objection to a reservation expresses its author’s opposition to a reservation formulated by a Contracting Party to a treaty, and its intention to prevent the reservation being opposable to it. What is at issue, therefore, is a reaction, and a negative one, to a reservation formulated by another party, it being understood that any reaction of this type is not necessarily an objection.

83. As the Court of Arbitration which settled the dispute between France and the United Kingdom of Great Britain and Northern Ireland concerning the delimitation of the continental shelf in the *English Channel* case stated in its decision of 30 June 1997:

Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.¹²⁵

In this case, the Court did not expressly take a position on the nature of the United Kingdom’s “reaction”, but it “acted as if it were an objection”,¹²⁶ namely, by applying the rule laid down in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.¹²⁷

84. While the award could be criticized in that regard, nonetheless it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows:

The Government of the United Kingdom are unable to accept reservation (b).¹²⁸

¹²³ Salmon, ed., p. 763.

¹²⁴ *Ibid.*, p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

¹²⁵ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 33, para. 39.

¹²⁶ Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”, p. 45.

¹²⁷ See below.

¹²⁸ UNRIAA (see footnote 125 above), para. 40.

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

85. As the Franco-British Court of Arbitration noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20–23 of the 1969 and 1986 Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be valid. For example:

In 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to the ECHR [European Convention on Human Rights]. By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalisation measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting states did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987.¹²⁹

86. The following examples can be interpreted in the same way:

(a) The communications whereby a number of States indicated that they did not regard “the statements¹³⁰ concerning paragraph (1) of Article 11 [of the Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People’s Republic as modifying any rights or obligations under that paragraph”¹³¹; the communications could be seen as interpretations of the reservations in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;¹³²

(b) The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in

¹²⁹ Polakiewicz, *op. cit.*, p. 106 (footnotes omitted).

¹³⁰ These statements, in which the parties concerned explained that they consider “that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State”, they expressly termed “reservations” (*Multilateral Treaties ...* (see footnote 71 above), chap. III.3, pp. 87–89 and 96, note 21).

¹³¹ *Ibid.*, p. 89 (Australia); see also pages 90 (Canada), 91 (Denmark, France), 92 (Malta), 93 (New Zealand, Thailand) and 94 (United Kingdom).

¹³² *Ibid.*, statements by Greece (p. 91), Luxembourg and the Netherlands (p. 92), or the United Republic of Tanzania (p. 94) or the more ambiguous statement by Belgium (p. 90). See also, for example, the final paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention (*ibid.*, vol. II, chap. XXIII.1, p. 300) or the reaction of Norway to the corrective “declaration” of France dated 11 August 1982 regarding the Protocol of 1978 to the MARPOL Convention (a declaration that clearly appears to be a reservation and to which Sweden and Italy had objected as such) stating that it considered it to be a declaration and not a reservation (J/7339 (see footnote 72 above), p. 77, note 1).

Narcotic Drugs and Psychotropic Substances, in which the United States Government says that it understands the reservation “to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth), *to the extent that the reservation is intended to apply*”^{*} other than to the extradition of Colombian nationals by birth, the Government of the United States *objects to the reservation*^{*}¹³³; this is an example of a “conditional acceptance” rather than an objection strictly speaking; or

(c) The communications of Greece, Norway and the United Kingdom concerning the declaration of Cambodia on the Convention on the International Maritime Organization.¹³⁴

87. Such “quasi-objections”, moreover, have tended to proliferate in recent years with the growth of the practice of the “reservations dialogue”, which will be discussed in due course. What the dialogue entails is that States (for the most part European States) inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but often they merely open a dialogue that could lead to an objection but could also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations made by Malaysia on its accession to the Convention on the Rights of the Child clearly falls into the first category and undoubtedly constitutes an objection:

The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.

The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.

In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*.^{*} The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.

The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].¹³⁵

¹³³ *Multilateral Treaties ...* (see footnote 71 above), chap. VI.19, p. 419. Colombia subsequently withdrew the reservation (*ibid.*, p. 420, note 11).

¹³⁴ *Ibid.*, vol. II, chap. XII.1, p. 9, note 12.

¹³⁵ *Ibid.*, vol. I, chap. IV.11, pp. 294–295. For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden and the communications of Belgium and Denmark (*ibid.*, pp. 295–298 and 301, note 25). Malaysia subsequently withdrew part of its reservations (*ibid.*).

88. Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed towards the same purpose, can be considered an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of the reservations of Malaysia and suggests instead a waiting stance:

Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention on the Rights of the Child] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with [the] object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations *a final assessment as to its admissibility under international law cannot be made without further clarification.**

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question *if** the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless** Malaysia ..., *by providing additional information or through subsequent practice** ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].¹³⁶

Here again, rather than a straightforward objection, the statement can be considered a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation), but with uncertain legal status and effects, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

89. Such statements pose problems comparable to those raised by communications in which a State or an international organization reserves its position regarding the validity of a reservation made by another party, particularly with regard to their validity *ratione temporis*.¹³⁷ For example, there is some doubt as to the scope of the statement of the Netherlands to the effect that the Government of the Netherlands "reserve all rights regarding the reservations made by the Government of Venezuela on ratifying [the Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".¹³⁸ The same could be said of the statement of the United Kingdom to the effect that it was

¹³⁶ *Ibid.*, p. 294. See also the reaction of Sweden to Canada's reservation to the Convention on Environmental Impact Assessment in a Transboundary Context, *ibid.*, vol. II, chap. XXVII.4, p. 396.

¹³⁷ See below.

¹³⁸ *Multilateral Treaties ...* (see footnote 71 above), vol. II, chap. XXI.1, p. 215. See also the examples given by Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 318 and 336 (Canada's reaction to France's reservations and declarations to the Convention on the Continental Shelf).

not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety.¹³⁹

Similarly, the nature of the reactions of several States¹⁴⁰ to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the European Convention on Human Rights is not easy to determine. These States, using a number of different formulas, communicated to the Secretary General of the Council of Europe that they reserved their position pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition ... of the Turkish Government's reservations".¹⁴¹ It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance.

90. By contrast, an objection involves taking a formal position seeking, at the minimum, to prevent the application of the "provisions to which the reservation relates ... as between the reserving State or organization and the objecting State or organization to the extent of the reservation", to borrow the language of article 21, paragraph 3, of the 1986 Vienna Convention.

91. It does not follow that other reactions, of the same type as those mentioned above,¹⁴² which the other parties to the treaty may have with respect to the reservations formulated by a State or an international organization are prohibited or even that they produce no legal effects. It simply means that they are not objections within the meaning of the 1969 and 1986 Vienna Conventions and their effects are not those envisaged in article 21, paragraph 3, of those Conventions. Rather, they relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue", whose components will be analysed more carefully in due course.

92. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of reactions to a reservation, in the wording and in the definition of the scope which the author of an objection intends to give to it.¹⁴³

¹³⁹ *Multilateral Treaties ...* (see footnote 71 above), chap. IV.4, p. 181. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (*ibid.*, p. 178); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant looks more like an interpretation of the reservations in question (*ibid.*).

¹⁴⁰ Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (see draft guideline 1.4.6, paragraph 2 (footnote 104 above), but the example (given by Polakiewicz, *op. cit.*, pp. 106–107) is nonetheless striking by analogy.

¹⁴¹ Statement of Luxembourg, *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310, *judgment of 23 March 1995* (Strasbourg, 1995), p. 12, para. 20. The text of these different statements is reproduced there, *ibid.*, pp. 12–13, paras. 18–24.

¹⁴² Paras. 84–88.

¹⁴³ See in this respect the model response clauses to reservations

93. As to the first point—the description of the reaction—the most prudent solution is certainly to use the noun “objection” or the verb “object”.¹⁴⁴ Such other terms as “opposition/oppose”, “rejection/reject”,¹⁴⁵ and “refusal/refuse” must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions like “the Government of ... does not accept the reservation ...”¹⁴⁶ or “the reservation formulated by ... is impermissible/unacceptable/inadmissible”.¹⁴⁷ Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is “prohibited by the treaty”,¹⁴⁸ “entirely void”¹⁴⁹ or simply “incompatible with the object and purpose” of the treaty, which is extremely frequent.¹⁵⁰ In these last cases, this conclusion is the only one possible given the provisions of article 19 of the 1969 and 1986 Vienna Conventions: in such cases, a reservation cannot be formulated and, when a Contracting Party expressly indicates that this is the situation, it would be inconceivable that it would not object to the reservation.

94. This being so, despite the contrary opinion of some writers,¹⁵¹ no rule of international law requires a State or an international organization to state its reasons for an objection to a reservation. Except where a specific

appended to recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word “objects”. On the disadvantages of vague and imprecise objections, see Horn, *op. cit.*, pp.184–185; see also pages 191–197 and 221–222.

¹⁴⁴ See the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child (para. 87 above).

¹⁴⁵ See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties ...* (footnote 71 above), vol. I, chap. III.3, p. 92).

¹⁴⁶ See, for example, the objections of Australia to various reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, chap. IV.1, p. 125) and of the Netherlands to numerous reservations to the Convention on the High Seas (*ibid.*, vol. II, chap. XXI.2, p. 221). See also the objection of the United Kingdom to reservation (b) by France to article 6 of the Convention on the Continental Shelf (para. 84 above).

¹⁴⁷ See, for example, the reaction of Japan to reservations made to the Convention on the High Seas (*Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XXI.2, p. 221) or that of Germany to the reservation by Guatemala to the Convention relating to the Status of Refugees (*ibid.*, vol. I, chap. V.1, p. 336).

¹⁴⁸ See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea (*ibid.*, vol. II, chap. XXI.6, pp. 257–259).

¹⁴⁹ See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) (*ibid.*, vol. I, chap. XI A.16, pp. 556–557).

¹⁵⁰ See, for example, the statement by Portugal concerning the reservations of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8, p. 245) and that by Belgium concerning the reservations of Singapore to the Convention on the Rights of the Child (*ibid.*, chap. IV.11, p. 294).

¹⁵¹ Lijnzaad, (*Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, p. 45) cites in this respect Kühner, *Reservations to Multilateral Treaties*, p. 183, and Szafarz, *loc. cit.*, p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice demonstrates that States do not feel bound to state the reasons on which their objections are based; see, *inter alia*, Horn, *op. cit.*, p. 131 and pp. 209–219.

reservation is expressly authorized by a treaty,¹⁵² the other Contracting Parties are always free to reject it and even to enter into treaty relations with its author. A statement drafted as follows:

The Government ... places on record the formal objection to the reservation made by ...¹⁵³

is as valid and legally sound as a statement setting forth a lengthy argument.¹⁵⁴ There is, however, a recent but unmistakable tendency to specify and explain the reasons justifying the objection in the eyes of the author. This tendency, which seems to be instituting a “reservations dialogue”, should doubtless be encouraged.

95. As to the effect which the author of the objection intends it to have,¹⁵⁵ it is not always sufficient to rely implicitly on the rule laid down in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions:¹⁵⁶ it may be that the State or international organization which intends to object wishes to modulate the effects of that position. In particular, it is apparent from established practice that there is an intermediate stage between the “minimum” effect of the objection, as envisaged by this provision, and the “maximum” effect, which results from the intention expressed by the author of the objection of preventing the treaty from entering into force between itself and the author of the reservation, in accordance with the provisions of article 20, paragraph 4 (b). There are situations in which a State wishes to be associated with the author of the reservation while at the same time considering that the exclusion of treaty relations should go beyond what article 21, paragraph 3, provides.¹⁵⁷ Clearly, such effects are not automatic and must be expressly indicated in the text of the objection itself.

¹⁵² See, in this respect, the arbitral award in the *English Channel* case: “Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance” (UNRIAA (footnote 125 above), p. 32, para. 39). Imbert even thinks that an expressly authorized reservation can be objected to (*op. cit.*, pp. 151–152). This question will be considered when the scope of article 20, paragraph 1, of the 1969 and 1986 Vienna Conventions is discussed.

¹⁵³ Among the many examples, see the statement by Australia concerning the reservation of Mexico to the Convention on the High Seas (*Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XXI.2, p. 220) and those by Belgium, Finland, Italy, Norway and the United Kingdom with respect to the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid.*, vol. I, chap. IV.2, pp. 140–143).

¹⁵⁴ For an example, see paragraph 87 above.

¹⁵⁵ It will be recalled that the purpose of this chapter is not to study the effects of an objection; the question is raised here only insofar as it is relevant to the *formulation* of an objection.

¹⁵⁶ According to this provision in the 1986 text: “When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.”

¹⁵⁷ See, for example, Canada’s objection to the Syrian Arab Republic’s reservation to the 1969 Vienna Convention: “... Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable” (*Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XXIII.1, p. 296). For other examples and for a discussion of the permissibility of this practice, see below. See also Edwards Jr., “Reservations to treaties”, p. 400.

96. Similarly, if there exists, as some writers think,¹⁵⁸ a “super-maximum” effect, consisting in the determination not only that the reservation objected to is not valid, but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States, this certainly should be mentioned in the statement made in reaction to the reservation, as Sweden did in its “objection” of 27 November 2002 to the reservation which Qatar made when acceding to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography:

This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.¹⁵⁹

97. Whatever the validity of such a statement,¹⁶⁰ it is doubtful whether it qualifies as an objection within the meaning of the 1969 and 1986 Vienna Conventions: the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Conventions. Whereas “unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State”,¹⁶¹ in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.

98. In view of the foregoing considerations, the definition of an objection to a reservation could be included in draft guideline 2.6.1—which would be placed at the head of section 2.6 of the Guide to Practice, entitled “Procedure regarding objections to reservations”¹⁶² and might read as follows:

“2.6.1 Definition of objections to reservations

“‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international

¹⁵⁸ See Simma, “Reservations to human rights treaties: some recent developments”, pp. 667–668.

¹⁵⁹ *Multilateral Treaties ...* (see footnote 71 above), vol. I, chap. IV.11.C, p. 318; see also Norway’s objection of 30 December 2002 (*ibid.*, p. 317).

¹⁶⁰ Which can be recommended on the basis of the position adopted by the organs of the European Convention on Human Rights and general comment No. 24 of the Human Rights Committee (see the second report on reservations to treaties, *Yearbook ... 1996* (footnote 7 above), pp. 73–74, paras. 196–201), but is hardly compatible with paragraph 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties, adopted in 1997 (see *Yearbook ... 1997* (footnote 22 above), p. 57, para. 157) or with the principle *par in parem non habet jurisdictionem*. “To attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties” (*English Channel* case, UNRIAA (see footnote 125 above), p. 42, para. 60). This matter will be studied further when the question of the effects of objections is taken up.

¹⁶¹ Imbert, *op. cit.*, p. 419.

¹⁶² This draft guideline could be placed in chapter 1 of the Guide to Practice (Definitions). However, the Special Rapporteur believes that it would be preferable to group together all the guidelines concerning objections in section 2.6.

organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.”

99. This definition was modelled very closely on the definition of reservations given in article 2, paragraph 1 (d) of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 1.1 of the Guide to Practice. It reproduces all its elements,¹⁶³ with the exception of the time element, for the reasons indicated above.¹⁶⁴ Apart from the foregoing considerations, certain aspects of the proposed definition call for a few additional remarks.

100. First, the Special Rapporteur is not suggesting that this definition should include a detail found in article 20, paragraph 4 (b), of the 1986 Vienna Convention, which refers to a “contracting* State” and a “contracting* organization”.¹⁶⁵ There are two reasons for this:

(a) On the one hand, article 20, paragraph 4 (b), settles the question whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question whether it is possible for a State or an international organization that is not a Contracting Party in the meaning of article 2 (f) of the Convention to make an objection; the possibility that such a State or an organization might formulate an objection cannot be ruled out, it being understood that the objection would not produce the effect produced in article 20, paragraph 4 (b), until the State or organization has become a Contracting Party. Moreover, article 21, paragraph 3, does not reproduce this detail and refers only to “a State [*tout court*] or an international organization [*tout court*] objecting to a reservation”; this aspect will be studied more closely in due course;

(b) On the other hand, the definition of reservations itself gives no information about the status of a State or an international organization that is empowered to formulate a reservation.

101. Secondly, the phrase “in response to a reservation” (draft guideline 2.6.1 above) also deserves comment. According to the wording of draft guidelines 2.3.1–2.3.3, the Contracting Parties may also “object” not to the reservation itself but to the late formulation of a reservation. In its commentary on draft guideline 2.3.1, the Commission wondered whether it was appropriate to use the word “objects” to reflect the second hypothesis and noted that, given the possibility for a State to accept the late formulation of a reservation but object to its content,

¹⁶³ See paragraph 75 above.

¹⁶⁴ See paragraph 76 above. It might be noted that the definition of interpretative declarations adopted by the Commission in draft guideline 1.2 does not mention a time element.

¹⁶⁵ Article 20, paragraph 4 (b), of the 1969 Vienna Convention speaks only of the “contracting State”.

some members “wondered whether it was appropriate to use the word ‘objects’ in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation. Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable”.¹⁶⁶ This position leads to the question of whether the distinction between the two meanings of the word “objection” in relation to the right to enter reservations to treaties should not be made clearer. The Special Rapporteur, who persists in his view that the word “objection” should be replaced by “opposition” in draft guidelines 2.3.1–2.3.3, believes that it would be sufficient to make this clear in the commentary on draft guideline 2.6.1. If the Commission were to disagree, attention might be drawn to the problem through a draft guideline 2.6.1 *bis* (or draft guideline 2.6.1, paragraph 2):

“**2.6.1 bis** *Objection to late formulation of a reservation*

“‘Objection’ may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.”

102. Thirdly and lastly, the objective sought by the author of an objection is at the very heart of the definition of objections proposed above. This objective is the result of combining article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions. The latter provision defines both the “maximum”¹⁶⁷ objective which a State or an international organization may seek in formulating a reservation: preventing the treaty from entering into force in its relations with the author of the reservation, and its minimum objective: preventing the application of the provisions to which the reservation relates, in those same relations, “to the extent of the reservation” (draft guideline 2.6.1 above).

103. This procedure is in keeping with that used in the definition of the reservations themselves, which must purport “to exclude or to modify the legal effect of certain provisions of the treaty in their application”¹⁶⁸ to the author of the reservation. And it is understood that, although this objective constitutes the very criterion of a reservation, its inclusion in the definition would not indicate, in any specific case, whether the reservation is valid and does indeed produce the effect sought. The same is true of an objection: to merit the term, a unilateral statement must purport to produce one of the effects provided for in the 1969 and 1986 Vienna Conventions, but that will not necessarily be the case: to that end, the objection itself must be permissible. This question is not one of definition, but of the legal regime of objections and will be discussed later on.

104. Another point is worthy of comment. Draft guideline 1.1.1, adopted by the Commission in 1999, states that a reservation purports to exclude or modify, as necessary,

the legal effect “of the treaty as a whole with respect to certain specific aspects in [its] application to the State or to the international organization which formulates the reservation”.¹⁶⁹ The question then arises whether this detail should not be reflected in the definition of objections. The definition proposed above¹⁷⁰ refers exclusively to the usual objective of reservations, which relates to certain provisions of the treaty; however, across-the-board reservations are far from isolated occurrences¹⁷¹ and they, like all reservations, are obviously open to objection. This explanation could be included in the commentary on draft guideline 2.6.1; it would, however, be logical to echo draft guideline 1.1.1 in a special draft guideline supplementing the definition of objections, which might read as follows:

“**2.6.1 ter** *Object of objections*

“When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection, an objection purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation.”

105. Another possibility would be to include this hypothesis in draft guideline 2.6.1 itself, which would then read as follows:

“**2.6.1** *Definition of objections to reservations*

“‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.”

This is the most “economical” solution, its only disadvantage being its unwieldiness.

106. One last problem should be mentioned. As he indicates above,¹⁷² the Special Rapporteur is firmly of the view that, *de lege lata*, a State or an international organization is not at all obliged to give the reasons for its objection to a reservation. It is purely a question of judgement, which may be based on legal reasons, but which may also, and quite legitimately, be related to political

¹⁶⁶ *Yearbook ... 2001* (see footnote 4 above), p. 189, para. (23) of the commentary on draft guideline 2.3.1.

¹⁶⁷ See paragraphs 96–97 above.

¹⁶⁸ *Yearbook ... 1999* (see footnote 82 above), p. 91, draft guideline 1.1.

¹⁶⁹ *Ibid.*

¹⁷⁰ See paragraph 98 above.

¹⁷¹ See *Yearbook ... 1999* (footnote 82 above), pp. 93–94, para. (5) of the commentary on draft guideline 1.1.1.

¹⁷² Para. 94.

concerns.¹⁷³ Nevertheless, it is probably advisable for the reasons motivating the objection to be communicated to the author of the reservation, especially if the author of the objection wishes to persuade it to review its position. The question therefore arises whether the Commission should make a recommendation to that effect to States and

¹⁷³ This is very frequently the case—see, for example, Imbert, *op. cit.*, pp. 419–434.

international organizations, as it has done on other occasions.¹⁷⁴ The Special Rapporteur is therefore of the view that this question, which is one aspect of the “reservations dialogue”, should be revisited in a subsequent chapter.

¹⁷⁴ See, for example, *Yearbook ... 2002* (footnote 1 above), pp. 22–23, para. 103, draft guideline 2.5.3 (Periodic review of the usefulness of reservations).

*Annex***MODEL LETTER ADDRESSED TO THE CHAIRPERSONS
OF THE HUMAN RIGHTS BODIES**

13 August 2002

Sir/Madam,

In 1997, the International Law Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. A copy of the text is attached herewith.

The Commission intends to resume its consideration of this topic and adopt final conclusions, probably during its fifty-fifth session in 2003 or fifty-sixth session in 2004. We are therefore contacting you again to propose the fullest possible cooperation between the Committee over which you preside and the Commission so that we might hold an exchange of views.

It would thus be particularly appropriate for all the bodies concerned (to the Chairpersons of which we are addressing a letter similar to this one)* and the Commission or their representatives, to hold one or more joint meetings, preferably at the Commission's next session, which is scheduled from 5 May to 6 June and from 7 July to 8 August 2003. We would be pleased to hear your reaction and that of the body over which you preside as soon as possible.

The International Law Commission is open to any suggestions you might wish to make on the topic covered by the 1997 preliminary conclusions, and we are available to provide any information or clarifications that you or your colleagues might wish to request.

We thank you in advance for your response to this letter.

Accept, Sir/Madam, the assurances of our highest consideration.

(Signed) Robert **Rosenstock**
Chairman
International Law Commission

(Signed) Alain **Pellet**
Special Rapporteur on reservations to treaties

Mr. Ion Diaconou
Chairperson
Committee on the Elimination of Racial Discrimination
Geneva

* Sub-Commission on the Promotion and Protection of Human Rights; Human Rights Committee; Committee on the Elimination of Racial Discrimination; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Discrimination against Women; Committee against Torture; Committee on the Rights of the Child.

UNILATERAL ACTS OF STATES

[Agenda item 5]

DOCUMENT A/CN.4/534

Sixth report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur

[Original: English/French/Spanish]
[30 May 2003]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	53
Works cited in the present report	53
<i>Chapter</i>	<i>Paragraphs</i>
INTRODUCTION: Viability of the topic. Possible forms for the final product of work on the topic. Methodological approach: study of specific unilateral acts. Structure of the sixth report.....	1–16 54
I. RECOGNITION: Conduct and acts. Silence and acquiescence. Tacit recognition through implicit or explicit acts. Conventional recognition. Criteria for formulation and discretionality of acts of recognition	17–67 57
II. VALIDITY OF THE UNILATERAL ACT OF RECOGNITION: Formulation of the act: act of the State and persons authorized to formulate the act. Acknowledgement of the situation and intention of the author State. Lawfulness of the object. Question of the addressee in the case of the act of recognition. Temporal and spatial application of the act of recognition.....	68–81 63
III. LEGAL EFFECTS OF RECOGNITION: Opposability and enforceability. Basis for the binding nature of the act of recognition	82–108 65
IV. APPLICATION OF ACTS OF RECOGNITION: Commencement of legal effects and their relativity. Spatial and temporal application of acts of recognition. Modification, suspension, revocation and termination of unilateral acts of recognition	109–123 68

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Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States (Montevideo, 26 December 1933)	<i>Ibid.</i> , vol. CLXV, p. 19.
Charter of the Organization of American States (Bogotá, 30 April 1948)	United Nations, <i>Treaty Series</i> , vol. 119, No. 1609, p. 3.
Protocol of amendment to the Charter of the Organization of American States: “Protocol of Buenos Aires” (Buenos Aires, 27 February 1967)	<i>Ibid.</i> , vol. 721, p. 324.
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Introduction

Viability of the topic. Possible forms for the final product of work on the topic. Methodological approach: study of specific unilateral acts. Structure of the sixth report

1. It is true that it has not been clearly established that the institution of unilateral legal acts exists, and the existence of such an institution is by no means clearly defined in international law, even though there are major doctrinal and case-law elements and even a certain State practice that could demonstrate the existence of the institution. However, the topic must continue to be studied by the International Law Commission, in accordance with the views expressed by the great majority of Commission members and Sixth Committee representatives. Governments have given the Commission a mandate to consider the topic and

to endeavour to engage in a codification and progressive development exercise. Despite any doubts members might have, the Commission has had to adopt such an approach to consideration of the topic of unilateral acts of States. Even if the institution of unilateral acts did not in fact exist, the Commission would still be obliged to take up the matter: as a consultative organ of the General Assembly, it must consider all topics in its agenda. It must examine any legal institutions that it is asked to, to determine whether such institutions exist and whether a codification and progressive development exercise is feasible, and to respond

appropriately to the requests made and issues raised by Governments.

2. Since 1997, when the decision was taken to appoint a Special Rapporteur on the topic of unilateral acts of States,¹ the Commission's work has been characterized by its complexity and by the uncertainty that has prevented the Commission from making the progress it was hoping for when it first embarked on its work on the topic, unlike in the case of its consideration of other issues. As pointed out by some Commission members, the topics considered by the Commission in recent years have been based on a wealth of authoritative law and the task was to choose between competing and inconsistent rules emerging from State practice, as in the case of diplomatic protection.²

3. An extremely important factor that has had a negative impact on the Commission's work on the topic has been that State practice is not being considered in a broad context. It has been emphasized that consideration of the conduct of States in their international relations reflects a whole range of unilateral acts and conduct, some of which are not within the purview of the study of unilateral acts of the type with which the Commission is concerned. The main issue that arises is that of the uncertainty as to how convinced the author State is as regards the nature and scope of the act it is formulating.

4. The Commission has been considering the topic on the basis of the reports submitted by the Special Rapporteur, which, as pointed out on earlier occasions, have been based on the Commission's prior work on the topic. So far the main goal has been to elaborate rules governing the acts in question, focusing more on a progressive development approach than on codification, in accordance with the Commission's statute, in keeping with the conclusions adopted by the Commission and the Working Group on unilateral acts of States that met in 1996,³ and in accordance with the views expressed by the majority of representatives in the Sixth Committee.

5. In the specific case of unilateral acts, the majority view in the Commission and the Sixth Committee has been that the topic of unilateral acts of States can be dealt with as both a codification and a progressive development exercise. It should be borne in mind that the 1997 Working Group on unilateral acts of States concluded in its report that "[i]n the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of act and what the legal consequences are, with a clear statement of the applicable law".⁴ However, owing to the complexity of the topic and the doubts to which it gives rise, a number of other Commission members and Sixth Committee

representatives are of a different view: they believe that it is too early for the topic to be the subject of such a study, particularly since consideration of State practice has not been completed; States have yet to comment on the matter, although some information that is of great relevance to the Commission's work has indeed already been received.

6. Apart from any quantitative assessment in that connection, these differences of opinion in the Commission and the Sixth Committee are an obstacle to progress in dealing with the topic. A number of other possibilities should perhaps be considered, since they offer ways of solving some difficulties and would facilitate further consideration of the topic, enabling States to hear the Commission's views on a matter of great importance to international relations.

7. Although it is true that codification and progressive development form the mandate of the Commission as a consultative organ of the General Assembly, the Commission has itself adopted other approaches with respect to other topics, as in the case of the topic of reservations to multilateral treaties, in connection with which a Guide to Practice is being prepared, which will set out guidelines for States to consult in matters relating to their future practice and will facilitate the consolidation of State practice.

8. As one representative indicated in the Sixth Committee, unilateral acts are extremely complex in nature and their codification may not necessarily be feasible within the foreseeable future. That representative also said that codification obviously does not mean a simple compilation of doctrine and jurisprudence on it: it is vital to complete the above two elements with the practice developed by States. The representative in question indicated in that connection that the adoption of such guidelines on unilateral acts by a General Assembly resolution, similar to those relating to reservations to treaties, might be advisable to provide a set of non-binding rules that States could rely upon, which in her view could help develop uniform practice in that respect.⁵ Although the view has been expressed that it is too early to decide on the final form to be taken by the outcome of the Commission's work on the topic under consideration, the view expressed by that representative can be taken appropriately into account. A decision on the matter could perhaps facilitate progress in the Commission's work, by making the relevant conclusions less rigid. The Commission might wish to consider the matter before taking up other questions that entail further consideration of work carried out earlier that is discussed in the present report.

9. In accordance with suggestions made by a number of Commission members and representatives of States, this report will focus on a particular type of unilateral act: recognition, particularly recognition of States, although reference will also be made to other acts of recognition. Acts of recognition in general could

¹ *Yearbook ... 1997*, vol. II (Part Two), pp. 66, para. 212, and 71, para. 234.

² *Yearbook ... 2002*, vol. I, 2722nd meeting, statement by Mr. Dugard, p. 76, para. 57.

³ *Yearbook ... 1996*, vol. II (Part Two), p. 14, para. 29, and annex II, addendum 3, p. 141.

⁴ *Yearbook ... 1997* (see footnote 1 above), p. 64, para. 196 (c).

⁵ Statement by Poland, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 26th meeting (A/C.6/57/SR.26)*, para. 25.

represent a specific category of the acts in question, that is, acts whereby States assume unilateral obligations.

10. Focusing efforts on the study of a particular act such as recognition could facilitate study of the topic, in addition to constituting a response to the suggestions made by a number of Commission members and Sixth Committee representatives. At the fifty-fourth session of the Commission in 2002, a number of members did in fact suggest such an approach. For example, one Commission member indicated that it had been proposed that the Commission should focus on certain areas of practice, such as recognition of States or Governments.⁶ Another member had expressed the view that the Commission should start by considering examples of unilateral acts such as recognition and promise, in order to ascertain whether any general rules could be laid down.⁷

11. In the Sixth Committee, a number of representatives had also been of the view that separate consideration of the acts could be very useful. For example, one representative indicated that in order to achieve greater progress on this complex topic it would be desirable not only to gather and study relevant State practice on the widest possible basis, but also, in parallel with the consideration of general rules, to begin to study and codify rules on some unilateral acts whose nature and intended legal effects were relatively easier to determine. Protest, recognition, waiver and promise were examples of such unilateral acts.⁸ Another representative made a similar statement on the same occasion, indicating that to do so it would be necessary primarily to elaborate a method of work which would be appropriate for the matter at hand and conducive to the production of results. Such a method would entail, first, the study of each category of cases of unilateral acts, starting from the classical ones, i.e. promise and recognition. It would thereafter be much easier to proceed to the identification of the general rules that would be applicable to those acts.⁹ Another representative said that she would be grateful if in his sixth report the Special Rapporteur would consider a specific category of unilateral acts that many delegations regarded as falling within the category of so-called classical acts in the area under consideration, such as recognition.¹⁰ Another representative had made a similar comment, indicating that in order to facilitate such work, it might be useful to study each specific type of act, such as promise, recognition, renunciation or protest, before elaborating the general rules on unilateral acts.¹¹

12. Before consideration of the various aspects of the topic is taken up in this report, attention should be drawn to a major concern, with respect to which it

⁶ *Yearbook ... 2002* (see footnote 2 above), statement by Ms. Escarameia, p. 77, para. 65.

⁷ *Ibid.*, statement by Ms. Xue, para. 70.

⁸ *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 24th meeting, statement by China (A/C.6/57/SR.24), para. 37.

⁹ *Ibid.*, statement by Greece, para. 74.

¹⁰ *Ibid.*, 26th meeting, statement by Venezuela (A/C.6/57/SR.26), para. 51.

¹¹ *Ibid.*, statement by the Republic of Korea, para. 70.

should be borne in mind that major doubts have been expressed: the question of the possibility of elaborating a number of rules for application with respect to all unilateral acts, regardless of their characterization and their legal effects.

13. In earlier reports, the Special Rapporteur indicated that it would seem possible to elaborate a number of rules applicable to all unilateral acts, particularly as regards formulation of an act: definition, capacity of the State, individuals authorized to formulate the act, conditions for validity and reasons for revocation, which gave rise to a very interesting exchange of views at the fifty-fourth session of the Commission in 2002. Some members, it will be recalled, were of the view that the applicable rules could be unified, at least at the level of general principles.¹² Other members, however, did not express support for such a possibility.

14. In 2002 a number of Sixth Committee representatives also made comments on the matter, and some representatives expressed support for the approach. One representative indicated that it would be appropriate for the Commission at first to formulate rules common to all unilateral acts and afterwards to focus on the consideration of specific rules for particular categories of unilateral acts.¹³ On the same occasion, another representative indicated that despite the controversial nature of the subject matter, he was convinced that the identification of general rules applicable to all unilateral acts was required to foster the stability and predictability of relations between States.¹⁴ Similarly, another representative encouraged the Commission to continue to study the general and specific rules applicable to the various types of unilateral acts and to build upon that in order to draft a complete and coherent set of rules on the matter.¹⁵

15. Regardless of whether or not it is possible to elaborate rules common to all unilateral acts, whatever their form and legal effects, consideration of the matter will be approached in keeping with the suggestions made by the majority of Commission members in 2002. It is not a question of preparing a new theoretical study on the institution of recognition, which has been sufficiently examined by legal writers, but rather of examining the matter in the light of the considerations put forward on the topic of unilateral acts of States in general, in the Commission.

16. In chapter I, the institution of recognition will be taken up, with a focus on recognition as a unilateral act, and excluding other State acts and conduct that, although they might produce similar legal effects, do not fall within the context of the study currently under discussion by the Commission. A brief reference will also be made, in this chapter, to two interesting

¹² *Yearbook ... 2002* (see footnote 2 above), 2726th meeting, statement by Mr. Pellet, p. 99, para. 13.

¹³ *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 26th meeting, statement by Nepal (A/C.6/57/SR.26), para. 18.

¹⁴ *Ibid.*, 24th meeting, statement by Brazil (A/C.6/57/SR.24), para. 64.

¹⁵ *Ibid.*, statement by Portugal, para. 15.

questions: criteria for the formulation of an act and their discretionality, relating chiefly to recognition of States. In the same chapter an attempt will be made to define acts of recognition, either in terms of or in close connection with the work carried out so far by the Commission; in addition, at the end of the chapter, a number of comments will be made on a type of non-recognition that has its own characteristics, although to a certain extent its effects are comparable to those of an act containing a protest. In chapter II, the conditions required for the validity of such an act are examined: formulation (intent), lawfulness of the object and conformity with imperative norms of international law. In chapter III, consideration of the legal effects of an

act of recognition will be taken up, particularly with regard to the opposability and enforceability of the act. Lastly, chapter IV takes up a number of issues relating to the application of acts of recognition: the relationship between the author State and the addressee; the spatial and temporal application of acts of recognition; and, lastly, although only on a preliminary basis, matters relating to the modification, suspension and revocation of acts of recognition, including causes external to the act, that is, causes beyond the author's control, in particular, in keeping to a certain extent with the Vienna regime on the law of treaties, the disappearance of the object and a fundamental change in circumstances.

CHAPTER I

Recognition

Conduct and acts. Silence and acquiescence. Tacit recognition through implicit or explicit acts. Conventional recognition. Criteria for formulation and discretionality of acts of recognition

17. As already indicated, the goal is not to prepare a new study on a topic on which extraordinary writings have already been produced by jurists. The aim is, instead, as indicated in the introduction to this report, to set out the most important characteristics of the institution of recognition in such a way as to link them to the work already carried out by the Commission on unilateral acts in general. Recognition as an institution and unilateral acts of recognition are not necessarily identical concepts, and this is precisely what is being referred to in the present chapter. Specifically, the aim is to examine the institution and the various acts and forms of conduct whereby a *de facto* or *de jure* situation or legal claim is recognized, in order to exclude those that do not fall within the framework of the unilateral acts that are of interest to the Commission.

18. To begin with, once again an issue must be examined that has already been considered in earlier reports: the difficulties involved in qualifying or characterizing unilateral acts of recognition in a definitive manner; and the need to circumscribe the study of recognition of unilateral legal acts, which means that it will be necessary to exclude other acts and types of conduct on the part of States to which reference has also been made, in general terms, in reports and previous discussions in the Commission.

19. As experience has already shown, it is not easy to qualify unilateral acts of States in a definitive fashion and to characterize them, on the basis of studies of the subject and the conclusions drawn by international legal writers and case law. As will be noted, it is possible to choose to qualify such acts without differentiating between them. There is, for example, the relationship between acts of recognition and other acts accepted by legal writers as also being unilateral acts, as in the case of renunciation and promise; and in the case of some forms of conduct and attitudes on the part of States, such as silence, which is sometimes interpreted as acquiescence. There is also an important relationship, particularly as regards effects, between acts of recognition and estoppel, which has sometimes been referred to in earlier reports. As indicated

by the Chamber constituted by ICJ in the *Gulf of Maine* case:

[The] concepts of acquiescence and estoppel ... both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.¹⁶

20. This approach also calls for a reference to non-recognition which may be performed by means of an express act or by means of express or explicit conduct, which is also of interest and has legal implications; in any event, non-recognition can constitute a unilateral act within the meaning that is of concern to the Commission.

21. The Ihlen declaration¹⁷ is a clear example of the wide range of conclusions that can be drawn when an attempt is made to qualify an act, as the Special Rapporteur attempted to demonstrate in earlier reports.¹⁸ This declaration recognizes a situation, but it also contains a promise and even a renunciation. The same can be said of the declaration by the Government of Colombia on Los Monjes, which has also been referred to in earlier reports¹⁹ and can equally well be described as recognition or a renunciation, or even a promise. Further valid examples are unilateral declarations of neutrality, which can entail a renunciation or a promise; and, lastly, as yet a further illustration of the wide variety and complexity of acts of recognition, there are the negative security assurances formulated by States in the framework of disarmament

¹⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 305, para. 130.

¹⁷ See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 69–70.

¹⁸ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519, p. 125, paras. 72–73; and *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add. 1–2, pp. 93–94, para. 6, p. 97, para. 36 and p. 112, para. 160.

¹⁹ *Yearbook ... 2002* (see footnote 18 above), p. 96, para. 23. See also Vásquez Carrizosa, *Las relaciones de Colombia y Venezuela: la historia atormentada de dos naciones*, pp. 337–339.

negotiations, which can be regarded or qualified as a promise or a renunciation.

22. Whereas a renunciation is an expression of the general capacity to dispose of one's rights, as pointed out by some, recognition is an expression of the capacity to assume obligations, which is a prerogative of States: this is the same capacity whereby a legal value is attributed to international agreements, whatever term may be used in that connection. Recognition has some characteristics in common with a promise, or, to be more precise, it falls within the broader framework of unilateral acts representing exercise of the general capacity to assume obligations by means of an expression of will, that is, within the framework of a general concept of legal acts.²⁰ An act of recognition of a State would thus, owing to its object, seem to be on firmer ground than other unilateral acts because it is not easily confused with a renunciation or a promise.

23. One and the same question arises, however, in all cases: the State formulating the act, regardless of its qualification or characterization, would be assuming unilateral obligations. The State would be obliged, on the basis of the act concerned, to conduct itself in a particular manner, when a promise is involved; or it would be obliged subsequently to refrain from calling into question the legality of a particular situation, in the case of recognition or a renunciation. An act formulated by a State is binding on it from that point in time, which means that the addressee has the right to require enforcement; the principles of opposability and enforceability, which will be dealt with below, thus arise.

24. Formulation of an act could, in all events, be the subject of another general comment. Unilateral acts of recognition, renunciation and protest, and unilateral acts containing a promise are expressions of unilateral will on the part of an individual authorized to act on behalf of a State and engage it on its behalf in that context, with the intention of producing particular legal effects.

25. Recognition of a *de facto* or *de jure* situation or a legal claim is not always performed by means of acts expressly formulated to that end. Both the writings of jurists and practice reveal the existence of various acts and a number of types of conduct whereby States can recognize a situation or a claim that should be excluded from the study that is to be carried out. The type of recognition to focus on is that formulated by a State by means of a unilateral legal act. Recognition of States and Governments in particular can be performed either explicitly or implicitly. Furthermore, a listing of acts that result in recognition does not exist.

26. It will thus be noted that States can recognize a particular *de facto* or *de jure* situation or a legal claim not only by means of the expression of explicit will, but also by means of various forms of conduct or acts that tacitly, implicitly or explicitly encompass such

recognition. First, recognition of a situation or claim by means of non-active conduct, such as silence, will be noted; this is of great importance in international law and has unquestionable legal effects, as will be revealed by an examination of international practice and writings of jurists. Silence may be interpreted as a lack of reaction, which has its importance in the context of legal situations and claims, particularly territorial claims, matters which have been considered on a number of occasions by ICJ, as in the cases concerning the *Temple of Preah Vihear*,²¹ the *Arbitral Award Made by the King of Spain on 23 December 1906*,²² the *Right of Passage over Indian Territory*²³ and, *inter alia*, in the cases involved in the *Land, Island and Maritime Frontier Dispute*.²⁴ It should, however, be pointed out that silence is not always interpreted as acquiescence, as observed by the majority of legal writers and the case law of the international courts;²⁵ it cannot always be viewed as acquiescence.²⁶

27. A State can also recognize a *de facto* or *de jure* situation or a legal claim by means of an act expressly performed to that end, but not with the specific intention of formulating an act of recognition in the sense under consideration. Nor does such an act, whereby a State recognizes implicitly or explicitly a situation or claim, appear to belong in the category of acts of recognition in a strict sense. If that is so, one is in the presence of explicit acts of States that may be interpreted as acts of recognition that unquestionably produce the same legal effects.

28. When a State establishes diplomatic relations or concludes an agreement with an entity that it has not recognized as such, it will be recognizing it from that point in time onwards or from the point in time at which the act is established. A State that concludes an agreement with another State on the subject of a territory will unquestionably be recognizing that entity as a State, which has legal consequences similar to those produced by an express act of recognition, manifested with the intention of recognizing such a situation.²⁷ As will be seen below, a State could even be recognizing a State as such when it is admitted to membership of the United Nations.

29. Another category of acts of recognition that would not fall within the context of the unilateral acts of

²¹ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6.

²² *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192.

²³ *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 39.

²⁴ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 422, para. 100.

²⁵ *Ibid.*, p. 577, para. 364.

²⁶ Arbitral award in the *Island of Palmas case (Island of Palmas (Netherlands/United States of America)*, award of 4 April 1928, UNRIIA, vol. II (Sales No. 1949.V.1), p. 843).

²⁷ In the context of the recognition of States there is, for example, the joint communiqué of 17 January 1986 signed by Israel and Spain, in which the Governments of the two countries decided to establish diplomatic relations, an act which would without question be governed by the Vienna regime on the law of treaties.

²⁰ Venturini, "The scope and legal effects of the behaviour and unilateral acts of States", p. 396.

recognition under consideration would be conventional acts of recognition, that is, recognition performed by means of a conventional act concluded by two States, which would be an act falling within the sphere of the Vienna regime on the law of treaties. Nothing would appear to prevent two States from deciding to establish relations, by means of an agreement, including an informal one such as a joint communiqué that would not necessarily be signed, but would simply be issued; this could represent mutual recognition, as, for example, in the case of mutual recognition by the two Germanies, by means of a treaty concluded by the two countries, in which they recognized each another as legitimate political entities.²⁸

30. Recognition can also occur as a result of an act formulated by an international organization, particularly acts whereby a State is admitted to membership of the United Nations. These are unilateral acts of a collective origin, performed by an international organization, within the framework of its competences and in accordance with its rules, to be more specific, by means of a formal resolution of the General Assembly.

31. The admission of new members is based on a constitutional procedure, laid down in the Charter of the United Nations, for political reasons; new members have been admitted in greater numbers since 1960 following the adoption by the General Assembly of its resolution 1514 (XV) of 14 December 1960, on the granting of independence to colonial countries and peoples; more recently, this process has been the result of the disintegration of the former Yugoslavia and the Soviet Union. The most recent admission to membership involved Timor-Leste, which was admitted by means of Assembly resolution 57/3 of 27 September 2002. Unquestionably, this internal act on the part of the United Nations, which is not an express act of recognition in the sense that is of concern to the Commission, has legal and political effects similar to those of the formal unilateral act under consideration. States participating in the decision would be implicitly recognizing the entity admitted by the United Nations. When the United Kingdom of Great Britain and Northern Ireland supported the admission of the Democratic People's Republic of Korea to the United Nations it stated: "[W]e also now recognize [it] as a state, but have no plans to establish diplomatic relations".²⁹ An act of recognition formulated by means of a resolution on admission to membership of the United Nations would even be opposable with respect to States that reject such recognition. In such a case, there would be a State that has effectiveness.

32. Although the act in question is a unilateral legal one of a collective origin that produces particular legal effects, and despite its legal and even political importance, this act must be excluded from the scope of the

study under discussion because it does not fall within the Commission's mandate, which is limited to unilateral acts of States.

33. Consideration of the type of recognition with which the Commission is concerned should be limited to unilateral legal acts formulated by States with the intention of recognizing a particular situation or claim. The acts in question must be formulated expressly by a State, either orally or in writing, and should not be other acts or various types of conduct that imply recognition, even though they may produce the same legal effects. The relevant practice indicates that many acts of recognition are formulated expressly by means of a declaration or a diplomatic note, with even greater frequency in the context of the recognition of States that is to form the main framework for the present report, in accordance with the suggestion made by the Commission. One type of act of recognition among many others is the kind of formal declaration formulated by most States whereby the new African and Caribbean States and new States in other regions have been recognized upon gaining independence since 1960. More recently, there have been many acts concerning the recognition as independent States of Bosnia and Herzegovina, Croatia, Estonia, Latvia, Lithuania and Slovenia, and the various former Soviet Republics, among others, that have resulted from the political process that began towards the end of the 1980s.³⁰

34. Before any attempt is made to define unilateral acts of recognition, two issues that would appear to be of interest should be taken up: the criteria for formulating such acts and discretionality.

35. Acts of recognition, including acts of non-recognition, which will be discussed below, are not subject to any specific criteria. Recognition of States, for example, is based on criteria that are not homogeneous in practice, but in any event meet the requirements of international law for determining that the State in question exists. For example, in the case of the political recognition of States by the United Kingdom, formulated when in 1986 it was considering either recognizing or not recognizing Bophuthatswana, the British Government laid down the following criteria:

The normal criteria which the Government apply for recognition as a State are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations.³¹

Interestingly, the British Government adds the following: "Other factors, including some United Nations resolutions, may also be relevant".³² Also in 1986, it

²⁸ Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic (Berlin, 21 December 1973), ILM, vol. XII, No. 1 (January 1973), p. 16.

²⁹ Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, *Hansard*, House of Commons Debates (6th series), vol. 196 (16 October 1991), cited in Harris, *Cases and Materials on International Law*, p. 145.

³⁰ Among the many declarations of recognition in question, attention should be drawn to those formulated by Venezuela whereby it recognized, as sovereign and independent States, Bosnia and Herzegovina (14 August 1992), Croatia (5 May 1992) and Slovenia (5 May 1992), *Libro Amarillo de la República de Venezuela correspondiente al año 1992* (Caracas, Ministry for Foreign Affairs, 1993), pp. 505 and 508.

³¹ *Hansard* (see footnote 29 above), vol. 102, Written Answers (23 October 1986), cited in Marston, ed., "United Kingdom materials on international law 1986", p. 507.

³² *Ibid.*

expressed the view that the entity in question did not qualify for recognition by the United Kingdom because it was a fragmented territory largely dependent on South Africa. Later in 1988, it also indicated that the chief obstacle to recognition of the fragmented territory in question was that, in addition to being a dependent territory, Bophuthatswana was a result of apartheid.³³

36. Recognition by means of acts on the part of the United Nations is not based on specific criteria either, although there was an occasion when it was proposed that the relevant criteria should be consolidated. It was once suggested that the General Assembly should adopt a declaration describing the characteristics of a State and “assert[ing] that there must be a finding of the possession of such characteristics before any political entity is recognized as a state”.³⁴ That did not prove possible, however. The criteria continued to be an expression of the State in terms of its political interests, because in the final analysis an act of recognition is a political act, entered into freely and at the discretion of a State, that produces legal effects.

37. In practice, however, there are additional criteria on which recognition can be based that can to a certain extent be assimilated to the conditions imposed by some countries for recognition of certain States, particularly those that emerged from the disintegration of the Soviet Union and the former Yugoslavia. This is so in the case of the declarations adopted by the 12 States members of the European Community on 16 December 1991,³⁵ whose chief substantive purpose was to reconcile practice as regards self-determination with recognition of the need for international stability, particularly with respect to borders and minority rights. According to this practice, which could point to a number of relevant criteria, the entities in question must be founded on democratic principles, comply with the Charter of the United Nations and respect human rights and fundamental freedoms.

38. There is less reason to assert that there are criteria for recognition of legal situations or claims, such as those relating to a state of belligerency or those of a territorial nature. Discretion in the formulation of acts of recognition extends to the criteria that form the basis for the declarations containing the acts.

39. Acts of recognition are unilateral in the strict sense of the term, and they are perhaps the most important type of unilateral act, in view of their content and their legal effects, including their political effects. However, fundamentally what determines their unilateral nature is that they are discretionary, as emphasized both by the relevant writings of jurists and widespread practice. No general rule of international law would appear to have been laid down that might specify that it is mandatory to recognize a legal situation or claim. Discretionality continues to be of fundamental importance in formulating acts of recognition. The assertion that acts of recognition are discretionary is to be found in a number of

texts, such as opinion No. 10 of the Arbitration Commission of the International Conference on Peace in the Former Yugoslavia, which emphasized that:

[R]ecognition is ... a discretionary act which other States may perform when they choose and in a manner of their own choosing, subject only to respect for the guiding norms of general international law.³⁶

40. The discretionary nature of acts of recognition means, as already indicated, that there is no obligation to perform such an act. If there were such an obligation in this context, it would be conventional.

41. The obligation of non-recognition arises in a different manner. First, a State is prevented from recognizing a particular situation when that situation is linked to, or has resulted from, situations that violate international law, as in the case of situations linked to or resulting from the threat or unlawful use of force, as laid down in a number of instruments and international texts that reflect the existence of a norm of general international law. This is so, for example, in the inter-American regional sphere, in the case of the Anti-War Treaty (Non-Aggression and Conciliation), which is known as the Saavedra Lamas Treaty, article II of which states that the parties:

shall recognize no territorial arrangement not obtained through pacific means, nor the validity of an occupation or acquisition of territory brought about by armed force.

42. This obligation is also provided for in article 20 of the Charter of the Organization of American States (as amended by the “Protocol of Buenos Aires”) and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which is set out in the annex to General Assembly resolution 2625 (XXV) of 24 October 1970, which states that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal”.

43. There are also a number of other General Assembly resolutions adopted by consensus that contain such a prohibition, as in the case of resolution 3314 (XXIX), on the definition of aggression, adopted on 14 December 1974, article 5, paragraph 3, of which states that:

No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

44. There is also General Assembly resolution 42/22 of 18 November 1987, containing in its annex the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, paragraph 10 of which states that:

Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.

³³ *Ibid.*, vol. 126 (3 February 1988), cited in Harris, *op. cit.*, p. 154.

³⁴ Jessup, *A Modern Law of Nations: an Introduction*, p. 47.

³⁵ S/23293, annexes I–II.

³⁶ A/48/874–S/1994/189, annex, para. 4.

45. The obligation of non-recognition also arises in Security Council resolutions, such as resolution 662 (1990) of 9 August 1990, on the situation between Iraq and Kuwait, which reads as follows:

1. *Decides* that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;

2. *Calls upon* all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.

46. Moreover, a State is not obliged to formulate an act of non-recognition in order to ensure that a given situation is not regarded as binding on it. That is, it is not obliged to formulate an express act to that effect, which means that the discretionality applicable to an act of recognition would be valid with respect to the formulation of an act of non-recognition. There does not appear to be any norm of general international law that requires States to formulate an act of recognition or of non-recognition, which reflects the discretionary nature of the two types of act. What a State may not do, and this is not discretionary, is recognize a situation resulting from the threat or use of force; from an express act; or from explicit acts or forms of conduct.

47. Generally speaking, recognition has been extensively examined by legal writers,³⁷ although its definition may vary according to the object involved, that is, according to whether a general definition is what is entailed or whether the definitions concerned relate to a particular object, as in the case of definitions relating to recognition of a State, Government, state of insurgency or belligerency, national liberation movements or any other change in or modification of the legal order, including in a territorial context, which is one of the most important and delicate objects of such acts, on which the international courts have made pronouncements on a number of occasions.

48. Although recognition is not a term of art having a precise meaning in international law,³⁸ most legal writers generally define it as “a unilateral declaration of will whereby a subject of international law acknowledges the existence of a fact, a situation or a claim and expresses its will to consider them legitimate”.³⁹ Other legal writers have formulated definitions along the same lines, in general terms. Recognition is a unilateral act “whose object is the attitude which a State takes with regard to a *de facto* or *de jure* situation”⁴⁰ or “an expression of will ... by a State or a group of States

with the intention of making a situation opposable in respect of the author State”.⁴¹

49. In these definitions and the other definitions generally formulated in the writings of jurists, the three constituent elements of the definition of the act can be distinguished: formal unilaterality, acknowledgment of an existing situation and the intention of the author to produce specific legal effects by recognizing its opposability.

50. The definition of the act of recognition will contain a series of elements on which comments shall subsequently be made: unilateral expression of will (absence of defects), capacity of the subject formulating the recognition and of the person acting on its behalf, the lawfulness of the object of the act and the production of legal effects; the latter question will be discussed in chapter III. In every case, these characteristics of the act of recognition in general would seem to be applicable to the act of recognition of States.

51. The act of recognition which is of concern is a unilateral expression of will that produces effects in itself. No other expression of will is required to enable it to produce its legal effects. In form it is a unilateral act and therefore in no way depends on or is related to any pre-existing norm, although it may be related to a pre-existing *de facto* situation, as in the case of the act of recognition of a State.

52. The act of recognition which is of concern is “a declaration of will which, in principle, should not entail any condition or be subject to any limitation”.⁴² Nevertheless, as practice shows, although the act of recognition can be considered declarative in nature, it can be formulated in conditional form, as some legal writers acknowledge,⁴³ which links it to the previously considered issue of the criteria for the formulation of the act.

53. In the European context, for example, one may note the guidelines on recognition adopted by the European Community which, although they do not constitute an act of recognition in themselves, establish the rules for the formulation of such acts by member States. The European Community declaration on Yugoslavia referred to above (para. 37) contains a clear condition, in that the Community and its member States “require a Yugoslav republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring community State and that it will conduct no hostile propaganda activities versus a neighbouring community State, including the use of a denomination which implies territorial claims”.⁴⁴

³⁷ See, *inter alia*, Kelsen, “Recognition in international law: theoretical observations”; Venturini, *Il riconoscimento nel diritto internazionale*; Lauterpacht, *Recognition in International Law*; Kunz, “Critical remarks on Lauterpacht’s ‘Recognition in International Law’”; Williams, “La doctrine de la reconnaissance en droit international et ses développements récents”; Charpentier, *La reconnaissance internationale et l’évolution du droit des gens*; Suy, *Les actes juridiques unilatéraux en droit international public*; Brownlie, “Recognition in theory and practice”; and Dugard, *Recognition and the United Nations*.

³⁸ Brownlie, *loc. cit.*, p. 627.

³⁹ Díez de Velasco Vallejo, *Instituciones de derecho internacional público*, p. 133.

⁴⁰ Monaco, “Cours général de droit international public”, p. 182.

⁴¹ Degan, “Création et disparition de l’État (à la lumière du démembrement de trois fédérations multiethniques en Europe)”, p. 247.

⁴² Strupp, *Grundzüge des positiven Völkerrechts*, p. 78. Quoted by Williams, *loc. cit.*, p. 210.

⁴³ Barberis, “Los actos jurídicos unilaterales como fuente de derecho internacional público”, p. 113. The author recognizes that these acts can be subject to conditions or specific circumstances, which could provide grounds for their termination or revocation.

⁴⁴ S/23293, annex I.

54. The act of recognition, like all unilateral acts, can be formulated by a single State, by several States collectively and even by several States in a concerted manner through similar but not necessarily identical declarations.⁴⁵

55. The act of recognition, especially recognition of States, may thus be individual, collective or even concerted in origin, that is, expressed by various States in separate acts or declarations, whether simultaneous or not, as in the case—although these are not acts of recognition—of the declarations on negative security guarantees, to which reference has been made in earlier reports,⁴⁶ and which, although they express rather a promise or even a waiver, according to the definition most often given in the writings of jurists, illustrate the possibility of concerted adoption in the context of the formulation of unilateral acts in general. There seems to be no reason why several States should not formulate similar or even identical declarations to recognize a *de facto* or *de jure* situation. In the case of recognition of States, this has been seen in the acts of recognition formulated by the European States *vis-à-vis* the new States which emerged from the dismemberment of the former Yugoslavia.

56. In State practice there are many important acts of recognition of individual origin, referring mainly to situations involving States, Governments, belligerency and insurgency, which are easy to find in the various repertoires of State practice. These declarations are particularly numerous in the case of recognition of States, having been formulated during the 1960s after the decolonization process initiated by the Declaration on the granting of independence to colonial countries and peoples adopted by the General Assembly (para. 31 above), and, more recently, after the formation of the new States emerging from the dismemberment of the Soviet Union and the former Yugoslavia. Although the tendency will be to focus on these declarations, in practice there are also many declarations concerning territorial questions, such as the aforementioned Ihlen declaration⁴⁷ or the declaration by the Government of Colombia,⁴⁸ and other situations such as recognition of a state of belligerency or insurgency.

57. With regard to the collective form, one may cite the declarations adopted by the member States of the European Community in Brussels on 16 December 1991 concerning Yugoslavia and the guidelines relating to the recognition of the new States in Eastern Europe and in the Soviet Union, which were, in substance, used by the member States in recognizing those entities.⁴⁹ As has already been noted, those declarations are not in themselves acts of recognition. Legal writers consider that the power of recognition has not been transferred by States to the European Community. Therefore, on

the basis of the declarations, the European States decided to recognize, individually but in a concerted manner, although not necessarily in the same terms, the new States arising from the disintegration of the former Yugoslavia and the Soviet Union.

58. In the case of recognition and, more particularly, recognition of a State through an act expressly formulated to that end, the intention of the State is not difficult to identify, as can be seen from the declarations formulated by a number of States concerning the recognition of the States resulting from the dismemberment of the former Yugoslavia, which use the term “recognizes”, thus reflecting the intention to grant the status of State requested by those entities. In concrete terms, it is to be noted that these declarations state that the author State “has decided to recognize ...”.⁵⁰

59. The act of recognition which is of concern is generally formulated in a declaration incorporated in a diplomatic note or communication which the author State sends to the authorities of the State or entity in question, whatever the object of the act. Practice shows that the act of recognition is generally formulated in writing, although this does not preclude its being formulated orally, as was the case of the declaration by the Minister for Foreign Affairs of Venezuela concerning non-recognition of an insurgent group,⁵¹ to which reference will be made later when considering the act of non-recognition. In the non-formalist system of public international law, the form of the recognition in itself is of no importance.⁵² The view that the form of the act is not determinant, in the context of unilateral acts in general, is also applicable to the act of recognition of a State in particular.

60. In the case of territorial questions, to which reference is always made for illustrative purposes, diplomatic correspondence is the most widely used means of performing the act of recognition; this is reflected in the practice, including the cases examined by the international courts, as in the *Legal Status of Eastern Greenland* case, in which PCIJ considered the official correspondence addressed by Denmark to other States.⁵³ In the *Minquiers and Ecrehos* case, ICJ considered an official British document of 17 August 1905.⁵⁴ The aforementioned declaration by Colombia was likewise transmitted through a diplomatic note from the Ministry for Foreign Affairs.⁵⁵ In any case, form does not seem to be determinant in establishing the performance of an act of recognition.

61. Furthermore, for acts of recognition in general, and the act of recognition of a State in particular, there is a requirement of “notoriety”, which is consistent with the conclusions reached concerning unilateral acts in

⁴⁵ Suy, *op. cit.*, p. 191; and Erich, “La naissance et la reconnaissance des États”, p. 457.

⁴⁶ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, pp. 198–199, paras. 23 and 25; *Yearbook ... 2001*, para. 71, and *Yearbook ... 2002*, para. 6 (see footnote 18 above).

⁴⁷ See footnote 17 above.

⁴⁸ See footnote 19 above.

⁴⁹ See footnote 35 above.

⁵⁰ Declarations of 5 May and 14 August 1992 (see footnote 30 above).

⁵¹ *El Universal* (Caracas), 11 March 2003.

⁵² Verhoeven, “Relations internationales de droit privé en l’absence de reconnaissance d’un État, d’un gouvernement ou d’une situation”, p. 22.

⁵³ *P.C.I.J.* (see footnote 17 above), p. 54.

⁵⁴ *I.C.J. Pleadings, Minquiers and Ecrehos*, Vol. I, pp. 123–124.

⁵⁵ See footnote 19 above.

general. “Notoriety”, which goes beyond mere publicity of the act, that is, knowledge of the act and its content on the part of the addressee, is another constituent element of the act of recognition. Indeed, the act must be known to the addressee in order to produce its legal effects, even though some might consider the importance of this to be, rather, probatory in nature, which is undoubtedly also true. ICJ referred to notoriety in connection with the *Gulf of Maine* case, when considering the reply of the United States of America concerning the lack of “notoriety” of the issue of offshore permits by Canada.⁵⁶

62. Furthermore—and reference will be made to this in chapter III of this report—the act of recognition produces specific legal effects, independently of its acceptance by the addressee, which are based on the intention of the author State. The unilateral act of recognition will be opposable with respect to the author State from the time of its formulation.

63. Consideration of the act of recognition also obliges one to consider non-recognition, which can be carried out through the formulation of an explicit act, rendering it to some extent similar to recognition, and through other acts or forms of conduct of a conclusive nature. As has been noted, a State can recognize a *de facto* or *de jure* situation or a legal claim. However, a State may also not recognize a situation, both explicitly and implicitly, and this, too, can produce legal effects.

64. Non-recognition can be produced through the formulation of an explicit act, which to some extent can be assimilated to protest as regards its legal effects. Refusal to recognize the status claimed by an entity which aspires to recognition as a State can take the form of an explicit declaration, as was the case with the explicit acts of non-recognition formulated by Greece with regard to the former Yugoslav Republic of Macedonia or a number of States in relation to Southern Rhodesia.

65. Explicit non-recognition may arise in another context, namely in connection with recognition of a subject other than a State. The qualification of such an

entity, for example an internal insurgency movement, is likewise of interest in the context of the consideration of non-recognition. There are unilateral acts which, although also based on political motives, can produce important legal effects in international relations. One example taken from recent practice is the explicit oral declaration by the Minister for Foreign Affairs of Venezuela, in which he affirmed that “Venezuela will not qualify the leftist guerrillas in Colombia (Fuerzas Armadas Revolucionarias de Colombia and the Ejército de Liberación Nacional) as terrorists”.⁵⁷ The absence of explicit qualification implies non-recognition of something specific, which has important legal consequences, relating mainly, at least, to the applicable legal regime.

66. Consideration of the act of non-recognition is important within the framework of the study of the act under consideration. The legal act of non-recognition is also, as has already been noted, a unilateral expression of will, formulated with the intention of producing a specific legal effect. Hence, in the view of the Special Rapporteur, the act of non-recognition, explicitly formulated and not dependent on or related to any other expression of will, may be placed within the context of the study of the act under consideration. On the other hand, implicit or tacit non-recognition, which cannot be assimilated to a legal act in the strict sense of the term, should be excluded from the study, like the aforementioned tacit or implicit act of recognition.

67. It is not easy to define the act of recognition, specifically the recognition of a State, just as it is not easy to define unilateral acts in general. However, one can try to present a definition which to some extent is related to the work already done by the Commission on this topic. The act of recognition could thus be defined as follows:

“A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself.”

⁵⁶ *I.C.J. Reports 1984* (see footnote 16 above), para. 131.

⁵⁷ See footnote 51 above.

CHAPTER II

Validity of the unilateral act of recognition

Formulation of the act: act of the State and persons authorized to formulate the act. Acknowledgement of the situation and intention of the author State. Lawfulness of the object. Question of the addressee in the case of the act of recognition. Temporal and spatial application of the act of recognition

68. Having sought to define the unilateral act of recognition in the light of doctrine and practice and in accordance with the work already done by the Commission, reference is now made to the conditions of validity of the act of recognition.

69. The conditions of validity of legal acts in general appear to be applicable to the act of recognition

in particular. Although no draft article on the conditions of validity of a unilateral act has been drafted, such conditions were mentioned in earlier reports, in particular the capacity of the State, the authorization of the person who can act on behalf of the State in international relations and engage it in this sphere and the causes of invalidity, which include, as has already been said, the lawfulness of the object, its conformity with

international law, the expression of will and absence of defects, to all of which reference will be made later.

70. In the majority of cases seen in practice, only States formulate acts of recognition of the kind which are of concern, namely unilateral, explicit and with the intention of producing legal effects. This does not mean that there can be no other subjects with the capacity to do so. Acts of recognition of States and Governments, those relating to states of belligerency and insurgency, those concerned with declarations of neutrality by a State and those concerning territorial questions are formulated by States. Hence, the first consensual condition of validity relates to the capacity of the State, which means, at least for the time being, that other subjects of international law, such as international organizations, cannot formulate an act of this kind.

71. Acts of recognition, specifically recognition of a State, unlike other unilateral acts, are generally formulated by ministries for foreign affairs and their ministers, which does not mean that other persons linked to the State cannot formulate acts on its behalf. As practice indicates, diplomatic notes are in general declarations formulated by ministries for foreign affairs, the principal organ competent to act on behalf of the State in the international sphere, although the issue of competence to act on behalf of the State in this context is a matter of internal law.

72. With regard to unilateral acts in general, it may be stated that other entities and representatives of the State can act on its behalf at the international level and engage it, a matter which has been considered in earlier reports and on which the Commission has expressed its views at length. However, in relation to the act of recognition and, more specifically, the act of recognition of a State, it seems difficult to admit that a person other than the Head of State or Government or the minister for foreign affairs or the representatives of the State in limited spheres, such as ambassadors *vis-à-vis* the State or international organization to which they are accredited, can act on its behalf. It is difficult for the recognition of a State or Government to be the object of an act of recognition by a different organ. There is a limitative criterion in the case of recognition of a State, which is probably different from other unilateral acts such as promise, in which case a broader criterion can be established since, in effect, the object of such acts may fall within the sphere of competence of other State authorities.

73. The international courts have examined the character of some declarations, finding some of them to be binding.⁵⁸ However, not all officials or persons related to the State, to cite a broader category, can formulate

acts on its behalf and engage it at the international level. Thus, the act of a technical official was examined in the *Gulf of Maine* case, in which the Chamber of ICJ considered that the act did not engage the United States internationally. In this case, it will be recalled, the Chamber of the Court considered that the "Hoffman letter" could not be invoked against the United States.⁵⁹

74. With regard specifically to the act of recognition of a State, no references have been found to its being examined by the international courts with a view to determining whether it is binding or not.

75. The conditions of validity and the causes of invalidity of unilateral acts in general and the act of recognition in particular are also related to the object, the expression of consent and conformity with international law. This question has been dealt with in earlier reports, in which it was noted, among other things, that a unilateral legal act could be governed, to a large extent, by rules similar to those applicable to treaties embodied in the Vienna regime on the matter.

76. According to most legal writers, the object of an act of recognition referring to any situation or claim must be lawful. As has been noted, such acts may have various objects, but the main one is the recognition of the State "whose birth, since the end of the eighteenth century, has constantly evoked reflexes of (non) recognition on the part of the 'family of nations' which was called upon to welcome a new member".⁶⁰ As has already been noted, the object may refer to a Government, to a state of belligerency or insurgency, or to any legal claim. There are no criteria for establishing a limitative list of objects in relation to which an act of recognition can be formulated.

77. If a unilateral act, particularly an act of recognition, runs counter to an act emanating from an international body, such as a United Nations resolution, which precludes the recognition of a State, this invalidates the act and deprives it of legal effects.

78. In the specific case of recognition in the context of territorial changes, it may be observed that in practice, acts of annexation carried out in breach of international law have been considered invalid and therefore do not produce the legal effects claimed by the author State. For example, the annexation of Ethiopia by Italy⁶¹ shows that recognition by third parties did not give it the legality claimed.

79. As has been seen, the act of recognition is an expression of will which must be formulated without defects, a condition which is applicable to legal acts in general, whether conventional or unilateral. An act of recognition will be valid and produce legal effects if the will of the author State is formulated without defects.

⁵⁸ Thus, for example, PCIJ recognized the binding nature of declarations in the following cases: *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*; and *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*. In the context of a judicial process, an arbitral tribunal considered that the declarations of an agent in the oral proceedings were binding on the State.

⁵⁹ *I.C.J. Reports 1984* (see footnote 16 above), para. 139.

⁶⁰ Verhoeven, *loc. cit.*, p. 20.

⁶¹ Italian Decree regarding the Transfer of Abyssinia to Italian Sovereignty (Rome, 9 May 1936), *British and Foreign State Papers, 1936*, vol. CXL (London, HM Stationery Office, 1948), p. 624.

The causes of invalidity established in the Vienna regime on the law of treaties, as noted in earlier reports in connection with the expression of consent, could to a large extent be transferred to the regime applicable to unilateral acts in general. The act of recognition of a State, in particular, is an expression of will and the defects which might affect it would be the same as those applicable to the expression of consent in that sphere.

80. An act of recognition of a State must be formulated in conformity with international law, and in particular it must not run counter to an imperative norm

of international law. Thus, for example, the recognition of a State established in violation of international law, e.g. by an illegal annexation, would as has already been noted, be invalid and produce no legal effects.

81. The condition of validity applicable to a legal act in general, which intervenes in the sphere of the law of treaties with reference to the lawfulness of the object, is fully applicable to acts of recognition in general and recognition of States in particular. Indeed, it is essential, as has been seen earlier, that the object of the act be lawful.

CHAPTER III

Legal effects of recognition

Opposability and enforceability. Basis for the binding nature of the act of recognition

82. In this chapter three questions shall briefly be considered: the legal effects of the act of recognition of States, its opposability and enforceability, and the basis for its binding nature.

83. First, one must seek to determine the nature of the act of recognition, particularly as it refers to recognition of States, that is, whether what is at issue is a declarative or a constitutive act—a longstanding discussion. As Dugard points out, “there is an unresolved debate among legal scholars as to whether a political community that meets these requirements automatically qualifies as a ‘State’ or whether, in addition, it requires recognition by other States to endow it with international legal personality”.⁶² This reflects the point of view of those who support the declarative theory of the act of recognition. They affirm that “an entity becomes a State on meeting the requirements of statehood and that recognition by other States simply acknowledges (declares) ‘as a fact something which hitherto has been uncertain’”.⁶³

84. Indeed, as has been seen, the existence of a certain situation does not depend on such a declaration, as reaffirmed by the majority of legal writers and embodied in international instruments and texts. For instance, with regard to the existence of the State, the Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, states in its article 3 that: “The political existence of the State is independent of recognition by the other States.”

85. The Institute of International Law expressed itself in similar terms, stating in its resolution III that recognition is “the free act by which one or more States acknowledge the existence in a certain territory of a politically organized human society, independent of any other existing State and capable of observing the precepts of international law”.⁶⁴

86. To this should be added article 13 of the Charter of the Organization of American States, as amended by the “Protocol of Buenos Aires”, which states that:

The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.

87. Article 14 of the same Charter stipulates that:

Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

88. The declarative theory of the act of recognition is supported by the views of most legal writers. It is observed that “international practice shows us how the reality of the new State is acknowledged by means of recognition”.⁶⁵ It is affirmed that “the new State does not need to be recognized in order to exist as a State. Once the process of establishment is completed, it is a State, a subject of international law and a member of the international community”.⁶⁶

89. Arbitral tribunals have also supported the declarative theory of the act. Thus, in the *Tinoco* case,⁶⁷ the Tribunal suggests that recognition is simply proof of compliance with the requirements established by international law.

90. Nevertheless, the nature of the act of recognition has been subject to differing interpretations. In some cases the constitutive theory of recognition has been argued unsuccessfully, as in the position espoused by Denmark in the proceeding concerning the *Legal Status*

⁶² Dugard, *op. cit.*, p. 7.

⁶³ *Ibid.*, and Brierly, *The Law of Nations: an Introduction to the International Law of Peace*, p. 139.

⁶⁴ *Annuaire de l'Institut de Droit International*, Brussels session (April 1936), vol. II, art. 1, p. 300.

⁶⁵ Verdross, *Derecho Internacional Público*, p. 228.

⁶⁶ Daillier and Pellet, *Droit international public*, p. 553.

⁶⁷ *Aguilar-Amory and Royal Bank of Canada Claims*, award of 18 October 1923, UNRIAA, vol. I (Sales No. 1948.V.2), p. 369.

of *Eastern Greenland*, in which the Government stated that:

The legal status of a certain region is established in international law by the general conviction, or *communis opinio juris*, of the States constituting the international community ...

When the sovereignty claimed by a State over a country finds ... general acceptance among other States, such sovereignty should be considered to have been established ...

The sovereignty of Denmark over all of Greenland is based above all on international agreements and on general recognition by the community of nations.⁶⁸

91. More recently, the declarative theory has been confirmed by the practice of States. Note should be taken, for instance, of the opinion of the Arbitration Commission of the European Community, which stated that the recognition of States by other States “has only declarative value”.⁶⁹

92. While it may be concluded that the act of recognition of States is mainly declarative, it cannot be denied that non-recognition also has important legal ramifications. Indeed, non-recognition of an entity as a State affects the exercise of its rights under international law, such as, for example, rights deriving from the law concerning State immunity and the impossibility of being admitted to international organizations. Such a situation undoubtedly limits the international capacity of the State in practice. As some have noted, “recognition is not a mere formality ... the legal situation of the new State is not the same *before* and *after*”.⁷⁰

93. The act of recognition is a unilateral expression of will, formulated with the intention of producing certain legal effects. It is in the intention of the author State that the act of recognition of States is rooted, as in the formulation of any other legal act. Of course, as can be seen in the Commission’s discussions, the author’s intention can arouse concern because of the difficulties of determining it. In any event, as has been noted, intention is difficult to prove. In the *Nuclear Tests* case⁷¹ ICJ examined intention (although it did so in the context of an act containing a promise), which proved to be the basis of the binding nature of the act. Intention is sometimes easy to determine, at least within the framework of the law of treaties; it can be based on the interpretation of the terms of the declaration and other circumstances pertaining to the formulation of the act, in accordance with the rules established for that purpose. In other cases, however, intention is more difficult to determine; it may, however, be inferred if it is clear from the interpretation of the act, as has been referred to in previous reports and observed in the *Nuclear Tests* case (also referred to earlier), in relation to promise.

⁶⁸ *Legal Status of Eastern Greenland, P.C.I.J., Series C, Nos. 62–67*, pp. 712 and 723–724, cited by Kohen, *Possession contestée et souveraineté territoriale*, p. 330.

⁶⁹ See footnote 36 above.

⁷⁰ Daillier and Pellet, *op. cit.*, p. 553.

⁷¹ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253.

94. The act of recognition can be addressed to another State, and that may be what is most common in practice, but it does not preclude the possibility that such acts may be addressed to addressees other than States. While it can be affirmed, at least in this context, that only States can formulate this category of acts, it can also be said that the addressee of the act can be any other entity, such as an international organization, a subject with a defined but limited legal capacity, as well as other entities, such as a liberation movement or an insurgent group. Of course, one is not claiming that this extends to all entities which in some manner act in the international arena, such as transnational enterprises and even NGOs, since that does not appear to be the practice. For now, at any rate, the focus shall only be on the act of recognition of States.

95. One question which has not been studied thoroughly in previous reports, in the context of unilateral acts in general, concerns their effects, although it was always indicated that such acts could vary in accordance with their classification, particularly if what is of concern is acts by which States assume obligations or reaffirm their rights. In any event, the object of the act has a significant bearing on its effects. It does not appear feasible to provide a single answer for all acts. Regardless of the object of the act of recognition, the subsequent conduct of the author State must be consistent with the terms of its declaration, provided that the latter has been formulated in accordance with the requirements of international law, to which reference was made earlier.

96. International law accords a legal effect to recognition, in the sense that a State which has recognized a certain claim or an existing state of affairs cannot contest its legitimacy in the future;⁷² this, as shall be seen, is confirmed by both doctrine and case law.

97. While the act of recognition may be regarded as declarative, it has important legal effects. First, the State undertakes to consider an existing *de facto* or *de jure* situation as such and to respect its legal consequences, so that it is obligated not to act in a contrary manner in the future.

98. The legal effects of the act of recognition are reflected mainly in the opposability to which reference shall be made forthwith.⁷³ What is at issue is an act whereby the State accepts certain facts or legal acts, and “acknowledges that they are opposable to it”.⁷⁴

99. Before considering opposability in the context of the act of recognition, it should be looked at in relation to treaties and custom. In accordance with the principle of the relative effect of treaties, “third parties are not bound by undertakings to which they are not parties;

⁷² Anzilotti, *Cours de droit international*, p. 347, cited by Williams, *loc. cit.*, p. 210.

⁷³ Opposability is defined in Salmon, ed., *Dictionnaire de droit international public* (p. 782) as “the capacity of a rule, a legal act, a right or a *de facto* situation to produce legal effects *vis-à-vis* external subjects of law which are foreign to the obligations arising directly therefrom”.

⁷⁴ Daillier and Pellet, *op. cit.*, p. 358.

the latter are simply *not opposable* to them”.⁷⁵ Opposability, in the context of custom, is more complicated. A State can accept a practice and regard it as legal because it is opposable to that State; on the other hand, it is also possible for a State to deny the existence of a practice or its legality, which means that such a practice is not opposable to that State. A State can persistently oppose a general custom, which would mean that the latter is not opposable to it.

100. As has been seen, recognition in all its forms makes the recognized *de facto* or *de jure* situation opposable to the State which is the author of the act. This in turn raises the issue of its enforceability by the addressee. Case law is clear in this context, as can be seen in the case concerning the *Arbitral Award Made by the King of Spain on 23 September 1906*, where the ICJ stated that, in its opinion, “Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award”.⁷⁶ The Court also confirms this in the *Temple of Preah Vihear* case, where it states that “[i]t is not now open to Thailand ... to deny that she was ever a consenting party to [the settlement]”.⁷⁷

101. In the context of the act of recognition, the question of opposability is posed in the following terms. As some have indicated, by means of recognition, “the State declares that, in its view, a situation exists, and it can no longer retract that declaration; whether or not it exists objectively, the situation is opposable to that State from then on, if it was not already so”.⁷⁸ Recognition produces effects in relation to the States directly involved, that is, the State which is the author of the act and the addressee. The State which acts and recognizes is obligated to maintain a conduct consistent with its declaration in relation to the addressee of the act. In the case of recognition of States, the author State recognizes that status, which from then on is opposable to it by the entity that is the object of the act, and therefore its legal relations must take such recognition into account.

102. Recognition is an expression of will formulated “with the intention of making a situation opposable in respect of the State which grants it. In other words, the State granting recognition acknowledges that the legal consequences of the recognized situation apply to it. Moreover, the State is henceforth prevented from contesting any characterization of the recognized situation (the principle of *estoppel*)”.⁷⁹

103. In the specific case of recognition of a frontier, for example, it is to be noted that, as ICJ points out, recognizing a frontier means first and foremost accepting that frontier, that is, drawing the legal consequences

of its existence, respecting it and refraining from contesting it in the future.⁸⁰

104. Statements of recognition can also have a different value in certain contexts, such as a probative one. This is the case, for example, with regard to the statements by high-ranking Nicaraguan officials that were considered by ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case. The Court recalls “that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission”.⁸¹ The statements in question are seen by the Court in a broader context. It thus considers the statements made in the framework of international organizations and takes note specifically of “statements of representatives of the Parties ... in international organizations ... in so far as factually relevant”.⁸²

105. The binding nature of the unilateral act of recognition needs to be justified. In the same way that a treaty obligates the parties and must be complied with in good faith, as stipulated by article 26 of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention), the act of recognition is also binding and the State which formulates it must comply with it in good faith.

106. The universally accepted *pacta sunt servanda* rule, which implies that the good-faith attitude must prevail during the performance of a treaty in force, satisfies a need for legal security, which applies also in relation to unilateral legal acts, where such security must also prevail.

107. As mentioned, unilateral acts in general and acts of recognition in particular are opposable in respect of the author State from that time on, which makes them enforceable by the addressee(s). Good faith should also be the basis of the binding nature of such acts, as ICJ stated in the *Nuclear Tests* case, although that was in relation to a specific type of act, namely, promise.⁸³

108. The issue of justifying the binding nature of a legal principle was raised in the Commission in 1996⁸⁴ and addressed by the Special Rapporteur in his first report on the topic.⁸⁵ Unilateral acts of recognition would be binding on the basis of the *acta sunt servanda* principle. It should be added that confidence in international legal relations also strengthens this justification of the binding nature of unilateral acts, particularly the act of recognition.

⁸⁰ *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, I.C.J. Reports 1994, p. 22, para. 42.

⁸¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64.

⁸² *Ibid.*, p. 44, para. 72.

⁸³ I.C.J. Reports 1974 (see footnote 71 above), pp. 267–269, paras. 43, 46 and 49.

⁸⁴ *Yearbook ... 1996* (see footnote 3 above), annex II, addendum 3, sect. 2, p. 142.

⁸⁵ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 337, para. 157.

⁷⁵ *Ibid.*, p. 273.

⁷⁶ *Arbitral Award Made by the King of Spain on 23 September 1906*, Judgment, I.C.J. Reports 1960, p. 213.

⁷⁷ I.C.J. Reports 1962 (see footnote 21 above), p. 32.

⁷⁸ Combacau and Sur, *Droit international public*, p. 285.

⁷⁹ Degan, *loc. cit.*, p. 247.

CHAPTER IV

Application of acts of recognition

Commencement of legal effects and their relativity. Spatial and temporal application of acts of recognition. Modification, suspension, revocation and termination of unilateral acts of recognition

109. The act of recognition produces its effects in respect of the parties involved (author and addressee) from the time of its formulation, which to some extent is equivalent to the entry into force of a treaty in the context of the law of treaties. The act produces effects without the need for its acceptance by the addressee; that is, it produces effects in and of itself, which is one of the main characteristics of unilateral acts in general, as ICJ in fact indicated in the aforesaid *Nuclear Tests* case⁸⁶ with reference to one such act, promise.

110. The act of recognition obligates the author State in relation to one or more addressees. The author State cannot impose obligations on third parties without their consent by means of such an act, as stipulated in the law of treaties, and as previously considered by the Commission. The *pacta tertiis nec nocent nec prosunt* principle, or, treaties neither obligate nor benefit third parties, is fully applicable to any legal act.

111. Two issues resolved within the framework of the law of treaties deserve comment in relation to unilateral acts and the act of recognition of States in particular, namely, the territorial application of the act and its application in time.

112. Territorial application in the context of the law of treaties is regulated in article 29 of the 1969 Vienna Convention, which provides, in general terms, that the territory to which the treaty applies is the one on which the parties agree. There is an assumption that the treaty applies to territories under the sovereignty of the State. For its part, the territorial application of the act of recognition would essentially be a function of the object of recognition itself, that is, of the entity to which it refers; nothing, however, would prevent the author State from formulating a limitation that would exclude some part of the territory of the new State from forming a part thereof. In any event, the author's will is what is most important. The rule contained in article 29 of the Convention would, in the view of the Special Rapporteur, be fully applicable to unilateral acts of recognition, particularly recognition of States.

113. Application in time may be less complicated. In contrast to the object, reference is made in this case to the expression of will and its effects in time. It can be said that, as in the law of treaties, the act will in principle produce its effects from the time of its formulation or the time when the addressee becomes cognizant of it (a question that has not yet been considered), unless the author State expresses a different intention. The non-retroactivity embodied in the treaty regime would appear to be applicable in the context of unilateral acts and, more specifically, in that of unilateral

acts of recognition. Unless the State which is the author or declarant of the recognition expresses otherwise, the act would produce its effects from the time of its formulation, as can be seen in article 28 of the 1969 Vienna Convention. The question of the non-retroactivity of treaties has been considered by international courts, particularly ICJ and its predecessor, PCIJ, in the *Ambatielos*⁸⁷ and *Mavrommatis*⁸⁸ cases.

114. The final question which arises with regard to the act of recognition, in the context of its application, is that which concerns its modification, suspension and revocation. As has been noted, the act produces its legal effects from the time of its formulation, without the need for acceptance or any reaction signifying such on the part of the addressee(s). This is very different from the manner in which elaboration and entry into force are posed in the context of the law of treaties, where the concerted expression of will gives rise to the act, and the determination of the time when the act arises and the commencement of the production of its legal effects is agreed on by the States parties. The basic rule governing the matter in that context is that the modification of a treaty is possible only on the basis of the will of the parties to the treaty.

115. In the case of unilateral acts in general and the act of recognition in particular, the act is formulated unilaterally. As has been stated, what is at issue is a unilateral expression of will, which does not depend on another manifestation of will in order to give rise to a legal act. It is from that time, moreover, that the act produces its legal effects.

116. The question posed is whether, given the specificity of legal acts and their particular and individual characteristics, which distinguish them from conventional acts, the same criterion that prevails in the Vienna regime can be applied in this context. The question, concretely, is whether the author State can modify, suspend or revoke the act unilaterally.

117. It is to be noted first of all that in relation to unilateral acts in general, the view of most legal writers is that the author State does not, generally speaking, have the power to modify a legal relationship unilaterally. For some, the State which is the author of the act does not have the power to create arbitrarily, by means of another unilateral legal act, a rule constituting an exception to the one which it had created by means of the first act.⁸⁹ For others, such capacity can be limited and even non-existent.⁹⁰ In the specific case of revocation, and

⁸⁶ *I.C.J. Reports 1974* (see footnote 71 above), p. 267, para. 43.

⁸⁷ *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10.

⁸⁸ See footnote 58 above.

⁸⁹ Barberis, *loc. cit.*, p. 113.

⁹⁰ Skubiszewski, "Unilateral acts of States", p. 234.

in relation to unilateral acts in general, it is admissible “only in the case envisaged by the general norms of the international legal system, because otherwise, the compulsory value of those same acts would be abandoned to the arbitrary power of their authors”.⁹¹ An unauthorized unilateral act which modifies a previous act can be considered a different act, which could even be situated in the context of international responsibility.

118. The modification, suspension or revocation of a unilateral act, in particular an act of recognition, is possible when it is provided for in the act itself. Thus, for example (resorting to hypotheses that might be valid in order to stimulate reflection), the State which is the author of the act stipulates therein that it can be modified under certain conditions. It can also be suspended, if certain requirements are met, and even revoked under similar circumstances. It is necessary to add that the act can terminate in the strict sense of the term, that is, if it is performed, if the same act provides for a fixed term or conditions giving rise to its termination. For example, it may be that

a State formulates a promise for a term of 10 days or subjects it to certain resolutive conditions. In such cases, if the term expires or the condition is fulfilled, the promise ceases without the need for any act of revocation. Another case may occur in which the author of the promise or the waiver expressly provides for the possibility of revoking it under certain circumstances. However, if the possibility of revocation derives neither from the context of the unilateral legal act nor from its nature, a unilateral promise and a unilateral waiver are in principle irrevocable⁹²

—in the same unilateral manner, at least. In sum, unilateral acts can be said to be unmodifiable in the broad sense of the term, unless the opposite can be inferred from the act itself or derived from circumstances or conditions provided for therein, or, as shall be seen below, from external situations.

119. Modification, suspension or revocation of an act apart from the cases indicated would be possible only with the agreement of the addressee. Indeed, as noted, once the act has been bilateralized, a right is created on the part of the addressee that, while not affecting the unilateral nature of the act, makes any change dependent on the will of the addressee.

⁹¹ Venturini, *loc. cit.*, p. 421.

⁹² Barberis, *loc. cit.*, p. 113.

120. In the case of the act of State recognition (resorting again to the use of hypotheses), it is to be noted that an act of State recognition, while declarative, cannot be modified, suspended or revoked unilaterally unless one of the aforesaid circumstances occurs, such as the disappearance of the State (object) or a change of circumstances.

121. Lastly, a brief reference which may prompt reflection, concerning the modification of the act for reasons beyond the will of the author State. The act of recognition may, in fact, cease to produce legal effects for external reasons, as referred to in the Vienna law of treaties regime, particularly in connection with the appearance of a supervening impossibility of performance⁹³ and a fundamental change of circumstances⁹⁴ which makes performance of the treaty impossible.

122. Generally speaking, if the object of the act disappears, the latter would cease to produce its legal effects, which would to some extent transpose the concept contained in the law of treaties regime. In the case of the act of recognition of States in particular, if the State disappears through disintegration or dismemberment, for example, the act would no longer produce its effects. Likewise, it can be said that the fundamental change of circumstances or the *rebus sic stantibus* clause, understood as a resolutive clause in the contractual and treaty context, could also affect the application of the unilateral act of recognition, particularly with regard to suspension or termination—although, as the majority of legal writers affirm, its acceptance does not conflict with the binding nature of treaties or the application of the *pacta sunt servanda* rule.

123. If it is considered that a change of circumstances could prompt the suspension or termination of a unilateral act, the clause must be examined more thoroughly. The change must be fundamental and must affect the object of the act itself, and, as stated in the 1969 Vienna Convention, must affect the essential basis of the expression of consent by the author State, as stipulated in article 62, paragraph 1 (a)–(b), of the Convention (although it refers exclusively to treaties).

⁹³ 1969 Vienna Convention, art. 61.

⁹⁴ *Ibid.*, art. 62.

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

[Agenda item 6]

DOCUMENT A/CN.4/531

First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur

[Original: English]
[21 March 2003]

CONTENTS

	<i>Page</i>	
Multilateral instruments cited in the present report	72	
Works cited in the present report	73	
		<i>Paragraphs</i>
INTRODUCTION.....	1–4	75
<i>Chapter</i>		
I. THE INTERNATIONAL LAW COMMISSION AND INTERNATIONAL LIABILITY.....	5–46	76
A. Work of Special Rapporteurs Mr. Quentin-Baxter and Mr. Barboza	6–14	77
1. Approach of Mr. Quentin-Baxter: shared expectations and negotiated regime.....	6–9	77
2. Treatment of liability by Mr. Barboza	10–14	77
B. International liability regime: outstanding issues	15–42	78
1. State liability: a case of misplaced emphasis	16–19	79
2. Strict or absolute liability: a necessary legal basis for an international regime?.....	20–25	80
3. Scope of activities to be covered	26–28	81
4. Threshold of damage: significant harm as a necessary criterion	29–32	82
5. Prevention and liability: distinct but related concepts	33–36	82
6. Further work on liability: focus on models for allocation of loss.....	37–42	83
C. Some policy considerations	43–46	84
II. ALLOCATION OF LOSS.....	47–149	85
A. A sectoral and regional analysis	47–113	85
1. International Convention on Civil Liability for Oil Pollution Damage, International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and Protocols thereto.....	47–61	85
2. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, and International Convention on Civil Liability for Bunker Oil Pollution Damage.....	62–65	88
3. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources	66–67	88
4. Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area	68–69	89
5. Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal.....	70–80	89
6. Nuclear damage and liability	81–91	90
7. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment	92–95	92

	<i>Paragraphs</i>	<i>Page</i>
8. Liability and compensation: the European Community model	96–106	93
9. Damage caused by space objects	107–110	95
10. Activities in Antarctica	111–113	95
B. Models of allocation of loss: some common features	114–121	96
C. Some elements of civil liability	122–149	97
1. The problem of causation.....	125–126	97
2. Discharge of duty of care.....	127–129	98
3. Definition of damage and compensation.....	130–138	98
4. Standing to sue.....	139–140	100
5. Proper jurisdiction.....	141–149	100
III. SUMMATION AND SUBMISSIONS FOR CONSIDERATION	150–153	102

Multilateral instruments cited in the present report

	<i>Source</i>
Treaty establishing the European Community (Rome, 25 March 1957)	<i>Official Journal of the European Communities</i> , No. C 325, vol. 45 (24 December 2002), p. 1.
The Antarctic Treaty (Washington, D.C., 1 December 1959)	United Nations, <i>Treaty Series</i> , vol. 402, No. 5778, p. 71.
Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991)	ILM, vol. XXX, No. 6 (November 1991), p. 1461.
Vienna Convention on civil liability for nuclear damage (Vienna, 21 May 1963)	United Nations, <i>Treaty Series</i> , vol. 1063, No. 16197, p. 265.
Protocol to amend the Vienna Convention on civil liability for nuclear damage (Vienna, 12 September 1997)	<i>Ibid.</i> , vol. 2241, No. 16197, p. 270. See also ILM, vol. XXXVI, No. 6 (November 1997), p. 1462.
Convention on third party liability in the field of nuclear energy (Paris, 29 July 1960) and Additional Protocol to the said Convention (Paris, 28 January 1964)	<i>Ibid.</i> , vol. 956, No. 13706, p. 251. See also United Kingdom, <i>Treaty Series No. 69</i> (1968), and <i>No. 6</i> (1989).
Convention supplementary to the above-mentioned Convention (Brussels, 31 January 1963)	<i>Ibid.</i> , vol. 1041, No. 13706, p. 358. See also ILM, vol. 2 (1963), p. 685.
Protocol to amend the above-mentioned Convention, as amended by the Additional Protocol of 28 January 1964 (Paris, 16 November 1982)	<i>Ibid.</i> , vol. 1519, No. 13706, p. 329.
Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels, 27 September 1968)	<i>Official Journal of the European Communities</i> , vol. 41, No. C 27 (26 January 1998), p. 1. See also ILM, vol. VIII, No. 2 (March 1969), p. 229.
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Protocol of 1984 to amend the above-mentioned Convention (London, 25 May 1984)	IMO publication, Sales No. IMO-456E.
Protocol of 1992 to amend the above-mentioned Convention (London, 27 November 1992)	United Nations, <i>Treaty Series</i> , vol. 1953, No. 17146, p. 330.
Convention on international liability for damage caused by space objects (London, Moscow and Washington, 29 March 1972)	<i>Ibid.</i> , vol. 961, No. 13810, p. 187.

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- Convention for the prevention of marine pollution from land-based sources (Paris, 4 June 1974) *Ibid.*, vol. 1546, No. 26842, p. 103.
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Introduction

1. The subject of international liability has been under consideration by the Commission since 1978.¹ The Commission was able to complete a set of draft articles on prevention of transboundary harm from hazardous activities in 2001. In considering those draft articles, the General Assembly of the United Nations felt that in order to

fully discharge its mandate on the topic of international liability, the Commission should continue to deal with the topic of international liability.² In 2002, a working group of the Commission considered the matter in some depth and made some preliminary recommendations on the possible ways of making progress on the matter. It chiefly noted that, for the work to be profitable, it should at the current stage proceed to develop a model of allocation of loss.³

¹ The matter was first raised in the Commission in 1973 and included in its work programme in 1977. See *Yearbook ... 1973*, vol. II, document A/9010/Rev.1, p. 169, paras. 38–39, and General Assembly resolution 32/151 of 19 December 1977 in which the Assembly invited the Commission to commence work at an appropriate time on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

² General Assembly resolution 56/82 of 12 December 2001.

³ *Yearbook ... 2002*, vol. II (Part Two), pp. 90–92, paras. 442–457.

2. The Commission's work on liability could not make rapid progress for a variety of reasons. For one thing, the subject of international liability does not lend itself easily to codification and progressive development. Experience also has shown that global and comprehensive liability regimes have failed to attract States.⁴ Furthermore, the attempt to gain compensation for damage through the instrumentality of civil wrongs or the tort law of liability has its limitations.⁵ Concepts of harm and damage are not uniformly defined and appreciated in national law and practice. Moreover, it is not easy in any system of law to establish a chain of causation and proof of failure or fault or both in the performance of a duty of care required in law in respect of wrongful conduct. And questions concerning proper adjudicatory forum, applicable law and recognition and enforcement of foreign judicial awards are acknowledged to be technically difficult.⁶

⁴ The Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which is the only existing horizontal international environmental regime, has so far not come into force. Difficulties in reconciling its provisions with domestic laws and the unfinished deliberations within the European Commission over the general issue of liability and compensation for environmental harm are cited as the reasons for this. See La Fayette, "The concept of environmental damage in international liability regimes", p. 163, footnote 50. It is not likely, according to one assessment, to come into force in the near future. See the Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, *Official Journal of the European Communities*, No. C 151 E, vol. 45 (25 June 2002), p. 132 (hereinafter the Proposal), and document COM(2002) 17 final, explanatory memorandum, p. 17, footnote 46. On the general view that global liability regimes have less chance of success, see Cassese, *International Law*, pp. 379–393.

⁵ Jones sounded the caution that "in our very commendable and understandable general environmental zeal, we may all too easily lose sight of the fact that the rules of tortious civil liability are but one component of ... more general picture of environmental liability: and, in so doing, we may seek to make such civil liability rules perform functions for which they are not very well suited". The other components in the picture, he suggested, are liability under criminal law, liability to indemnify the governmental agencies for expenses incurred by such agencies in preventive or remedial work in relation to anticipated or actual harm, and liability to contribute joint contributory solutions ("Deterring, compensating, and remedying environmental damage: the contribution of tort liability", p. 12). In a similar vein, Bergkamp noted: "Modern societies have high hopes for liability ... It would compensate victims, secure environmental restoration, deter injurers and polluters, procure insurance, adjust activity levels to their optimal level, implement corrective and distributive justice, and correct problems of government failure in regulating and enforcing the law. Given its conceptual and institutional constraints, the liability system cannot meet these social goals." (*Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, p. 366)

⁶ See below for a treatment of this aspect.

3. There are also other reasons. State liability and strict liability are not widely supported at the international level, nor is liability for any type of activity located within the territory of a State in the performance of which no State officials or agents are involved. Non-performance of duty of due diligence cast upon private citizens and individuals cannot easily be attributed to the State as a wrongful conduct justifying attachment of liability. International negotiations that attempted to develop some form of State liability, in the context of the international transport of hazardous wastes or in Antarctica, for example, have not succeeded in spite of several years of persistent efforts.⁷ The case law on the subject is scant and the basis on which some claims of compensation between States were eventually settled is open to different interpretations. They do not lend strong support to the case of State liability. The role of customary international law in this respect is equally modest.⁸

4. It is worthwhile to examine how some of these problems and issues were handled by the Commission in its earlier phase of consideration of the topic on international liability. Such an examination might help in putting these issues and problems in a proper perspective for the purpose of the present exercise. We shall deal with some well-known and recent models of allocation of loss negotiated and agreed upon in respect of specific regions of the world or in respect of a specific sector of harm. Such an examination might throw some useful light on the model of allocation of loss the Commission may wish to recommend. Further, as several models of allocation of loss have also relied on civil liability, we will briefly touch upon the elements of that system also to see whether it would be feasible to integrate some or more of those elements into any model of allocation of loss.

⁷ See below for a discussion on this matter.

⁸ Brownlie, "A survey of international customary rules of environmental protection". On the point that the case law, treaty or State practice provides inconclusive evidence to support strict or absolute liability of States, see also Boyle, "Nuclear energy and international law: an environmental perspective", pp. 292–296. Goldie and Schneider hold the view that strict liability was a principle of international law, and Jenks took the view that strict liability was justified in the case of ultrahazardous activities. On the other hand, Dupuy, Handl, Smith and Hardy argued in favour of strict or absolute liability for ultrahazardous activities, and in respect of other activities, liability only for failure to observe due diligence obligations. For a summary of these positions, see Boyle, "Nuclear energy ...", pp. 290–294 and footnote 246. See also footnote 55 below.

CHAPTER I

The International Law Commission and international liability

5. The topic of international liability for injurious consequences arising from acts not prohibited by international law was placed on the agenda of the Commission in 1978.⁹ It was a logical consequence of a view taken

by the Commission which concluded that it "fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any harmful

⁹ Prior to that the General Assembly noted in its resolution 3071 (XXVIII) of 30 November 1973 the desirability of studying the injurious consequences of acts not treated as wrongful (para. 3(c)). This aspect came to light because of the decision of the Commission in

1970 to confine the study of the topic of State responsibility generated by a breach of an international obligation, and thus to the origin and consequence of the wrongful conduct of States (*Yearbook ... 1970*, vol. II, document A/8010/Rev.1, pp. 307–308, para. 74).

consequences arising out of certain lawful activities, especially those which, because of their nature, present certain risks ... the latter category of questions cannot be treated jointly with the former".¹⁰ Mr. Roberto Ago, Special Rapporteur on State responsibility, described that the nature of issues falling under this latter category derived their legal basis from "responsibility for risk".¹¹

A. Work of Special Rapporteurs Mr. Quentin-Baxter and Mr. Barboza

1. APPROACH OF MR. QUENTIN-BAXTER: SHARED EXPECTATIONS AND NEGOTIATED REGIME

6. Mr. Robert Q. Quentin-Baxter was appointed as the first Special Rapporteur to deal with the topic of international liability in 1978.¹² In his view, the primary aim of the draft articles on that topic was "to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects".¹³ In his view the term liability entailed "a negative asset, an obligation, in contra-distinction to a right",¹⁴ and accordingly it referred not only to the consequences of an obligation but also to the obligation itself, which, like responsibility, included its consequences. This topic thus viewed was to address primary obligations of States, while taking into consideration the existence and reconciliation of "legitimate interests and multiple factors".¹⁵ Such an effort was further understood to include a duty to develop not only principles of prevention as part of a duty of due and reasonable care, but also to provide for an adequate and accepted regime of compensation as a reflection of the application of equitable principles. He posited the whole scheme as a scheme of "shared expectations"¹⁶ with "boundless choices" for States.¹⁷

7. Mr. Quentin-Baxter submitted five reports. He developed during this period his conception of the topic into a schematic outline.¹⁸ The main objective of the outline, according to him, was "to reflect and encourage the

growing practice of States to regulate these matters in advance, so that precise rules of prohibition, tailored to the needs of particular situations—including, if appropriate, precise rules of strict liability¹⁹—will take the place of the general obligations treated in this topic".²⁰

8. For balancing the multiple interests at stake, Mr. Quentin-Baxter suggested a three-stage procedure between the "source State" and an "affected State". First, the affected State was to have a right to be furnished with all relevant and available information. Secondly, an affected State "may propose to the acting State that fact-finding be undertaken".²¹ Finally, States concerned were invited to settle their differences by negotiation. As to the legal significance of these procedural steps, he took the view that "[f]ailure to take any step required by the rules ... shall not in itself give rise to any right of action".²² Further, on the question of reparation, he suggested that it be settled by negotiation on the basis of a set of factors for balancing the interests involved. In the absence of any agreement, the source State, according to him, was nevertheless liable to make reparation to the affected State in conformity with the shared expectations entertained by them.

9. The reaction of the General Assembly to the schematic outline was mostly positive. It was, however, noted that the outline should be reinforced to give better guarantees that the duties it envisaged would be discharged. There were also views in favour of separating issues of prevention from liability and others expressing doubts about the value or the viability of the topic itself.²³

2. TREATMENT OF LIABILITY BY MR. BARBOZA

(a) *Place and value of procedural obligations*

10. Mr. Julio Barboza was appointed as the Special Rapporteur in 1985 and followed the basic orientation developed by Mr. Quentin-Baxter. In the 12 reports that he submitted, he elaborated upon it by adding provisions on the scope, duty of prevention, and notification.²⁴ One of the shortcomings of Mr. Quentin-Baxter's schematic outline, as noted above, was that it did not contain elements

¹⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 6, para. 17.

¹¹ *Yearbook ... 1970*, vol. II, second report on State responsibility, document A/CN.4/233, p. 178, para. 6.

¹² See *Yearbook ... 1978*, vol. II (Part Two), p. 150, para. 178.

¹³ *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2, p. 250, para. 9.

¹⁴ *Ibid.*, para. 12.

¹⁵ *Ibid.*, p. 258, para. 38.

¹⁶ The "shared expectations" are those that "(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions, (b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community" (*Yearbook ... 1983*, vol. II (Part One), document A/CN.4/373, annex: schematic outline, p. 224, sect. 4, para. 4). On the nature of the "shared expectations", Mr. Barboza explained that they "have a certain capacity to establish rights. This falls within the purview of the principle of good faith, of estoppel, or of what is known in some legal systems as the doctrine of 'one's own acts'" (*Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402, p. 150, para. 22).

¹⁷ *Yearbook ... 1980* (see footnote 13 above), p. 261, para. 48.

¹⁸ For the text of the schematic outline, see his third report, *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/360, p. 62, para. 53.

¹⁹ On strict liability as an option, Mr. Quentin-Baxter noted that "[at] the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss" (*ibid.*, p. 60, para. 41). He considered, however, that there was a need to modify the rigours of strict liability to make it more acceptable (see his second report, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/346 and Add.1 and 2, p. 123, para. 92).

²⁰ Fourth report, *Yearbook ... 1983* (see footnote 16 above), p. 216, para. 50.

²¹ *Ibid.*, p. 224, schematic outline, sect. 2, para. 4.

²² *Ibid.*, para. 8.

²³ *Ibid.*, p. 204, para. 10.

²⁴ See *Yearbook ... 1996*, vol. II (Part Two), p. 77, footnotes 221–222. On the scope, requirements of prevention and notification, Mr. Barboza identified at least six elements: prior authorization, risk assessment, information and notification, consultation, unilateral preventive measures, and the standard of due diligence. For a summary, see the first report on prevention of transboundary damage from hazardous activities by Mr. P. S. Rao, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1, pp. 190–191, para. 55.

to secure implementation of the scheme.²⁵ Mr. Barboza suggested that the failure to take or comply with the procedural requirements of prevention could entail certain adverse procedural consequences for the acting or source State. Referring to section 5, paragraph 4, of the schematic outline,²⁶ he noted that it would enable the affected State to have a liberal recourse to inferences of facts and circumstantial evidence to establish whether the activity did or might give rise to loss or injury. Furthermore, under due diligence obligations, the source State would be required to continuously monitor the activity, in addition to its duty to make reparation to any injury caused. On the whole, the scheme of implementation of the procedural obligations of prevention proposed by Mr. Barboza also very much hinged on reparation and liability, which came into play only after injury had occurred. In that event, the failure to comply with the procedural requirements of prevention would provide, according to that approach, aggravated legal and material consequences for the source State.²⁷

(b) *Negotiated regime of liability: an important option*

11. Moreover, on the question of liability, like Mr. Quentin-Baxter, Mr. Barboza also relied on negotiation as a means to settle the matter of compensation between the States concerned.²⁸ Article 22 of the 1996 draft articles of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law provided a list of factors which the States concerned could use to balance their interests in arriving at an agreement.²⁹ Negotiation of compensation, however, was not necessarily to be preferred over the method of resort to courts, which was also indicated in article 20. The commentary to article 21 envisaged situations in which such a resort to domestic courts could be unnecessary (if public and private claims overlapped) or difficult (due to conflict-of-law issues, inaccessibility of the forums available because of distance, lack of knowledge about the applicable law and problems of expenses) or ineffective (if remedies were not provided even for citizens for the harm involved), in which case negotiation would be the only way open or might prove to be more appropriate.³⁰

(c) *Factors relevant for negotiation*

12. The various factors noted in article 22 were not exhaustive and were provided by way of guidance to parties to arrive at fair and equitable solutions with due regard to all relevant factors in the context. The point was made that specification of a list of factors, in the absence of a third party to settle differences which might arise

between concerned States, could work to the disadvantage of the weaker of the two and might undermine certainty of law.³¹ Nevertheless, by way of some guidance,³² it was noted that flagrant lack of care and concern for the safety and interests of other States would enhance the extent of liability and compensation payable by the source State. This would be particularly so when it had the knowledge of the risk the activity posed to them and the means to prevent or mitigate it. In contrast, the extent of its liability and compensation could be lower if it had taken all the preventive measures that it was required to take in deference to the duty of due diligence. Similarly, it would also be lower if the injury was unavoidable or could not be foreseen. So also, if the source State participated and cooperated in all possible measures of response and restoration after the injury occurred, it would get due credit. Equally, the share of the affected State in the benefits of the activity, its own ability to mitigate the effects of damage, and the promptness with which it took the necessary responsive measures could be factors in arriving at an agreed level of compensation. The standards of care and levels of compensation available in the jurisdiction of the affected State for the activity in question could also be relevant factors for fixation of liability and computation of compensation.

(d) *Compensation: not so full and complete*

13. Such a negotiated reparation or compensation should attempt an equitable settlement, keeping in view "the principle that the victim of harm should not be left to bear the entire loss".³³ In other words, it need not be full and complete.

14. Article 5 of the 1996 draft articles of the Working Group of the Commission endorsed this policy and stated that liability arises from significant transboundary harm caused by an activity referred to in article 1 and that will give rise to compensation and relief "[i]n accordance with the present articles".³⁴

B. International liability regime: outstanding issues

15. Most of the points thus noted and incorporated in the proposals of the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law were generally acceptable. But there were differences in view on at least four important aspects of the matter. These were: (a) State liability; (b) scope of activities; (c) threshold of damage covered; and (d) linkage between prevention and liability.

²⁵ For an analysis on this point, see Tomuschat, "International liability for injurious consequences arising out of acts not prohibited by international law: the work of the International Law Commission", p. 50.

²⁶ *Yearbook ... 1983* (see footnote 16 above), pp. 224–225.

²⁷ See *Yearbook ... 1998* (footnote 24 above), p. 190, paras. 52–53.

²⁸ See Tomuschat, *loc. cit.*, p. 51.

²⁹ *Yearbook ... 1996* (see footnote 24 above), annex I, p. 102.

³⁰ *Ibid.*, p. 130, para. (1) of the commentary to article 21. Incidentally, these are some of the reasons why States did not pursue claims in the case of the Chernobyl accident. See Boyle, "Nuclear energy ..." p. 296.

³¹ See Tomuschat, *loc. cit.*, p. 50; and Boyle, "Codification of international environmental law and the International Law Commission: injurious consequences revisited", p. 78.

³² *Yearbook ... 1996* (see footnote 24 above), annex I, p. 131, commentary to article 22.

³³ *Ibid.*, p. 130, art. 21. See also the second report by Mr. Barboza, where he noted that "it appears therefore that the negotiations may result in reparation, the amount of which may vary according to such factors as the nature of the injury, the nature of the activity in question and the preventive measures taken. Conceivably, the parties might agree that reparation should not be made because of exceptional circumstances that make it inappropriate", *Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402, p. 149, para. 20.

³⁴ *Yearbook ... 1996* (see footnote 24 above), annex I, p. 111.

1. STATE LIABILITY: A CASE OF MISPLACED EMPHASIS

16. The Commission relied on State liability as a vehicle to move issues of liability and compensation for several reasons. First, as noted above, the whole issue came up for consideration within the Commission as an extension of its work on State responsibility. Secondly, it was felt that the *sic utere tuo* principle provided an adequate basis to develop State liability as a principle. Thirdly, it was also felt that such an approach would better serve the interests of innocent victims who would not have the means or accessibility to a distant and sometimes unknown foreign jurisdiction of the source State to seek necessary relief and remedies. Fourthly, for policy reasons it was felt that States should be encouraged to take the obligation *sic utere tuo* more seriously. Mr. Barboza noted that he believed that there were sufficient treaties and other forms of State practice to provide an appropriate conceptual basis for the topic. He agreed with some members of the Commission that the principle *sic utere tuo ut alienum non laedas* provided adequate conceptual foundations for the development of the topic.³⁵ He further noted that, while not denying the usefulness of existing private-law remedies for transboundary harm, they failed to guarantee prompt and effective compensation to innocent victims, who, after suffering serious injury, would have to pursue foreign entities in the courts of other States. In addition, private-law remedies by themselves would not encourage a State to take preventive measures in relation to activities conducted within its territory having potential transboundary injurious consequences.³⁶

17. Separation of liability of States for harmful consequence of lawful—in the sense of not prohibited—activities from State responsibility for wrongful activities was criticized as flawed, misleading and confusing.³⁷ It was stated that such an attempted distinction tended to give the impression that there were lawful as opposed to unlawful, and prohibited as opposed to unprohibited activities in international law, whereas in fact there were very few prohibited activities. The emphasis in law was always on prohibited consequences of acts or activities. Further, it was suggested that such a global distinction was not necessary and helpful for progressive development of the law of liability and compensation for transboundary damage. It was also pointed out that, in addition to other norms that might be developed, State responsibility could continue to provide a basis for State liability for the consequences of ultrahazardous operations.³⁸

³⁵ *Yearbook ... 1987*, vol. II (Part Two), pp. 42–43, para. 143.

³⁶ *Ibid.*, p. 48, para. 181.

³⁷ See Brownlie, *System of the Law of Nations: State Responsibility*, p. 50; Boyle, “State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?”; and Akehurst, “International liability for injurious consequences arising out of acts not prohibited by international law”. For a more favourable view, see Magraw, “Transboundary harm: the International Law Commission’s study of ‘international liability’”. There were other views justifying the distinction for the purpose of the study of the liability topic. For a discussion on this point and other citations, see Mr. P. S. Rao’s third report, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/510.

³⁸ For a discussion on this matter, see *Yearbook ... 2000* (footnote 37 above), pp. 121–122, paras. 27–30.

18. In the absence of established, scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, it was argued that the elaboration of general principles could contribute to the emergence of disputes, while the lack of such standards would impede their settlement. It was feared that such an attempt would amount to absolute liability for non-prohibited activities and that would not be acceptable to States.³⁹ In response to those concerns, Mr. Barboza decided to present a new scheme combining civil liability with State liability.⁴⁰ He explained that to “mitigate a situation which was both Draconian and lacking in precedents”,⁴¹ he proposed to establish civil liability as a primary channel and supplement it with the liability of the State, or replace the liable private parties by State liability if the former could not be identified or located.⁴² Several members of the Commission responded favourably to the new proposal to give priority to civil liability and assign residual liability to the State. There was, however, no agreement on the conditions under which such residual liability could be invoked.⁴³

³⁹ *Yearbook ... 1987* (see footnote 35 above), p. 42, paras. 138–139. Tomuschat noted the same point when he wrote that:

“It is submitted that this global approach ... is not suited to yield constructive results. First, it can hardly be presumed that states might be prepared to accept liability for any harm sustained by another state in the form of physical consequences of just any kind of activity carried out within their territories or under their control. By undertaking such a commitment, states would on their part accept an uncontrollable risk ... A legal regime with unforeseeable consequences and heavy financial implications is (not acceptable to States by way of progressive development and hence) quite another matter. No responsible government could commit itself for such an adventure.”

(Tomuschat, *loc. cit.*, p. 55)

⁴⁰ *Yearbook ... 1990*, vol. II (Part One), sixth report by Mr. Barboza, document A/CN.4/428 and Add.1, pp. 94–100.

⁴¹ *Yearbook ... 1991*, vol. II (Part One), seventh report by Mr. Barboza, document A/CN.4/437, p. 84, para. 48.

⁴² *Ibid.*, p. 85, para. 50.

⁴³ The question of strict State liability was particularly discussed at the forty-third session of the Commission in 1991. See *Yearbook ... 1991*, vol. I, summary records of the 2222nd–2228th meetings. Several members who spoke on the subject expressed their doubts about the reception of that obligation in international law. They were also doubtful of the willingness of States to accept it even as a measure of progressive development of international law. Most favoured primary civil liability of the operator and residual State liability under some conditions (there was no common position on these conditions). See the opinions of Messrs. Jacovides (*ibid.*, 2222nd meeting, para. 6), Mahiou (*ibid.*, para. 18), Francis (*ibid.*, 2223rd meeting, para. 10), Calero Rodrigues (*ibid.*, para. 25), Pellet (*ibid.*, para. 41), Bennouna (*ibid.*, 2224th meeting, para. 5), Tomuschat (*ibid.*, para. 12), Njenga (*ibid.*, para. 26), Graefrath (*ibid.*, para. 31), Ogiso (*ibid.*, 2225th meeting, para. 15), Shi (*ibid.*, para. 27), Rao (*ibid.*, paras. 32–34), Pawlak (*ibid.*, 2226th meeting, para. 4) and McCaffrey (*ibid.*, 2227th meeting, para. 7). Mr. Arangio-Ruiz distinguished three types of harm: dangerous or hazardous activities, operator liability only if there is failure of performance of due diligence obligations; ultrahazardous activities, strict liability of the operator; and where the author of the harm cannot be identified (*ibid.*, paras. 14–17). Mr. Barségov preferred the civil liability of the operator, leaving State liability to be part of State responsibility (*ibid.*, 2226th meeting, para. 40). Mr. Al-Khasawneh had no strong feelings on the point (*ibid.*, para. 21). Mr. Hayes would like to keep the option open to the State (*ibid.*, 2225th meeting, para. 64). Mr. Thiam did not have an objection if State liability was to be residual (*ibid.*, para. 50), and Mr. Koroma would prefer State liability (*ibid.*, 2222nd meeting, para. 31). Mr. Barboza summed up to note that the Commission was virtually in agreement that civil liability should take priority and that State liability should be residual (*ibid.*, 2228th meeting, para. 25).

19. The Commission's approach to the principle of State liability, as may be noted, is centred on the liability of the State within the territory of which the hazardous activity is located. The concept of "control" and the test of "knowledge and means" noted in article 3 proposed by Mr. Barboza in his fourth and fifth reports did not affect that focus.⁴⁴ Both within the Commission and in some scholarly circles, it was pointed out that such focus was too limited and would not do justice to the interests and special circumstances of developing countries. There was a concern that multinational enterprises lacked any duty to notify to the developing countries all the risks involved in the export of hazardous technology. They also owed no duty to them to manage those operations with the same standards of safety and accountability as were applicable in the country of the nationality of the multinational enterprises. Furthermore, the developing countries lacked both the knowledge of the risks involved and the ability, with their limited resources, to monitor the hazardous operations of multinational enterprises within their territory. Under the circumstances, it was argued, a duty might be placed on the State of nationality of the multinational enterprises to ensure that such export of hazardous technology to the developing countries conformed to international standards. Moreover, it was stressed that that State should also accept a share in the allocation of loss resulting from any accident causing transboundary harm.⁴⁵ But this aspect of the matter did not find much echo in the debates of the Commission, and the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law did not touch upon it.⁴⁶

2. STRICT OR ABSOLUTE LIABILITY: A NECESSARY LEGAL BASIS FOR AN INTERNATIONAL REGIME?

20. The approach of Mr. Quentin-Baxter only glanced at strict liability as an option or a possibility, but actually laid emphasis on negotiation between the source State and the affected State(s) for balancing the interests and equities in arriving at a settlement on liability and compensation.⁴⁷ Mr. Barboza initially explored the possibility of developing the strict liability option more fully, but

⁴⁴ See, for example, articles 1 and 3 proposed by Mr. Barboza in his fourth (*Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413) and fifth (*Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423) reports. By the time the twelfth report (*Yearbook ... 1996*, vol. II (Part One), p. 29, document A/CN.4/475 and Add.1) had been submitted the two versions of article 3 had been placed within square brackets.

⁴⁵ For the views of Messrs. Shi (on difficulties faced by the developing countries), Rao and Pawlak (on the need to develop a multinational enterprise liability), in the debates of the Commission, see *Yearbook ... 1991*, vol. I, 2225th meeting, p. 117, para. 29; p. 118, paras. 37–38; and 2226th meeting, p. 122, para. 5. See also Francioni, "Exporting environmental hazard through multinational enterprises: can the State of origin be held responsible?"

⁴⁶ For the report of the Working Group, see *Yearbook ... 1996* (footnote 29 above).

⁴⁷ Mr. Barboza explained this well. He noted that:

"With regard to 'strict' liability, previous reports made a considerable effort, first ... to minimize its effects, and secondly, to consider it as only one of several factors which provide legal justification for any reparation made in cases of injury occurring in the absence of a treaty régime ... This second component would derive, perhaps, from the 'quasi-contractual' nature of shared expectations ... As the previous Special Rapporteur stated in his third report:

eventually preferred that those issues as well as possible claims under civil liability of the operator and others should be settled through resort to domestic legal action. Endorsing that approach, the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law in 1996 noted that the articles on compensation and relief it recommended "do not follow the principle of 'strict' or 'absolute' liability as commonly known".⁴⁸ It added,

As in domestic law, the principle of justice and fairness as well as other social policies indicate that those who have suffered harm because of the activities of others should be compensated ... Thus Chapter III provides two procedures through which injured parties may seek remedies: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. These two procedures are, of course, without prejudice to any other arrangements on which the parties may have agreed, or to the due exercise of the jurisdiction of the courts of the States where the injury occurred. The latter jurisdiction may exist in accordance with applicable principles of private international law: if it exists, it is not affected by the present articles.⁴⁹

21. This 1996 approach to separate the issues of liability and compensation from both the fields of torts or civil wrongs and private international law has its merits. In attempting to bring the States concerned together, the approach facilitated matters of relief and compensation to innocent victims to be settled early without lengthy court proceedings concerning conflicts in jurisdiction, applicable law and fixation of shares of liability among different actors involved and finally recognition and enforcement of awards made. It is equally meritorious in not pre-empting legal action on other applicable grounds.

22. The hesitation to peg State liability to strict liability is also understandable. It is mainly due to an assessment that in international practice, as between States, that form of liability is not accepted for activities that are considered as lawful to pursue in their domestic jurisdiction in accordance with their sovereign rights. On strict or absolute liability the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law noted that:

As a matter of general application, a rule of strict liability for all and any losses covered by activities lawfully carried out on the territory of a State or under its jurisdiction or control would be difficult, if not impossible, to sustain. Of course, a treaty may incorporate such a rule, but that does not necessarily show what the rule of general international law would be apart from the treaty.⁵⁰

23. It further noted that concepts of strict or absolute liability which

are familiar and developed in the domestic law in many States and in relation to certain activities in international law ... have not yet been

"At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss ...".

(*Yearbook ... 1986* (see footnote 33 above), p. 155, paras. 46–47)

⁴⁸ *Yearbook ... 1996* (footnote 29 above), p. 128, para. (1) of the general commentary on chapter III (Compensation or other relief).

⁴⁹ *Ibid.*, pp. 128–129.

⁵⁰ *Ibid.*, p. 112, para. (3) of the commentary to article 5, referring to some international treaties and other State practice adopting strict or absolute liability as legal basis for compensation.

fully developed in international law, in respect to a larger group of activities such as those covered by article 1.⁵¹

24. Moreover, after surveying a number of incidents in which States, without admitting any liability, paid compensation to victims of significant transboundary harm, the Commission came to the conclusion that “the trend of requiring compensation is pragmatic rather than grounded in a consistent concept of liability”.⁵²

25. Several commentators shared the view of the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law. Tomuschat felt that a general regime of strict or objective liability was established by treaty only for ultrahazardous activities. Boyle noted that the “difficulty with strict liability as a principle of international law is that although some commentators argue that it is a general principle of law applicable to ultra-hazardous activities,⁵³ there is little consistent evidence of supporting state practice in favour of this view”.⁵⁴ Further, according to him:

The clear preference of treaty formulations, such as the 1982 Law of the Sea Convention, is, at most, for the imposition of responsibility only in cases of a breach of international obligations, defined in terms of diligent control of sources of environmental harm.⁵⁵

Examples of direct and absolute State responsibility for damage, such as the Space Objects Liability Convention, remain exceptional. States have instead de-emphasised their own responsibility for pollution damage. Indeed many modern regulatory treaties, such as the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, either ignore the issue altogether, or leave it to further development.⁵⁶

3. SCOPE OF ACTIVITIES TO BE COVERED

26. With respect to the scope of the activities, there are two issues: one relating to the type of activities covered and the other related to criteria to delimit the transboundary element. Mr. Quentin-Baxter conceived a wide variety of “[a]ctivities and situations” to come within the scope of activities, including dangers such as air pollution that were insidious and might have massive cumulative

effects.⁵⁷ Mr. Barboza accepted the wide scope, but did not think reference to “situations”⁵⁸ in addition to “activities” was useful. A question also arose about the desirability of specifying, in a list, activities covered by the draft articles. The Working Group on international liability for injurious consequences arising out of acts not prohibited by international law considered the matter in 1995⁵⁹ and recommended that for the purpose of the study no list was necessary at that time and that the activities mentioned in some conventions dealing with transboundary issues should be considered as relevant.⁶⁰ Accepting that recommendation, the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law further defined the concept of risk, central to the scope of activities, reiterating the definition provisionally adopted by the Commission in 1994, to mean activities with “a low probability of causing disastrous harm and a high probability of causing other significant harm” (art. 2 (a)).⁶¹

27. To delimit the wide scope, however, both Special Rapporteurs relied on three criteria that defined “transboundary damage”. The activities must take place in the territory or control or jurisdiction of the source State. They must have a risk of causing significant transboundary harm. Finally, such a harm must have been caused by the “physical consequences” (art. 1) of such activities or must be determinable by clear direct physical effect and causal connection between the activity in question and harm or injury suffered. Such a delimitation would, for example, exclude from the scope of the articles harm to the global commons, which is beyond any national jurisdiction; or damage to the environment not within national jurisdiction; or air pollution and creeping pollution not attributable to any one source; as well as economic consequences arising from policies and decisions of one State over the other.

⁵⁷ The following were mentioned:

“[U]se and regulation of rivers crossing or forming an international boundary and avoidance of damage from floods and ice; use of land in frontier areas; spread, across national boundaries, of fire or any explosive force, or of human, animal or plant disease; activities which may give rise to transboundary pollution of fresh water, of coastal waters or of national airspace, or to pollution of the shared human environment, including the oceans and outer space; development and use of nuclear energy, including the operation of nuclear installations and nuclear ships and the carriage of nuclear materials; weather modification activities; overflight of aircraft and space objects involving a risk of accidental damage on the surface of the earth, in airspace or in outer space; and activities physically affecting common areas or natural resources in which other States have rights or interests.”

(*Yearbook ... 1983* (see footnote 16 above), p. 202, footnote 8)

⁵⁸ “Situations” are defined as “a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects”, and examples given are an approaching oil slick, danger from floods, or drifting ice, or risks arising from an outbreak of fire, pests or disease (fifth report, *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/383 and Add. 1, pp. 166–167, paras. 31–32).

⁵⁹ See *Yearbook ... 1995*, vol. II (Part Two), p. 89, para. 408.

⁶⁰ These conventions are: the Convention on environmental impact assessment in a transboundary context; the Convention on the Transboundary Effects of Industrial Accidents; and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

⁶¹ *Yearbook ... 1996* (see footnote 24 above), p. 101.

⁵¹ *Ibid.*, p. 128, para. (1) of the general commentary to chapter III. In arriving at this conclusion, the Working Group had the benefit of the Survey of liability regimes relevant to the topic “International liability for injurious consequences arising out of acts not prohibited by international law”, prepared by the Secretariat, *Yearbook ... 1995*, vol. II (Part One), p. 61, document A/CN.4/471.

⁵² *Yearbook ... 1996* (see footnote 29 above), p. 116, para. (32) of the commentary to article 5.

⁵³ See Jenks, “Liability for ultra-hazardous activities in international law”; and Smith, *State Responsibility and the Marine Environment: the Rules of Decision*, pp. 127–128.

⁵⁴ “Making the polluter pay? Alternatives to State responsibility in the allocation of transboundary environmental costs”. On State claims in case of nuclear injury, see Boyle, “Nuclear energy ...”. On the Chernobyl accident, see Sands, *Chernobyl—Law and Communication: Transboundary Nuclear Air Pollution—The Legal Materials*, pp. 26–27; and Boyle, “Chernobyl and the development of international environmental law”.

⁵⁵ Examples cited are the Convention on Long Range Transboundary Air Pollution, art. 2; the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, arts. II and IV; the Convention for the prevention of marine pollution from land-based sources, art. 1; the Vienna Convention for the Protection of the Ozone Layer, art. 2; and the United Nations Convention on the Law of the Sea, arts. 194 and 207–212.

⁵⁶ Boyle, “Making the polluter pay? ...” pp. 365–366.

28. The Working Group on international liability for injurious consequences arising out of acts not prohibited by international law considered these matters once again in 1996, but was reluctant to expand the scope and approved the criteria as noted above to delimit the scope. As one commentator observed, this moderation was necessary to make the work of the Commission on this difficult topic acceptable to most States.⁶² Another comment which lamented the lack of progress on the work of liability for transboundary harm appeared to endorse a more pragmatic limitation on the scope of the draft articles, when it recommended “promulgation of an international liability regime that so advances the interests of states that nations will surrender some of their sovereign rights to participate in the system”.⁶³

4. THRESHOLD OF DAMAGE: SIGNIFICANT HARM AS A NECESSARY CRITERION

29. With regard to the threshold of damage covered, the problem was one of designating the level of harm that is considered unacceptable and hence would merit remedial action, including appropriate compensation. For Mr. Quentin-Baxter not every transboundary harm was wrongful. He therefore mentioned “the seriousness” of the loss or injury as one of the factors to be included in the balancing test he had suggested (sect. 6, para. 2, of the schematic outline).⁶⁴ Mr. Barboza concurred, but believed that the concept of risk was relative and could vary according to a number of factors. He thought the matter was best suited for settlement among States when they negotiated a regime applicable to specific activities posing a risk of transboundary harm.⁶⁵

30. The matter required further examination because of persistent differences in views among members of the Commission and among States. The 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law took the view that:

it is legitimate to induce from the rather diverse practice surveyed ... the recognition—albeit on some occasions *de lege ferenda*—of a principle that liability should flow from the occurrence of *significant** transboundary harm arising from activities such as those referred to in article 1, even though the activities themselves are not prohibited under international law—and are therefore not subject to the obligations of cessation or *restitutio in integrum*.⁶⁶

⁶² Magraw, *loc. cit.*, p. 322, where he observed that the “key will be to define the scope of the topic in a sufficiently modest manner so as not to invite noncompliance”.

⁶³ Comment of the editors of the *Harvard Law Review*, “Trends in international environmental law”, reproduced in Guruswamy, Palmer and Weston, *International Environment Law and World Public Order: a Problem-Oriented Coursebook*, p. 332.

⁶⁴ *Yearbook ... 1982* (see footnote 18 above), p. 64.

⁶⁵ See *Yearbook ... 1987* (footnote 35 above), pp. 40–41, para. 127.

⁶⁶ *Yearbook ... 1996* (see footnote 24 above), p. 116, para. (32) of the commentary to article 5. The conclusion that activities which gave rise to liability need not be subject to obligations of cessation or *restitutio in integrum* is considered to be “important in those cases where the harm cannot reasonably be avoided, since otherwise such activities would then have to be closed down” (Boyle, “Codification of international environmental law ...”, p. 77). At the same time it was felt that there was no need for the Working Group to arrive at this conclusion on the basis of a distinction made on the nature of the activities involved as “not prohibited” or “prohibited” activities. It was pointed out that even under State responsibility, cessation of the activity itself would not

31. This was clarified to mean something that was not *de minimis* or not negligible but more than “detectable” and need not be at the level of “serious” or “substantial”. Further, the harm must lead to real detrimental effects on such aspects as human health, industry, property, the environment or agriculture in other States which could be measured by factual and objective standards.⁶⁷

32. While the above recommendations of the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, and their main thrust could be regarded as a positive contribution,⁶⁸ they could not be endorsed by the Commission in 1996 both for lack of time and, more significantly, for lack of agreement on other issues, such as the emphasis on State liability and the treatment of prevention as part of a regime of liability.

5. PREVENTION AND LIABILITY: DISTINCT BUT RELATED CONCEPTS

33. On the question of the linkage between prevention and liability, a working group of the Commission established in 1997 reviewed the work on the topic since 1978. It felt that “the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to ‘State responsibility’”.⁶⁹ It further observed that aspects of prevention and liability “are distinct from one another, though related”.⁷⁰ It was recommended that they be studied separately. On the study of the question of liability, the Working Group was of the view that it could

be required if what gave rise to that responsibility was the wrongful consequences of the activity, as was the case in the *Trail Smelter* case (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905) (Boyle, *loc. cit.*, pp. 77–78).

⁶⁷ *Yearbook ... 1996* (see footnote 24 above), p. 108, para. (4) of the commentary to article 2. Sands observed that “State practice, decisions of international tribunals and the writings of jurists suggest that environmental damage must be ‘significant’ or ‘substantial’ (or possibly ‘appreciable’, which suggests a marginally less onerous threshold) for liability” (*Principles of International Environmental Law I: Frameworks, Standards and Implementation*, p. 635). Referring to the exchange between the President of ICJ, Sir Humphrey Waldock, and Australia in the *Nuclear Test* cases (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253; and *Nuclear Tests (New Zealand v. France)*, *ibid.*, p. 457), Sands noted (*op. cit.*, p. 246), that, while a nominal harm or damage caused by activities conducted for community benefit did not give rise to liability, significant harm or damage caused even by such activities did.

⁶⁸ According to one comment, the main thrust of the Commission’s recommendation is to secure the approval of the international community for the proposition that:

“[S]tates do have the sovereign right to pursue activities in their own territory even where they cause unavoidable harm to other states (except in the case of those few activities which by agreement or under some other rule of law are not permitted) provided they pay equitable compensation for the harm done. If the Commission can secure international support for this proposition it will have achieved a significant advance and will have provided a useful element of flexibility in the wider balancing of interests which the articles as a whole seek to establish in transboundary relations.”

(Boyle, “Codification of international environmental law ...”, p. 78)

⁶⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 165. The report of the 1997 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law is reflected in paragraphs 165–167 (*ibid.*).

⁷⁰ *Ibid.*

await further comments from States. However, the title of the topic would need to be adjusted “depending upon the scope and contents of the draft articles”.⁷¹

34. The Commission endorsed these recommendations in 1997 and appointed a new Special Rapporteur for the subtopic of prevention of transboundary damage from hazardous activities.⁷²

35. In 1998, on the basis of proposals made by the Special Rapporteur,⁷³ and after further consideration of the regime of prevention, the Commission took decisions on the scope of the draft articles, including on the question of the threshold of harm that would fall within the scope of the draft articles. First, the articles would deal only with activities posing a *risk* of transboundary harm. Secondly, the risk of significant harm should be prevented. Thirdly, the harm must be a transboundary one with physical consequences. Thus, the draft articles would not deal with creeping pollution, pollution from multiple sources and harm to the global commons. Fourthly, the definition of harm adopted would cover damage to persons or property or to the environment within the jurisdiction and control of the affected State. It was readily admitted that the activities or other types of harm not brought within the scope were equally important, but because they encompassed a different set of considerations, it was desirable to study them under a fresh mandate from the General Assembly.

36. The reaction of the General Assembly to the proposals of the Commission on the subject of prevention was favourable. A sizeable section of members of the Assembly continued to insist that the main *raison d'être* of the topic assigned for study was liability and that its study should also be completed without delay after the completion of the draft articles on prevention. This demand was repeated in 2001 when the Commission completed the second reading of the draft articles on prevention, at which time the Assembly took note of the draft articles on prevention and urged the Commission to promptly proceed to the study of liability, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.⁷⁴

6. FURTHER WORK ON LIABILITY: FOCUS ON MODELS FOR ALLOCATION OF LOSS

37. At the fifty-fourth session of the Commission in 2002, a working group was established to consider possible approaches to the study of the topic of liability. It recommended that the Commission should:⁷⁵

(a) Concentrate on harm caused for a variety of reasons but not involving State responsibility;

(b) Better deal with the topic as allocation of loss among different actors involved in the operations of hazardous activities, such as, for instance, those authorizing, managing or benefiting from them;

(c) Limit the scope of the topic to the activities which are the same as those covered by the regime of prevention adopted by the Commission in 2001;⁷⁶

(d) Cover within the scope of the topic loss to persons, property, including the elements of State patrimony and natural heritage, and the environment within national jurisdiction.

38. The focus on allocation of loss instead of the development of an international liability regime is well in tune with the emerging thinking on the subject which is focused on facilitating a more equitable and expeditious scheme of compensation to the victims of transboundary harm. Given the difficulties and constraints of traditional tort law or civil liability regimes, the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law had already set in motion a more flexible approach, divorced from private-law remedies or from strict or absolute liability as a basis for the compensation scheme proposed. The thinking of legal and policy experts concerned with transboundary harm has also been oriented for some time on the development of suitable loss allocation schemes with a view to promoting a more equitable spreading of loss and enhancing the speedy and sufficient redress of the grievances of victims.

39. It was also suggested that the Commission might examine the threshold necessary for triggering the application of the regime on allocation of loss caused. Two views could be noted in this regard. One view advocated the retention of “significant harm” as the trigger, while another favoured a higher threshold than that prescribed for the application of the regime on prevention. In contrast, it was also suggested that there should be a lesser threshold than “significant harm” for dealing with liability and hence compensation claims.⁷⁷ Generally in the context of liability as in the case of prevention the need for a threshold of harm for triggering claims of compensation is emphasized. If the *Trail Smelter*⁷⁸ or the *Lake Lanoux*⁷⁹ cases are of any guidance, it is clear that a threshold of harm that is “appreciable” or “serious” or “significant” or “substantial” is what qualifies for compensation and not the negligible or *de minimis* damage. On the basis of a review of the consideration of the matter within the Commission, it is clear that in the debate on the scope of the draft articles, the designation of the threshold of harm and the definition of harm, no distinction was drawn between prevention on the one hand and liability and compensation, on the other. Accordingly, it appears reasonable not to reopen this debate and to endorse the earlier decision

⁷¹ *Ibid.*, para. 167.

⁷² *Ibid.*, para. 168.

⁷³ *Yearbook ... 1997* (see footnote 24 above), pp. 198–199, paras. 111–113.

⁷⁴ General Assembly resolution 32/151 of 19 December 1977.

⁷⁵ For the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, see *Yearbook ... 2002*, vol. II (Part Two), pp. 90–92, paras. 442–457.

⁷⁶ For the reasons for limiting the scope of the topic, see the Special Rapporteur's first report, *Yearbook ... 1998* (footnote 24 above), pp. 193–195, paras. 71–86, and pp. 198–199, paras. 111–113 (particularly the recommendations in para. 111 (a), (b), (c), (f) and (g)).

⁷⁷ *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 24th meeting, statement by Uruguay (A/C.6/57/SR.24), para. 41.

⁷⁸ See footnote 66 above.

⁷⁹ UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

of the Commission to designate “significant harm” as the threshold for the obligation of compensation to come into play.

40. The recommendation of the 2002 Working Group that the definition of harm may also cover the national patrimony and heritage as part of loss of property is worthy of support. The definition of damage or harm considered by the Commission only referred to loss of persons and property and environment within national jurisdiction. There was some doubt at that time about the best possible way to cover the damage to the national patrimony and heritage. Mr. Barboza, in his eleventh report,⁸⁰ recommended that harm to the cultural heritage as a category of damage was better considered together with loss of property.

41. In his view, damage to the environment should encompass damage to the natural elements or components of environment and loss or diminution of environmental values caused by the deterioration or destruction of such components. Further, damage to the environment *per se*, but within the jurisdiction and control of a State, should be covered within the definition of environmental harm, as it affected the whole community of people. But in that case it was the State as a whole which was the injured party. Such an approach would still exclude harm or damage to environment *per se* of global commons, that is, areas not within the jurisdiction or control of any State. The contemporary trends reviewed below appeared to have provided some basis for this recommendation.⁸¹

42. Before proceeding to review, in some detail, various models on allocation of loss among different actors for the purpose of evaluating contemporary trends in establishing models of loss allocation, it would be opportune to recollect some of the policies that guided those trends.

C. Some policy considerations

43. The 1996 Working Group on international liability for injurious consequences arising out of acts not

⁸⁰ *Yearbook ... 1995*, vol. II (Part One), p. 51, document A/CN.4/468.

⁸¹ For his views, see Barboza, “The ILC and environmental damage”, pp. 76–78. See also his eleventh report (footnote 80 above). The definition of harm proposed by the Special Rapporteur was discussed in a preliminary way in 1995: “It was stated that the definition of harm must be reasonably comprehensive without being overburdened with detail. In a preliminary stage, it ought to cover the following elements: loss of life, personal injury or other impairment of health, loss or damage to property within the affected State, as well as impairment of the natural resources and human or cultural environment of that affected State.” (*Yearbook ... 1995* (footnote 59 above), p. 88, para. 396). On the question whether harm, to be eligible for compensation, should only be direct or at least not be remote, a preliminary view was in favour of including such a criterion. Further, there was some emphasis that the primary purpose of compensation was “to restore the *status quo ante*” (*ibid.*, para. 401). For the view that damage to cultural heritage may be included in the definition of damage to the environment, see the definition adopted by a UNEP working group, cited in Fitzmaurice, “International protection of the environment”, p. 228. The author also cited the view of the Special Rapporteur, Mr. James Crawford, which he expressed while considering the question of State responsibility for harm, that no test for remoteness of damage should be included in the draft articles: “As with national law, it seems likely that different tests for remoteness may be appropriate for different obligations or in different contexts, having regard to the interests sought to be protected by the primary rule.” (*Ibid.*, p. 232, and *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/517 and Add.1, para. 33 (c))

prohibited by international law noted that the principle of liability should be based on certain broad policy considerations: (a) each State must have as much freedom of choice within its territory as is compatible with the rights and interests of other States; (b) the protection of such rights and interests requires the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation; and (c) insofar as may be consistent with those two principles, the innocent victim should not be left to bear his or her loss or injury.⁸² It may be recalled that the draft regime adopted on prevention of transboundary harm from hazardous activities in 2001⁸³ already reflected the policy objectives noted in point (a) above and partially those in point (b). The present effort of the Commission therefore should be directed more towards realizing the remaining parts of the policy, that is, towards encouraging States to conclude international agreements and to adopt suitable legislation, and implementing mechanisms for prompt and effective remedial measures including compensation in case of significant transboundary harm.

44. It may be noted that there is general support for the proposition that any regime of liability and compensation should aim at ensuring that the innocent victim is not as far as possible left to bear the loss resulting from transboundary harm arising from hazardous activity. However, it is realized that full and complete compensation may not be possible in every case. The definition of damage, sometimes a lack of the required proof of loss and applicable law, in addition to the limitations of the operator’s liability and limitations within which contributory and supplementary funding mechanisms operate would militate against the possibility of obtaining such full and complete compensation. Where mass tort claims are involved, lump-sum compensation is generally paid, which will always account for less than full and complete payment.

45. In any case the function of any regime of allocation of loss should be to provide an incentive for those concerned with the hazardous operations to take preventive or protective measures in order to avoid damage; to compensate damage caused to any victim; and to serve an economic function, that is, internalize all the costs (externalities).⁸⁴ In fact these functions are mutually interactive. In the context of the development of a policy concerning environmental liability at the level of the European Commission, it is noted that

The prevention and remedying of environmental damage should be implemented through the furtherance of the principle according to which the polluter should pay ... One of the fundamental principles ... should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage will be held financially liable in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.⁸⁵

⁸² *Yearbook ... 1996* (see footnote 24 above), annex I, p. 112, para. (4) of the commentary to article 5.

⁸³ *Yearbook ... 2001*, vol. II (Part Two), p. 145, para. 95.

⁸⁴ La Fayette, *loc. cit.*, p. 179.

⁸⁵ *Official Journal of the European Communities* (see footnote 4 above), p. 132, para. (2) of the preamble to the Proposal for a directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage.

In addition, issues of harmonization of the law of compensation would appear to be of interest. As has been noted, “[h]armonization can be a means of avoiding conflict of laws problems, and contributes to the creation of certain shared expectations on a regional basis”.⁸⁶ Further, such a harmonization could help in “the reduction of unpredictability, complexity, and cost”⁸⁷ and balance the “interests of plaintiffs in the widest possible choice of law and jurisdiction against the interests of defendants in ordering their affairs in an environmentally responsible manner”.⁸⁸

46. During the past few years, keeping some or all of these policies in view, the liability provisions of earlier

⁸⁶ Birnie and Boyle, *International Law and the Environment*, p. 279.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, pp. 279–280.

oil pollution and nuclear accident conventions have been strengthened. New treaties or protocols on liability for hazardous and noxious substances and wastes have been adopted. There have been negotiations for a liability protocol to the Antarctic Treaty. Attempts have also been made to reach international agreement on civil liability for other potential hazards such as genetically modified organisms. From the records of these negotiations it is instructive to note that States have attempted to settle the issue of allocation of loss in most of the treaties concluded recently by relying upon civil liability. They thus established “the direct accountability of the polluter in national law as the best means of facilitating recovery of compensation . . . without having to resort to interstate claims or the complexities of the law of state responsibility”.⁸⁹ These treaties also indicate that there could be no single pattern of allocation of loss.

⁸⁹ *Ibid.*, p. 281.

CHAPTER II

Allocation of loss

A. A sectoral and regional analysis

1. INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, AND PROTOCOLS THERETO

47. The International Convention on Civil Liability for Oil Pollution Damage (hereinafter the Civil Liability Convention),⁹⁰ as amended by additional Protocols in 1976, 1984 and 1992, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (hereinafter the Fund Convention),⁹¹ with additional Protocols in 1976, 1984,⁹² and 1992,⁹³ deal with the civil liability for oil pollution damage caused by ships.⁹⁴ These are conventions concluded under the auspices of IMO. The Civil Liability Convention (1992) provides for strict but limited liability of the shipowner for pollution damage resulting from the

⁹⁰ The Civil Liability Convention entered into force on 19 June 1975.

⁹¹ The Fund Convention entered into force on 16 October 1978.

⁹² The 1984 modifications never came into force.

⁹³ For the text of the Protocols, see also Birnie and Boyle, *Basic Documents on International Law and the Environment*. Both the Protocols entered into force on 30 May 1996.

⁹⁴ In addition to these conventions, two private agreements, one entered into among shipowners, the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) (see ILM, vol. VIII, No. 3 (May 1969), p. 497) and another entered into among oil companies, the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) (*ibid.*, vol. X, No. 1 (January 1971), p. 137), institute a “voluntary” system intended to indemnify the victims of pollution, in particular the Governments which carry out actions for prevention or for rescue. These constitute an inseparable element of the system of indemnification. On TOVALOP and CRISTAL, see White, “The voluntary oil spill compensation agreements: TOVALOP and CRISTAL”.

escape or discharge of oil from a seagoing vessel actually carrying oil in bulk as cargo. These conventions also provide for a limited number of exceptions which when present would exempt the shipowner from the payment of any compensation.⁹⁵

⁹⁵ Article III, paragraph 2, of the Civil Liability Convention provides for no liability of the owner if he proves that the damage:

“(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

“(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or

“(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.”

Furthermore, article III, paragraph 3, states that “[i]f the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person”. Conversely, according to article V, paragraph 2, as amended by the 1992 Protocol, the owner cannot claim any limit to his liability as prescribed by the Protocol, “if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result” (see also article 4, paragraph 3, of the Protocol of 1992 to the Fund Convention). In the case of the Fund Convention, the Fund under article 4, paragraph 2 (a)–(b), and article 4, paragraph 3, will have no obligation to pay compensation for reasons similar to those referred to in article III, paragraph 2, and article III, paragraph 3, of the Civil Liability Convention. In addition, the Fund will also not pay according to article 4, paragraph 2 (a)–(b), if the source of oil pollution was a warship or other ship owned or operated by and used, at the time of the incident, only on government, non-commercial service; or the claimant cannot prove that the damage resulted from an incident involving one or more ships. The Fund under article 4, paragraph 3, is in any event exempt from payment of compensation to the extent that the owner is exempt. However, there is no exoneration of the Fund from paying compensation in respect of preventive (response) measures undertaken.

48. Parties to the Civil Liability Convention recognized that the shipowner might not be able in every case of oil pollution damage to meet all the claims of compensation either because his funds were limited or because owing to certain exemptions he was not liable to pay compensation or because the amount of damage claimed exceeded the limit of his liability. For that reason, IMO members in 1971 adopted the Fund Convention to provide supplementary compensation to claimants unable to obtain full compensation under the Civil Liability Convention. Contributions to the International Oil Pollution Compensation Fund (hereinafter the IOPC Fund) come from a levy on oil importers which are mainly companies receiving oil transported by sea into the territories of the States parties.

49. Under the 1992 Protocols, the shipowner's maximum limit of liability is SDR 59.7 million; thereafter the IOPC Fund is liable to compensate for further damage up to a total of SDR 135 million (including the amounts received from the owner), or in the case of damage resulting from natural phenomena, SDR 200 million.⁹⁶

50. The Civil Liability Convention defines "pollution damage", which includes the costs of preventive measures and further loss, or damage caused by preventive measures.⁹⁷ Preventive measures are defined as reasonable measures of response undertaken by any person *after* the damage occurred to prevent or minimize the damage.

51. As the definition of pollution damage in the Civil Liability Convention was too general and indeed vague on its scope, the parties to the Civil Liability Convention and the Fund Convention made an attempt in 1984 to clarify its meaning and scope. According to that definition, "pollution damage" meant:

(a) Loss or damage caused outside the ship by contamination resulting from the escape or discharge of the oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

⁹⁶ Art. V, para. 1, of the Civil Liability Convention and art. 4 of the Fund Convention, both as amended by their 1992 Protocols. Following the sinking of the *Erika* off the French coast in 1990, the maximum limit was raised to SDR 89.77 million effective 1 November 2003 (IMO, LEG 82/12, annex 2, resolution LEG.1(82)). Under 2000 amendments of the limitation amounts in the Protocol of 1992 to amend the Civil Liability Convention (*ibid.*, annex 3, resolution LEG.2(82)) to enter into force in November 2003, the amounts have been raised from SDR 135 million to SDR 203 million. If three States contributing to the Fund receive more than 600 million tons of oil per annum, the maximum amount is raised to SDR 300,740,000, from SDR 200 million.

⁹⁷ Pollution damage is defined as "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur" (art. I, para. 6). However, "pollution" and "contamination" are not defined. It is understood generally that "contamination" referred to anthropogenic introduction of substances or energy into the sea; and "pollution" referred to their deleterious effects. For a representative definition of these terms, see, for example, the United Nations Convention on the Law of the Sea. Its article 1, paragraph (4), defines "pollution of the marine environment" as "the introduction by man ... of substances or energy into the marine environment, ... which results or is likely to result in such deleterious effects". There is now an attempt to further modify this definition "to reflect the precautionary approach" (La Fayette, *loc. cit.*, p. 153, footnote 16).

(b) The costs of preventive measures and further loss of or damage caused by preventive measures.

52. This definition was designed to provide compensation for direct economic loss to persons, their property and their economic circumstances through the damage to the environment. It was thus aimed specifically to exclude liability for damage to the environment *per se*.⁹⁸ The definition could not be adopted as an amendment to the Civil Liability and Fund Conventions because of the non-participation of the United States of America. To overcome this difficulty the parties then attempted to conclude two new protocols in 1992 to both the Civil Liability and the Fund Conventions incorporating the 1984 definition of "pollution damage". Before the two Protocols came into force in 1996, an attempt was made by some claimants to rely upon this definition to claim compensation for damage to the environment *per se*. The IOPC Fund took the view that claims for impairment of the environment *per se* were not acceptable; the only acceptable ones were those involving quantifiable economic loss, measurable in monetary terms. In some cases, the Fund arrived at out-of-court settlements.⁹⁹

53. To clarify matters further, an Intersessional Working Group was established in 1993 by the IOPC Fund Assembly.¹⁰⁰ As a result of its work, the Group noted that the Fund should pay only for quantifiable economic loss, which was verifiable, and for measures that were objectively reasonable at the time they were taken.

54. With regard to the costs of reinstatement, the Intersessional Working Group noted that, in order to qualify for payment: they should be reasonable; measures undertaken should not be disproportionate to the results achieved or the results which could reasonably be expected; and the measures should be appropriate and offer a reasonable prospect of success. In respect of a specific oil spill, it also agreed that the IOPC Fund should pay the costs of scientific studies to assess the precise extent and nature of the damage to the environment and to evaluate whether measures of reinstatement were needed. Moreover, the Group recommended that the compensation should be paid for measures actually undertaken or to be undertaken. The Fund Assembly endorsed these recommendations in 1994.¹⁰¹ However, to date it appears that no claims for reinstatement have been made or paid.

⁹⁸ La Fayette, *loc. cit.*, p. 156.

⁹⁹ See the Italian claims in the 1985 *Patmos* case and the 1991 *Haven* case. In those cases, the Italian courts allowed the claims of the Government of Italy, in its capacity as a trustee for the national patrimony, for damage to the environment *per se*. For a discussion of the *Patmos* case, see Sands, *op. cit.*, pp. 663–664, and also Maffei, "The compensation for ecological damage in the 'Patmos' case". On the settlement reached by the Italian Government in the *Haven* case, see *International Oil Pollution Compensation Funds Annual Report 1999*, pp. 42–48.

¹⁰⁰ "Record of decisions of the seventeenth session of the Assembly" (FUND/A.17/35 of 21 October 1994), para. 26.1.

¹⁰¹ *Ibid.*, para. 26.8.

(a) *Oil pollution damage and the special position of the United States under the Oil Pollution Act of 1990*¹⁰²

55. The position thus developed by the IOPC Fund in its practice in respect of oil pollution damage is different from the national position of the United States. The position of the United States changed with the 1989 *Exxon Valdez* oil spill disaster that caused massive damage to the environmentally sensitive coast of Alaska.¹⁰³ The cost of the oil removal and restoration far exceeded admissible amounts under the Fund Convention. Further, as the definition of "pollution damage" which the Fund attempted to put together in 1984 did not cover damage to the environment *per se*, the United States did not join the revised Civil Liability and Fund Conventions and decided to adopt its own more stringent Oil Pollution Act of 1990.

56. There are some important differences between the Oil Pollution Act of 1990, of the United States, and the international regime.¹⁰⁴ First, liability is channelled to "any person owning, operating, or demise chartering the vessel" (sect. 2701 (32) (A)) as opposed to the shipowner; and liability applies in respect of any oil spill as opposed to only persistent oil. The liability is strict, joint and several. More limited defences were provided under the Act than under the international regime. Thus, there are only three defences: act of God, act of war, or act or omission of a third party. "Third party" is narrowly defined. Acts or omissions of a third party which has a contractual relationship with the responsible party could not be offered as a defence under the Act unless the responsible party was able to show that it had exercised due care and taken precautions against foreseeable acts or omissions. Further, even those limited defences would not be available if the responsible party had failed or had refused to report the incident or to provide reasonable assistance and cooperation in connection with removal activities necessitated by the incident or to comply with certain orders. Equally, the defence of government negligence to maintain aids to navigation like lights would not be available under the Act, while it is a defence under the international regime.

57. In addition, the operator's liability is limited. Parties responsible may offset their own clean-up costs against the liability limits. If the limit is exceeded, liability is allocated to the lessee or permittee of the area in which the activity is located, again up to a limit. The limitation could be breached in the case of the Oil Pollution Act of 1990, as in the case of the international regime, if "gross negligence or wilful misconduct of ... responsible party" (sect. 2704 (c)) is a cause of the incident. However, unlike the international regime, the limitation could also be breached if the incident is proximately caused by "the

violation of an applicable Federal safety, construction, or operating regulation" (*ibid.*) by the responsible party; or if the responsible party fails or refuses to report the incident or to provide reasonable cooperation or assistance in connection with the removal of activities or to comply with various orders. Moreover, if the limit is not breached under the Act, it does not prevent individual states of the United States to impose additional liability requirements under their state law. The international regime is governed in this regard only by the "fault or privity"¹⁰⁵ test.

58. In addition to providing a higher level of compensation,¹⁰⁶ the Oil Pollution Act of 1990 provides compensation for damage to the environment *per se*, under the heading "natural resource damages".¹⁰⁷ In case of an "observable or measurable adverse change in a natural resource or impairment of a natural resource service",¹⁰⁸ liability could result and compensation is payable for "(a) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (b) the diminution in value of those natural resources pending restoration; plus (c) the reasonable cost of assessing those damages".¹⁰⁹ These costs are recoverable by designated federal agencies, state governments, or Indian tribes as trustees for the natural resources; and in the case of damage to the environment in the territory or area under the exclusive jurisdiction and control of a foreign State, the foreign trustee.¹¹⁰

59. However, the problem of how to calculate costs of damage remained in case of both the value of the loss of resource use while it is being restored, and the value of damaged resources, where they cannot be restored and the creation of an "equivalent" environment is not possible. This is a problem not only under the United States law but also under any international regime. The lack of a generally agreed method of calculation of natural resource damage or damage to the environment *per se* is one of the reasons that compensation for these aspects of "harm" was not included in the various international regimes.

60. The only reported case on this matter is *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*.¹¹¹ Rejecting a measure based upon diminution of the market value of the damaged area, the United States Court of Appeals held that the applicable measure is

the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area

¹⁰⁵ Civil Liability Convention, art. V, para. 2.

¹⁰⁶ For the limits specified in the Oil Pollution Act of 1990, see Schoenbaum, "Environmental damages: the emerging law ...", p. 161; and Popp, *loc. cit.*, pp. 123–124. Under the Act, an initial level of compensation is payable by the responsible party; and a second level is provided by the Oil Spill Liability Trust Fund.

¹⁰⁷ There are six categories of recoverable damages under the Oil Pollution Act of 1990: natural resources, real or personal property, subsistence use, revenues, profits and earning capacity and public service. For a discussion, see Schoenbaum, "Environmental damages: the emerging law ...", p. 163.

¹⁰⁸ *Federal Register*, vol. 61, No. 4, p. 504 (5 January 1996), cited in La Fayette, *loc. cit.*, p. 151.

¹⁰⁹ *United States Code* (see footnote 102 above), sect. 2706 (d) (1).

¹¹⁰ On the role of the government trustees, see Brighton and Askman, "The role of government trustees in recovering compensation for injury to natural resources".

¹¹¹ U.S. Court of Appeals, *Federal Reporter*, 2nd ed., vol. 628 (June–November 1980), p. 652.

¹⁰² *United States Code*, title 33, chap. 40, sects. 2701 *et seq.*

¹⁰³ After the *Erika* oil spill disaster off the western coast of France in December 1999, at a working group convened at the request of France to consider possible amendments to the Civil Liability Convention/Fund regime, it was suggested that a revision of the definition of oil pollution damage was desirable. No progress, however, has been reported so far (La Fayette, *loc. cit.*, p. 159).

¹⁰⁴ For an analysis of United States laws, see Schoenbaum, "Environmental damages: the emerging law in the United States"; and Popp, "A North American perspective on liability and compensation for oil pollution caused by ships", pp. 117–124. For an analysis of the Oil Pollution Act of 1990 and the Oil Spill Liability Trust Fund, see Kende, "The United States approach".

to its preexisting condition, or as close thereto as is feasible without grossly disproportionate expenditures. The court rejected as grossly disproportionate a measure of damages based on the replacement of damaged trees and oil-contaminated sediments, approving instead a standard based upon what it would cost to purchase the biota destroyed. The court's measure of damages, then, appears to be based upon man-aided rehabilitation of the affected area within a finite period of time, considering the restorative powers of the natural environment as well as economic factors.¹¹²

(b) *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*

61. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or "Superfund")¹¹³ was passed by the United States Congress in response to severe environmental and health problems posed by the past disposal of hazardous substances. It created a comprehensive scheme for remedying the release or threatened release of a "hazardous substance"¹¹⁴ anywhere in the environment—land, air or water. The statute established a trust fund, known as the Superfund, with tax dollars to be replenished by the costs recovered from the liable parties, to pay for clean-ups if necessary. The United States Environmental Protection Agency operates the Superfund and has the broad powers to investigate contamination, select appropriate remedial actions and either order liable parties to perform the clean-up or do the work itself and recover its costs. The courts have generally held that the liability under CERCLA is strict. CERCLA provides for a limited number of defences and exceptions. It also directs that the damage assessment regulations address "both direct and indirect injury, destruction, or loss and ... take into consideration factors including, but not limited to, replacement value, use value, and the liability of the ecosystem to recover".¹¹⁵

2. INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 1996, AND INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE

62. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter the HNS Convention), also concluded under the auspices of IMO, follows the same pattern of allocation of loss as the Civil Liability and Fund Conventions. The liability of the owner is defined but limited and the loss is shared with a supplementary HNS Convention fund. Contributions to the fund come from receivers of the HNS Convention cargo or from the Governments on their behalf.

63. However, neither the Civil Liability Convention nor the HNS Convention deals with damage caused by fuel oil pollution. It is difficult to treat this type of pollution, which could have a serious impact on some countries. In response to the demands of such countries, IMO developed the International Convention on Civil Liability for

Bunker Oil Pollution Damage, 2001 (hereinafter the Bunkers Convention).

64. The text follows the model of the Civil Liability Convention and adopts the same definition of pollution damage, confining it, however, to damage caused by oil used to propel the ship and to operate equipment. The Bunkers Convention thus covers only damage by ship oil contamination and not fire or explosion. The liability is that of the shipowner and could be limited as prescribed by any insurance or other financial securities under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended, by the Protocol of 1996. No supplementary funding is envisaged.

65. Together the three Conventions, the Civil Liability Convention, the HNS Convention and the Bunkers Convention, constitute an integrated regime of liability for ship-source marine pollution.

3. CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE RESULTING FROM EXPLORATION FOR AND EXPLOITATION OF SEABED MINERAL RESOURCES

66. Following the explosion of the wildcat well off the coast of California in 1972, the international community became sensitive to the danger of pollution from the ever-increasing exploitation of offshore oil reserves. Focusing such activities in the North Sea, at the initiative of the United Kingdom of Great Britain and Northern Ireland, the coastal States of the North Sea met in London in order to negotiate a convention on liability for damage resulting from the search for and exploitation of mineral resources from the seabed. The result was the adoption of the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources.

67. The Convention provides for objective or strict liability for the operator of the installation, subject to such exceptions as are provided under the Convention (art. 3). However, the operator is entitled to limit his liability to SDR 30 million for the first five years after the opening of the Convention for signature and thereafter to SDR 40 million (art. 6). To avail itself of the limitation of liability under the Convention, the operator should have and maintain insurance or other financial security to such amount (art. 8). This cover at the discretion of the State concerned need not provide for liability for pollution damage wholly caused by an act of sabotage or terrorism. Action in respect of damage claimed could be brought either in the courts of the country in which the harm suffered or in the courts of the country which exercises exclusive sovereign rights over the maritime area in which the installation is situated (art. 11). The Convention so far has not attracted any ratifications, since at about the same time as it was under negotiation, the oil companies negotiated in parallel among themselves a liability agreement, the Offshore Pollution Liability Agreement (OPOL).¹¹⁶ Under OPOL, in the event of an incident, the operator is liable for the entirety of the damage caused. If it is insolvent, OPOL

¹¹² Schoenbaum, "Environmental damages: the emerging law ...", p. 164.

¹¹³ *United States Code*, title 42, chap. 103, sects. 9601 *et seq.*

¹¹⁴ *Ibid.*, sect. 9604 (a) (1) (A).

¹¹⁵ Brighton and Askman, *loc. cit.*, p. 184.

¹¹⁶ For the text of the Offshore Pollution Liability Agreement (London, 4 September 1974), see ILM, vol. 13 (1974), p. 1409.

assumes the liability up to the amount of US\$ 100 million, sharing the amount to be paid among the different partners.

4. REGULATIONS ON PROSPECTING AND EXPLORATION OF POLYMETALLIC NODULES IN THE AREA

68. It may be recalled that parts XI–XII as well as annex III to the United Nations Convention on the Law of the Sea deal with protection of the environment and on liability and responsibility for marine pollution.¹¹⁷ On 13 July 2000, the Assembly of the International Seabed Authority, established under the Convention, approved the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area.¹¹⁸ Some notable features of the regulations are that prospecting for polymetallic nodules cannot be undertaken if substantial evidence indicates risk of serious harm to the marine environment; and once prospecting has commenced, the Secretary-General should be notified of any incident causing serious harm to the marine environment. In addition, the operator of an exploration activity in the Area must undertake baseline studies, conduct environmental impact assessment and put in place response measures to deal with any incidents likely to cause serious harm to the marine environment. Furthermore, the operator is required to notify the Authority of any incident of serious harm and the Authority has the power to take any emergency measures at the cost of the contractor, if it does not take these measures itself. The contractor is also responsible and “liable for the actual amount of any damage, including damage to the environment, arising out of its wrongful acts or omissions” (sect. 16.1). It is also responsible and liable for the wrongful acts or omissions of all of its employees, subcontractors or agents or all other persons engaged in the activity on its behalf. This liability includes the costs of reasonable measures to prevent or limit damage to the marine environment, account being taken of any acts or omissions by the Authority.

69. It may be noted¹¹⁹ that the regulations refer to the different concepts of “serious harm” and “damage” to the marine environment. It is not made clear whether they have the same meaning. While “serious harm” is defined as “significant adverse change in the marine environment” (regulation 1, para. 3 (f)), “damage” is left undefined. Moreover, the definition of “serious harm” is incomplete, as it is dependent upon a determination to be made “according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices” (*ibid.*). Further work is therefore required of the International Seabed Authority. Left out of the liability of the operator is the obligation to meet the costs of restoration or reinstatement of the marine environment to the extent that is possible at all. This gap is a bit unexplainable, particularly since the liability of the operator is fault based. It is also clear that reference to the obligation of the operator to pay only actual costs is to confine that obligation only to

¹¹⁷ See articles 139, 145, 209, 215 and 235 and annex III, art. 22, of the Convention.

¹¹⁸ Under the Convention, “‘Area’ means the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” (art. 1, para. 1(1)).

¹¹⁹ For an analysis and comments on the regulations adopted by the International Seabed Authority, see La Fayette, *loc. cit.*, pp. 173–177.

quantifiable damages and not to extend it to speculative or theoretical calculations (following the example of the IOPC Fund).

5. PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

70. Covering the field of international transport of hazardous substances there is the recent and, of course, slightly more complex arrangement of allocation of loss and liability found in the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal. The Protocol applies to damage resulting from the transboundary movement and disposal of waste. It follows the pattern of strict but limited liability. However, the liability is not channelled to the shipper or to the importer as in the case of the Civil Liability and Fund Conventions. Instead, generators, exporters, importers and disposers are all potentially liable at different stages of the journey of the hazardous waste. While the waste is in transit, the liability would lie with the person who notifies the States concerned of the proposed movement of the waste. In such event, that will generally be either the generator or the exporter of the waste. Later, once the waste is received on the other side, the disposer of the waste is liable for any damage. Further, in case the waste is declared as hazardous only by the State of import and not export, the importer is also liable until possession is taken by the disposer.

71. Article 4 of the Protocol also covers situations when no notification is given by the notifier, and makes the exporter liable until the waste is taken into possession by the disposer. Similarly, in the case of re-import, the person who notified will be liable for damage from the time the hazardous wastes leave the disposal site until the wastes are taken into possession by the exporter, if applicable, or by the alternate disposer. By not channelling the liability to the person operationally in charge of the wastes at any given point, the Protocol appeared to have deviated from an application of the polluter-pays principle.¹²⁰

72. Article 4, paragraph 5, of the Protocol provides for exemptions of liability. These are again similar to those in the Civil Liability Convention. One additional exemption is in the case of damage being wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred. Article 4, paragraph 6, provides for the right of the claimant to seek full compensation from any or all of the persons if more than one person is involved in causing the damage.

73. Article 7 of the Protocol is also noteworthy in that, unlike in the case of the Civil Liability Convention, in respect of damage where it is not possible to distinguish between the contribution made by the wastes covered by the Protocol and wastes not covered by the Protocol, all damage will be considered to be covered by the Protocol. However, if a distinction can be made, the liability under the Protocol will be proportional to the contribution made by the wastes covered by the Protocol.

¹²⁰ See Bernasconi, *Civil Liability resulting from Transfrontier Environmental Damage: a Case for The Hague Conference?*, p. 11.

74. Damage for the purpose of the Protocol is defined in article 2, paragraph 2 (c), as:

- (a) Loss of life or personal injury;
- (b) Loss of or damage to property other than the property held by the person liable in accordance with the Protocol;
- (c) Loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;
- (d) The costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken; and
- (e) The costs of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or results from hazardous properties of the wastes involved in the transboundary movement and disposal of hazardous wastes and other wastes subject to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.

75. Further, “measures of reinstatement” are defined as “any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment”. It is left to the domestic law to determine the party entitled to take such measures (art. 2, para. 2 (d)).

76. “Preventive measures” on the other hand are “any reasonable measures taken by any person in response to an incident, to prevent, minimize, or mitigate loss or damage, or to effect environmental clean-up” (art. 2, para. 2 (e)).¹²¹

77. The right to prescribe financial limits for liability is left to the Contracting Parties under their domestic law, but the Protocol sets out the minimum levels of liability in its annex B on financial limits.

78. Article 15 of the Protocol, as read with decision V/32 on the enlargement of the scope of the Technical Cooperation Trust Fund,¹²² on an interim basis, provides for a supplementary compensation scheme when compensation under the Protocol does not cover the costs of damage, consisting of a fund established by the Conference of the Parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. It is available only to developing States or States with economies in transition.¹²³

¹²¹ The reference to costs of assessment of the damage in the definition of “reinstatement” and the expression “to effect environmental clean-up” are new compared to other previous treaties on liability. This is regarded as a progressive step in the evolution of the law. However, the lack of reference to the duty to introduce equivalent components where the original fauna and flora cannot be reinstated is regarded as a backward step. Nevertheless, in comparison with the Civil Liability Convention regime, it is felt that there is a shift towards a greater focus on damage to the environment *per se*, rather than primarily on damage to persons and to property (see La Fayette, *loc. cit.*, pp. 166–167).

¹²² Decision adopted by the Conference of the Parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal at its fifth meeting in 1999 (UNEP/CHW.5/29, annex I).

¹²³ La Fayette, *loc. cit.*, p. 167.

79. Article 13 of the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal provides for time limits for entertainment of claims of compensation. Article 17 prescribes the proper forum for adjudicating the claims of compensation, that is, the courts of a Contracting Party only where either (a) the damage was suffered; or (b) the incident occurred; or (c) the defendant has his habitual residence, or has his principal place of business. Each Contracting Party must ensure that its courts under their law have the necessary jurisdiction to entertain such claims of compensation. Article 18 deals with the avoidance of simultaneous court action in different jurisdictions involving the same subject matter and the same parties and the consolidation of related claims before one court under one jurisdiction to avoid the risk of irreconcilable judgements from separate proceedings. There is also a provision in article 21 of the Protocol, subject to certain exceptions including public policy, for mutual recognition and enforcement of judgements of a court of competent jurisdiction in other jurisdictions, subject to compliance with the local formalities but without reopening the merits of the case.

80. The other main features of the Protocol are:

- (a) Additional fault-based liability is placed on any person whose failure to comply with laws implementing the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, or whose wrongful, intentional, reckless or negligent acts or omissions caused the damage;

- (b) There is a right of recourse against any other person liable under the Protocol, or under a contract, or under the law of the competent court;

- (c) Insurance and other guarantees are compulsory;

- (d) The provisions of the Protocol do not affect rights and obligations and claims under general international law with respect to State responsibility;

- (e) Pursuant to article 3, the Protocol applies to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic, from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of State of export (art. 3);

- (f) Under the same article 3, the application of the Protocol is excluded in several cases, for example, depending upon whether a State of export or import alone is a party, or when both of them are not parties, or when the provisions of another bilateral or regional or multi-lateral agreement which is in force apply to liability and compensation for damage caused by an incident arising during the same portion of a transboundary movement.

6. NUCLEAR DAMAGE AND LIABILITY

81. Nuclear liability is covered by several conventions. Mention may be made of the Convention on third party liability in the field of nuclear energy (as amended in 1964 and 1982), concluded under the auspices of the

European Nuclear Energy Agency and OECD. The Convention supplementary to the above-mentioned Convention, the Vienna Convention on civil liability for nuclear damage (as amended by a Protocol in 1997), and the Convention on Supplementary Compensation for Nuclear Damage may also be noted. These conventions basically establish the operator's liability as a first tier, which is fixed and limited. Supplementary compensation through funds to be established by the State in which the installation is situated is provided as the second tier. In addition to these two tiers, a third tier of compensation is also provided whereby all the Contracting Parties pool the costs of more major accidents on an equitable basis. Article V, paragraph 2, of the Vienna Convention, as amended by the Protocol of 1997, sets SDR 5 million as the lowest level of possible liability. A State could fix under its law a similar lowest possible limit under article 7 (b) of the Convention on third party liability (as amended in the 1982 Protocol (sect. I)).

82. However, under the Convention on third party liability in the field of nuclear energy, any compensation payable for damage caused to the means of transportation on which the nuclear installations were located at the time of the incident (art. 7 (c), as amended in the 1982 Protocol (sect. J)) or payments towards any interest or costs awarded by a court in actions for compensation (art. 7 (g)) would not affect the minimum payable compensation by the liable operator. The minimum limit of liability is also not affected in such cases under the amended Vienna Convention on civil liability for nuclear damage (arts. IV, para. 6, and V A, para. 1). Further, under article 1 A, paragraph 1, of the amended Vienna Convention, like the Convention on third party liability (art. 7 (d)), the liability of this operator liability would apply to nuclear damage wherever suffered.¹²⁴ This is an improvement in the case of the Vienna Convention over its earlier position.

83. While the installation State is given the liberty to set a lower limit of liability, under the amended Vienna Convention on civil liability for nuclear damage it is under an obligation to make good the difference by ensuring the availability of the public funds up to the amount established in article 7, paragraph 1. Thereunder:

The "liability of the operator may be limited by the Installation State for any one nuclear incident, either:

(a) to not less than 300 million SDRs; or

(b) to not less than 150 million SDRs provided that in excess of that amount and up to at least 300 million SDRs public funds shall be made available by that State to compensate nuclear damage; or

¹²⁴ However, an installation State can exclude the application of the Vienna Convention to damage suffered in the territory of a non-contracting State if that State has a nuclear installation in its territory or in any maritime zone established in accordance with international law of the sea and does not afford equivalent and reciprocal benefits. This exclusion does not affect the rights, under article IX, paragraph 2 (a), of persons seeking compensation in a situation where part of the damage occurred in one of the contracting States and the jurisdiction to deal with the claims of compensation rests with the courts of that State. Similarly, this does not affect the right of persons to seek compensation for damage on board or to a ship or an aircraft within the maritime zones of a non-contracting State.

(c) for a maximum of 15 years from the date of entry into force of this Protocol, to a transitional amount of not less than 100 million SDRs in respect of a nuclear incident occurring within that period. An amount lower than 100 million SDRs may be established, provided that public funds shall be made available by that State to compensate nuclear damage between that lesser amount and 100 million SDRs.

84. These limits of liability of the operators are far higher than the limits set earlier under the Vienna Convention on civil liability for nuclear damage (US\$ 5 million) and under the Convention on third party liability in the field of nuclear energy (only SDR 15 million (art. 7 (b))).

85. Over and above the sums of SDR 300 million or for a transition period of 10 years, a transitional amount of SDR 150 million is to be assured by the installation State. The Convention on Supplementary Compensation for Nuclear Damage provides under article III for an additional sum of compensation to be made available from the public funds of all the other Contracting Parties in accordance with a formula specified by article IV of the Convention. This could exceed US\$ 1 billion. There is one limitation on eligibility to qualify for the additional compensation: it is only open to States that are parties to the Convention on nuclear safety.¹²⁵

86. The amended Vienna Convention on civil liability for nuclear damage makes the operator's liability absolute. Exemption from liability, however, is given if the damage is attributable to an armed conflict, hostilities, civil war or insurrection. In case the operator can prove that the resulting damage is wholly or partly attributable to gross negligence of the person suffering the damage or to an act or omission of such a person done with the intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered.

87. In addition, there are time limits within which claims for compensation may be submitted (art. VI). The operator is required to maintain insurance and other financial security (art. VII). A right of recourse for the operator is accorded (art. X). Article XI deals with the jurisdiction of the court to entertain compensation claims. This is generally the court of the Contracting Party within whose territory the nuclear incident occurred. In case of any difficulty in determining the place of occurrence of the nuclear incident, jurisdiction for the incident will lie with the courts of the installation State of the liable operator. Where the incident occurred partly outside the territory of any Contracting Party and partly within the territory of a single Contracting Party, the jurisdiction will lie with the courts of the single Contracting Party. Where the jurisdiction would lie with the courts of more than one Contracting Party, the case should be settled by mutual agreement between the parties. In any case it must

¹²⁵ In order to make the benefits of the Convention on Supplementary Compensation for Nuclear Damage widely available to States, participation is not confined to the Vienna Convention on civil liability for nuclear damage, but is also open to States parties to the Convention on third party liability in the field of nuclear energy, and to any State not party to either Convention if its law conforms to the same basic principles of liability for nuclear accidents (arts. XVIII–XIX). The requirements which must be met by non-parties to the above-mentioned Conventions are set out in an annex.

be ensured that the courts of only one of the contracting States have jurisdiction to deal with compensation claims for any one nuclear incident.

88. Nuclear damage is defined on the same lines as the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal. Compensation for damage to the environment *per se* is not included. However, all the heads of damage are clearly set out. These include damage to persons or property and five other heads of damage, subject to the determination as admissible by the law of the competent court. They are: economic loss arising from the loss of life or any personal injury or loss of or damage to property; the costs of measures of reinstatement of the impaired environment; loss of income derived from an economic interest in any use or enjoyment of the environment incurred as a result of a significant impairment of the environment; the costs of preventive measures and further loss of damage caused by such measures; and any other economic loss, if permitted by the general law on civil liability of the competent court.

89. The amended Vienna Convention on civil liability for nuclear damage also defines “[m]easures of reinstatement”, “[p]reventive measures” and “[r]easonable measures”. Measures of reinstatement are reasonable measures approved by competent authorities of the State in which the measures were taken. They are aimed at reinstatement, the restoration of damaged or destroyed components of the environment or introduction, where reasonable, of the equivalent of those components into the environment authorized. Furthermore, only persons entitled under the law of the State in which the damage is suffered may take these measures. Qualifications requiring the approval of the competent authorities of the State concerned and law of the State are introduced to ward off overreactions and unnecessary precautions and are aimed at preventing excessive claims.

90. Preventive measures are any reasonable measures taken by any person after the nuclear incident to prevent or minimize damage. These measures may be taken only after the approval of the competent authorities of the State, if required by its law.

91. Reasonable measures are those measures found under the law of the competent court to be appropriate and proportionate, having regard to all the circumstances, for example, whether they are proportional to the magnitude and nature of the damage or risk of damage involved or whether they are likely to be effective or whether they are consistent with relevant scientific and technical expertise.

7. CONVENTION ON CIVIL LIABILITY FOR DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT

92. The Council of Europe’s Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, known as the Lugano Convention,¹²⁶ does not cover damage caused by nuclear substances or

¹²⁶ The Convention has not yet entered into force (see footnote 4 above).

the transport of dangerous goods or substances.¹²⁷ Its scope extends only to stationary activities, including the disposal of hazardous waste. It defines “[d]angerous activity” as one involving the production, culture, handling, storage, use, discharge, destruction, disposal, release of substances or preparation or operation of installations or sites for deposit or recycling or disposal of wastes posing significant risk for “man, the environment or property” (art. 2, para. 1 (b)) including substances listed in an annex, and genetically modified organisms.¹²⁸

93. The Lugano Convention imposes a strict liability for dangerous activities or substances on the operator of the activity in question. However, liability is not limited in amount and thus reflects the polluter-pays principle in a rather strict manner. Damage is widely defined and covers the impairment of the environment, as well as injury to persons and property. For this purpose, the environment is broadly defined and includes natural resources, cultural heritage property and “characteristic aspects of the landscape” (art. 2, para. 10). However, apart from loss of profit, recovery of compensation for impairment is limited to the costs of reasonable measures of prevention and reinstatement actually undertaken and to be undertaken.¹²⁹

¹²⁷ The Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), concluded under the auspices of UNECE, covers this aspect. It sets out objective liability in article 5 and contains very limited exoneration. The liability is channelled towards the transporter and its limits are set out in article 9. The Convention applies the main principles of the Civil Liability Convention regime to damage and deliberately replicates the 1984 definition of pollution damage. Thus, it focuses on damage to persons and property through damage to the environment and provides compensation for the cost of preventive measures and reasonable measures of reinstatement, which is undefined. There is joint and several liability in case damage is caused in the course of the operations of the loading and unloading of the goods. The transporter is also under an obligation to cover his liability by insurance or by any other form of financial guarantee (art. 13). Although no supplementary funding is contemplated under the Convention, a contracting State may avail itself of a reservation for the purpose of applying higher limits of liability or no limit on liability for damage arising from accidents taking place on its territory. There is one limitation under the Convention: it is applicable only if the damage caused by an event in the territory of one of the States parties and if its victims are also within the territory of that State. In other words, transboundary harm attributable to the event is not covered. For this reason the Convention has not found much favour so far with many of the States and has received no ratifications and remains without entry into force. Germany and Morocco are the only signatories to date.

¹²⁸ A genetically modified organism is defined as “any organism in which the genetic material has been altered in a way which does not occur naturally by mating and/or natural recombination” (art. 2, para. 3). However, this does not include genetically modified organisms obtained by mutagenesis, on condition that the genetic modification does not involve the use of genetically modified organisms as recipient organisms, and plants obtained by cell fusion (including protoplast fusion) on a similar condition.

¹²⁹ The limitation of recovery of costs to reasonable measures of prevention and reinstatement is also found in the Convention on Supplementary Compensation for Nuclear Damage. However, the difference is that under that Convention, it is for the State in whose territory the measures are to be taken to decide what those measures are. Under the formula noted here as well as in some other conventions, it may be for the courts to ultimately decide what constitutes reasonable measures. One guidance is that “abstract calculations of damages or claims concerning unquantifiable elements of damage to the marine environment ... will be inadmissible” (Brans, “Liability and compensation for natural resource damage under the international oil pollution conventions”, p. 301). A more authoritative guidance on this issue has come from the UNCC Panel of Commissioners regarding

94. Reinstatement includes the introduction “where reasonable” (art. 2, para. 8) of the equivalent of destroyed or damaged elements of the environment, for example, where exact restoration is impossible.

95. Possible defences to liability include war, hostilities, exceptional and irresistible natural phenomena, an act of a third party, compliance with a specific order or compulsory measure of a public authority or damage “caused by pollution at tolerable levels under local relevant circumstances; or ... dangerous activity taken lawfully in the interests of the person who suffered the damage”.¹³⁰ Limitations of time for submission of claims include three years from the time the claimant knew or ought to have known of the damage, which however should not be later than 30 years from the date of the accident. Compulsory insurance or other financial security assures the liability of the operator. Jurisdiction is based on the provisions of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

8. LIABILITY AND COMPENSATION: THE EUROPEAN COMMUNITY MODEL

96. The Commission of the European Communities has been studying the question of liability and compensation for environmental damage with a view to submitting a proposal to the European Parliament and the Council of the European Union (EU). The aim is to facilitate the adoption of EU legislation on strict environmental liability by 2003.¹³¹ After extensive consultations and debate in relevant quarters, the Commission finalized a proposal for a directive on environmental liability.¹³² The draft directive does not include within its scope personal damage and damage to goods covered by traditional damage.¹³³ It also

compensation claims by Governments for monitoring and assessment activities undertaken to identify and evaluate environmental and natural resource damage suffered as a result of Iraq's invasion and occupation of Kuwait. The Panel found that conclusive proof of environmental damage was not a prerequisite for monitoring and assessment activity to be compensable. While such activities which are “purely theoretical or speculative”, or which only have a tenuous connection with the damage resulting from the invasion and occupation would not be compensable, the Panel considered the reasonableness of the monitoring and assessment activities on a case-by-case basis. Furthermore, a recommendation of a monitoring and assessment study does not in any way prejudge the merits of a substantive claim based on such a study (Kazazi, “Environmental damage in the practice of the UN Compensation Commission”, pp. 128–129).

¹³⁰ Art. 8 of the Lugano Convention.

¹³¹ It is noted that action at the European Community level is needed to effectively and efficiently address site contamination and loss of biodiversity because: (a) there are some 300,000 sites which are definitely or potentially contaminated; (b) partial clean-up costs are estimated at between €55 and €106 billion; (c) not all member States have enacted national legislation, and most national legislation has not mandated national authorities to ensure clean-up of orphan sites; and (d) without a harmonized framework at the Community level economic actors could exploit differences in member States' approaches to engaging in the artificial legal constructions in the hope of avoiding liability. For the text, see “Impact assessment form” (COM(2002) 17 final) (footnote 4 above), pp. 55–56.

¹³² A list of different interests consulted can be found in COM(2002) 17 final (see footnote 4 above), annex (Public consultation), pp. 24–26. For a summary of their views, see pages 26–31.

¹³³ See article 3, paragraph 8 (*ibid.*, pp. 39–40). An earlier White Paper recommended otherwise. The following reasons were cited for the evolution of the view: they are out of place in a scheme which is aimed at achieving ambitious environmental objectives and

exempts from its scope liability and compensation regulated by other civil liability conventions noted in article 3, paragraph 3, of the draft, and the nuclear risks or environmental damage or imminent threat of such damage as may be caused by the operation of the activities covered by the treaty establishing IAEA or damage or an incident or activity in respect of which liability or compensation is regulated by civil liability agreements noted in article 3, paragraph 4. In addition, the activities the sole purpose of which is to serve national defence are also exempted from the scope (art. 3, para. 7). Further, any environmental damage or an imminent threat of such damage caused by pollution of a widespread, diffuse character, where it is impossible to establish a causal link between the damage and the activities of certain individual operators, is also excluded from the scope (art. 3, para. 6).

97. The proposal adopts the principle of strict but *not limited liability*¹³⁴ for damage arising from any of the occupational activities posing a potential or actual risk to man and the environment listed in annex I to the draft.¹³⁵ The liability is placed on the operator who has caused the damage or who is faced with the imminent threat of such damage. This is in accordance with the polluter-pays principle, which is at the root of the European Community environmental policy (art. 174, para. 2, of the Treaty establishing the European Community). The operator is also liable to compensate the (reasonable) costs of prevention and restoration, including the costs of assessment both in the case of environmental damage and in the case of an imminent threat of such damage.¹³⁶

98. Article 16 does not impose strict financial security and guarantee requirements on the operators, but only encourages them to acquire them for the discharge of their liability. It is believed that this does not create any disadvantage, as the risks to be covered by the regime are more easily calculable and manageable. In addition it is felt that flexibility is necessary for the first years of its implementation, since a number of novelties are present in the regime for insurers and other financial providers.¹³⁷

implementing to a meaningful extent the polluter-pays and preventive principles; traditional damage can only be covered by civil liability; and further reflection is needed to harmonize various sectoral international initiatives and evolving international civil liability instruments supplementing international environmental agreements (*ibid.*, pp. 16–17).

¹³⁴ An evaluation of the possibility of introducing limited liability according to the proposal should be undertaken within three years after the entry into force of the directive (see COM(2002) 17 final (footnote 4 above), annex III, p. 54). The question of limited liability also figures in connection with insurability of risk associated with the damage and compensation. However, limits have advantages and disadvantages. Lowered limits would improve insurability but would reduce compliance costs and hence deterrence. The proposal, on the other hand, gives the member States the choice to set up limited financial assurance requirements at the time of its implementation (*ibid.*, p. 9).

¹³⁵ *Ibid.*, p. 48. Occupational activities cover non-profit making activities as well as activities carried out by public enterprises or bodies (*ibid.*, p. 29).

¹³⁶ Art. 7 (*ibid.*, p. 42). The article does not refer to reasonable costs, as has been found in the case of several other conventions. But it is assumed that that limitation would be inherent in the principle. See Brans, “The EC White Paper on environmental liability and the recovery of damages for injury to public natural resources”, p. 328, footnote 22.

¹³⁷ COM(2002) 17 final (see footnote 4 above), p. 17.

99. However, under article 8, in the case of biodiversity¹³⁸ damage or imminent threat of such damage from the operation of any occupational activities other than those listed in annex I, the operator is not liable if it is not established that he is not at fault or negligent.¹³⁹ Nevertheless, he would be responsible, under article 10, to bear any costs relating to preventive measures which he was required to take as matter of course.

100. "Damage" is defined as "a measurable adverse change in a natural resource and/or measurable impairment of a natural resource service which may occur directly or indirectly" (art. 2, para. 1 (5)).

101. "Environmental damage" means biodiversity damage, water damage and land damage (*ibid.*, para. 1 (18)). "Natural resource" for this purpose "means biodiversity, water and soil, including subsoil" (*ibid.*, para. 1 (8)).

102. When the preventive or restorative measures are taken by the competent authorities or by a third party on its behalf, the cost should be recovered from the operator, within a period of five years. "Preventive measures" are defined as "any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage" (*ibid.*, para. 1 (12)). Furthermore, "'restoration' means any action, or combination of actions, to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services" (*ibid.*, para. 1 (16)) which includes primary restoration or natural recovery and compensatory restoration or restoration done in a different location from that in which the relevant natural resources and/or services have been damaged and action taken to compensate for interim losses.¹⁴⁰

¹³⁸ *Ibid.*, art. 2, para. 1 (2), p. 36. "Biodiversity" is defined in the proposal with reference to earlier European Community directives or as habitats and species, not covered by those directives for which areas of protection or conservation have been designated pursuant to the relevant national legislation. It is noted that the definition of "biological diversity" in article 2 of the Convention on biological diversity cannot be considered suitable for this purpose and for the purpose of liability to be attached to genetically modified organisms. That Convention's definition goes beyond the idea of habitats and species and covers "variability among living organisms". Such an approach, according to the proposal, raised delicate questions as to how such damage would be quantified and what the threshold of damage entailing liability would be. This comment was noted without prejudice to the future possibilities concerning the issue in the context of the implementation of that Convention and its Cartagena Protocol on Biosafety (*ibid.*, pp. 17–18).

¹³⁹ *Ibid.*, p. 42. The Commission's proposal to exclude traditional heads of damage and to limit the definition of biodiversity damage by reference to protected species and habitats is criticized. According to one comment, it "severely limits the relevance of and applicability of the proposed regime to any damage caused by GMOs [genetically modified organisms]" (Mackenzie, "Environmental damage and genetically modified organisms", p. 75).

¹⁴⁰ It is suggested that "when natural resource damage occurs the restoration purpose set in the proposal is to achieve equivalent solutions rather than replicate, irrespective of the cost, the situation pre-incident" (COM(2002) 17 final (see footnote 4 above), p. 7). It is considered that restoration costs can generally be estimated more accurately and easily than the value of the injured natural resources. See *Ohio v. Department of the Interior* (880 F2d 432 (D.C. Cir 1989)), cited in Brans, "The EC White Paper ...", p. 331. See also Mazzotta, Opaluch and Grigalunas, "Natural resource damage assessment: the role of resource restoration", p. 167. Annex II to the proposal elaborates on reasonable restorative options and urges the competent authority to evaluate the restorative

103. The operator is allowed under article 9 certain defences against claims of liability. These include events beyond his control, such as armed conflicts, hostilities, civil wars or insurrections, and natural phenomena of exceptional, inevitable and irresistible character. Other grounds for exemption from liability include: specific emissions or events allowed in applicable law or in the permit or authorization issued to the operator; or emissions or activities which were not considered at the time of their release, or activity harmful according to available scientific and technical knowledge, provided the operator is not negligent; damage intentionally caused by a third party; compliance with the rules and regulations emanating from public authorities;¹⁴¹ and where the operator, acting in the capacity as an insolvency practitioner, acted in accordance with relevant national provisions and is not at fault or negligent.

104. Under article 6, member States are required to put in place financial resources to ensure that the necessary preventive or restorative measures are taken in situations, without prejudice to the liability of the operator, where such liability cannot be put to use. This could happen in such cases as when the operator cannot be identified, his funds are not adequate or are insufficient to meet any or all necessary preventive or restorative measures or he is not required under the proposed directive to bear the costs of such measures. Detailed arrangements are, however, left to the States.

105. Provision is also made for qualified entities such as public interest groups and NGOs to be given special status to ensure the good functioning of the system, given the absence of proprietary interest with respect, for example, to biodiversity. In case of imminent threat of, or of actual damage to the environment, persons affected or qualified entities would be entitled to request that the competent authority take action under certain conditions and circumstances.

106. The scheme proposed is subject to periodic review on the basis of reports to be submitted by member States to the Commission of the European Communities indicating the experience gained, so that the Commission might assess the impact of the regime on sustainable development and whether review is appropriate.

options against several criteria: (a) the effect of each of the options on public health and safety; (b) the cost to carry out the option; (c) the likelihood of success of each option; (d) the extent to which each option will prevent future damage and avoid collateral damage as a result of implementing the option; and (e) the extent to which each option benefits each component of the natural resource and/or service. If several options are likely to deliver the same value, the least costly one should be preferred. Among other things, the competent authority should also invite the comments of the persons on whose land the restorative measures are to be carried out and give them necessary consideration (COM(2002) 17 final (see footnote 4 above), pp. 52–53). In its approach the proposal thus appears to be similar to the approach adopted in the United States under the natural resources damage assessment that accompanied CERCLA. For an analysis of this, see Brans, "The EC White Paper ...", pp. 331–334.

¹⁴¹ However, regulatory compliance, that is, compliance with permit or authorization, is not a defence (COM(2002) 17 final (see footnote 4 above), p. 29).

9. DAMAGE CAUSED BY SPACE OBJECTS

107. The Convention on international liability for damage caused by space objects is the only existing convention with State liability, as opposed to civil liability.¹⁴² It places absolute liability on the “launching State” (art. I (c)), which is defined as: (a) a State which launches or procures the launching of a space object; and (b) a State from whose territory a space object is launched. The launching State is liable for the damage caused by its space objects on the surface of the earth or to aircraft in flight. The term damage refers to loss of life, personal injury or other impairment of health; or loss or damage to property of the States or of persons, natural or juridical, or property of international organizations.

108. There is only one case of damage attributable to space activity which attracted the provisions of the Convention on international liability for damage caused by space objects.¹⁴³ On 24 January 1978, a Soviet satellite powered by a small nuclear reactor disintegrated over the Canadian Northwest Territories. Canada claimed compensation for damage caused by the radioactive fragments of the satellite pursuant to the Convention, and to the general principles of international law. No specific damage occurred.

109. However, Canada spent Can\$ 13,970,143.66 to locate, remove and to test the widely scattered pieces of satellite on the frozen Arctic terrain. It was Canada’s argument that the clean-up costs and the prevention of potential hazard to State territory and its inhabitants should be deemed to have been included in the concept of damage to property under the Convention on international liability for damage caused by space objects. Claims under general international law were made with abundant caution. The aim of the Canadian expenditure was to assess the damage, to limit the existing damage, to minimize the risk of further damage and to restore the environment to the condition which existed before the incident. After extended negotiations, the Soviet Union agreed to pay about half the amount claimed by Canada as the cost of clean-up operations.

110. The Canadian interpretation of the Convention on international liability for damage caused by space objects, however, was endorsed by the General Assembly in its resolution 47/68 of 14 December 1992, “Principles Relevant to the Use of Nuclear Power Sources in Outer Space”. Principle 9 deals with liability and compensation. While paragraph 1 applies the principle to damage caused by space objects with a nuclear power source on board, paragraph 3 declares that “compensation shall include reimbursement of the duly substantiated expenses for search, recovery and clean-up operations, including expenses for assistance received from third parties”. This could be treated as an authoritative interpretation of the concept of “damage” under the Convention. It is argued that this precedent should be generalized further for the concept of “damage” under that “Convention to include the cost of removing space object debris and of

reinstating the environment which it has impacted to the condition in which it would have been had the damage not occurred”.¹⁴⁴

10. ACTIVITIES IN ANTARCTICA

111. Negotiations are also proceeding, albeit not so successfully, on the question of concluding one or more annexes relating to liability for damage arising from the activities in Antarctica covered by the Protocol on Environmental Protection to the Antarctic Treaty concluded in Madrid in 1991. This Protocol suspended the earlier Convention on the Regulation of Antarctic Mineral Resource Activities concluded by the States parties to the Antarctic Treaty. Article 7 of the Protocol prohibits any activity relating to mineral resources. Article 16 further provides for the development by States parties of one or more annexes concerning liability.

112. Initially the effort to develop a liability regime proceeded in a group of legal experts and was later continued in meetings of the parties. Several issues have been under consideration with some specific proposals addressing such questions as scope of application, the definition of damage (which, it was suggested should be “significant and lasting”¹⁴⁵), standard of liability, exemptions and limits, quantum of damages, duty to take measures of response and restoration, State responsibility and dispute settlement.¹⁴⁶ However, it was not possible to achieve agreement on these questions. There was also no enthusiasm for accepting the liability of a State when not acting as operator, except in narrowly defined circumstances.

113. One of the controversial issues is whether the operator should be liable for damage that was identified and accepted in a comprehensive environmental evaluation (referred to as CEE in the discussions). As the discussions stand at present,¹⁴⁷ they are focusing more on protection and preservation of the fragile Antarctic environment and on emergency response measures. Traditional damage to persons and property covered by the normal tort law of liability is not in focus. The last Antarctic Treaty Consultative Meeting, held at St Petersburg, Russian Federation, on 9–20 July 2001, discussed a more restricted annex proposed by the United States on liability for failure to take emergency response measures.¹⁴⁸ The scope of the proposal does not cover damage caused by gradual or chronic pollution, or degradation. There is a general reluctance to develop a comprehensive liability convention.

¹⁴⁴ *Ibid.*, p. 173.

¹⁴⁵ *Ibid.*, p. 179.

¹⁴⁶ For a mention of the discussion on these issues at an earlier stage, see the second report by Mr. P. S. Rao, *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/501, p. 124, paras. 61–63.

¹⁴⁷ For the most recent update on the liability discussions in the context of Antarctica, see La Fayette, *loc. cit.*, pp. 177–181. On the lack of progress, the Antarctic and Southern Ocean Coalition (ASOC), an NGO, expressed serious concern. For some specific proposals and comments on the most recent draft pending for consideration at the next Antarctic Treaty Consultative Meeting in Madrid in 2003, see ASOC, “Information Paper 77, Liability”, agenda item 8, available at www.asoc.org.

¹⁴⁸ Antarctic Treaty, *Final Report of the Twenty-fourth Antarctic Treaty Consultative Meeting*, part II, annex B, decision 3 (2001).

¹⁴² The Convention entered into force on 1 September 1972.

¹⁴³ For a recent account of the incident, see La Fayette, *loc. cit.*, p. 172.

B. Models of allocation of loss: some common features

114. The various models of allocation of loss that have been observed generally share some common features. They confirm that State liability is an exception and has been accepted in the sole case of outer space activities. Liability in the case of damage which is not nominal or negligible, but more than appreciable or demonstrable is channelled,¹⁴⁹ in the case of stationary operations, to the operator of the installation. Other possibilities exist. In the case of ships it is channelled to the owner, not the operator. This means that charterers—who may be the actual operators—are not liable under the Civil Liability Convention. Under the Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and their Disposal, waste generators, exporters, importers and disposers are all potentially liable at different stages in the transit of waste. The real underlying principle is not that “operators” are always liable, but that the party with the most effective control of the risk at the time of the accident is made primarily liable.

115. The liability of the person in control of the activity is strict or absolute in the case of hazardous or dangerous activities. This is justified as a necessary recognition of the polluter-pays principle.¹⁵⁰ It must be added quickly that the polluter-pays principle more often than not begs the question, who is the polluter? This is answered by

¹⁴⁹ According to Goldie, the nuclear liability conventions initiated the new trend of channelling liability back to the “operator, no matter how long the chain of causation, nor how novel the intervening factors (other than a very limited number of exculpatory ones)” (Goldie, “Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk”, p. 196). On this point see also the same author, “Liability for damage and the progressive development of international law”, pp. 1215–1218.

¹⁵⁰ Goldie asserted that the

“crux of responsibility in this area of strict liability lies in the requirement that ultrahazardous activities should pay their way, to the extent that socially accepted ideas of distributive justice demand compensation for the denial of personal security, property or amenities rights through the infliction of injury by the operations of an enterprise. That is, risk-creating enterprises should not, despite philosophical, ethical and even factual problems of identifying causation, be entitled to pass the cost of their interferences with socially accepted amenities onto potential victims.”

(“Concepts of strict and absolute liability ...”, pp. 189–190)

On the difference between strict and absolute liability, the same author notes his clarification that absolute liability is a form of “‘stricter than strict’ liability” (*ibid.*, p. 195). He explained that

“exculpatory rules which the courts have developed to mitigate the rigour of the defendant’s liability under *Rylands v. Fletcher* (and those which have been evolved in jurisdictions recognizing the alternative doctrine of ultrahazardous activities) render the adjective ‘absolute’ something of a misnomer; hence the phrase ‘strict liability’ has come to be preferred in the usages of the common law. On the other hand, in this article the term ‘absolute liability’ has been revived ... to indicate that a more rigorous form of liability than that usually labelled ‘strict’ is now before us, especially in the international arena.”

(*ibid.*, p. 194).

It is noted that nearly eight exceptions could apply to the absolute liability rule enunciated by *Rylands v. Fletcher* (*ibid.*, p. 196, footnote 50). For the case, see *The Law Reports, English and Irish Appeal Cases before the House of Lords*, vol. III (1868), p. 330.

different schemes of allocation of loss in different ways depending upon the circumstances.¹⁵¹ Thus the present internationally agreed scheme of liability and compensation for oil pollution treats both the ship’s owner and the cargo owner as sharing the responsibility. In the case of nuclear accidents in Western Europe, the uninsured risks are borne first by the State in which the installation is situated and then, above a certain level, by a compensation fund to which the participating Governments contribute in proportion to their installed nuclear capacity and GNP. Here the basic principle is not one of making the polluter pay but of an equitable sharing of the risk, with a large element of State subsidy.

116. The example of management of risk arising from nuclear installations in East European States is even more interesting. Some West European Governments representing a large group of potential victims of any accident have funded the work needed to improve the safety standards. The riparian States of the Rhine have also adopted a similar approach to persuade France to reduce pollution from its potassium mines.

117. Strict liability is recognized in several jurisdictions around the world in all the legal systems.¹⁵² Hence it is open to regard it either as a general principle of international law or in any case as a measure of progressive development of international law.¹⁵³ In the case of activities which are not dangerous but still carry the risk of

¹⁵¹ Birnie and Boyle, *International Law and the Environment*, p. 94, give examples of different ways of allocation of loss. The authors note that in such cases “what matters is *how* the responsibility is shared, and how the compensation is funded: asking who the polluter is will not answer these questions, nor will it do so in other complex transactions such as the carriage of hazardous wastes”. See also the first report by Mr. P. S. Rao, *Yearbook ... 1998* (footnote 24 above), pp. 193–194, paras. 73–86, and in particular para. 84, and footnote 107 for other examples of sharing the risk and loss.

¹⁵² Strict liability has been favoured to regulate environmental liability by Denmark, Finland, Germany, Luxembourg, Norway and Sweden (see Jones, *loc. cit.*, p. 16). According to a study commissioned by the European Commission in connection with the Proposal for a directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (see footnote 4 above), by 1995, 40 states in the United States had instituted strict liability provisions for the cost of clean-up of contaminated sites threatening human health and ecological systems. This is in addition to the 1980 federal legislation CERCLA. See Austin and Alberini, “An analysis of the preventive effect of environmental liability—environmental liability, location and emissions substitution: evidence from the Toxic Release Inventory”, p. 3. See also the earlier references to the study of Arsanjani, “No-fault liability from the perspective of the general principles of law”, cited in Mr. Barboza’s second report, *Yearbook ... 1986* (see footnote 33 above), p. 159, footnote 61; and in Handl, “State liability for accidental transnational environmental damage by private persons”, p. 551. “[I]t should be permissible to proceed on the assumption that strict liability for abnormally dangerous activities exists as a principle of present general international law” (*ibid.*, p. 553).

¹⁵³ See the caution of the 1996 Working Group on international liability for injurious consequences arising out of acts not prohibited by international law earlier to regard no-fault liability as a general principle of international law (*Yearbook ... 1996* (footnote 24 above), annex I, p. 102). Goldie appears to share the caution of the Commission. After reviewing some justifications and theories in favour of strict liability, he stated that “[i]n so far as these theories provide a rationale for requiring strict enterprise liability for products and operations, they have received only a very limited acceptance in the world’s legal systems”. Accordingly, “their reception by international law would undoubtedly reflect actions in terms of ‘progressive development’” (“Concepts of strict and absolute liability ...”, p. 210).

causing significant harm, there perhaps is a better case for liability to be linked to fault or negligence.

118. Where the liability is based on strict liability, it is also usual to limit the liability to amounts that would be generally insurable. Otherwise, if a compensation fund did not exist, the channelling of strict liability, for example, to the oil tank owner alone, disregarding the owners of oil cargo, would not be reasonable or sustainable. Under most of the schemes which provide for limited but strict liability, the operator is obliged to obtain insurance and such other suitable financial securities to take advantage of the scheme.

119. The scheme of limited liability is open to criticism as not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits are set too low, it could even become a licence to pollute or cause injury to others and externalize the real costs of the operator. It is also felt that it may not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury.¹⁵⁴ It is argued that fault-based liability, on balance, is not unlikely to better serve the interests of the innocent victims and that it is worth retaining as an option for liability. It is not unusual that in the case of fault liability the victim is given an opportunity to have liberal recourse to rules of evidence and inference. By reversing the burden of proof, the operator may be required to prove that he has taken all the care expected of a reasonable and prudent person proportional to the risk of the operation.¹⁵⁵

120. Most liability regimes concerning dangerous activities provide for additional funding sources to meet the claims of damage and in particular to meet the costs of response and restoration measures that are essential to contain the damage and to restore value to affected natural resources and public amenities.

121. The additional sources of funding are created out of two different accounts. The first derives from the public funds and part of the national budget. In other words, the State takes a share in the allocation of loss created by the damage. The other share, however, is allocated to a common pool of funds created by contributions either

from operators of the same type of dangerous activities or from entities for whose direct benefit the dangerous or hazardous activity is carried out. It is not often explicitly stated which pool of funds—the one created by operators or by the beneficiaries, or by the State—would, on a priority basis, provide the relief after the liability limits of the operator had been exhausted. In the case of restoration and response measures, it is even stipulated that a State or any other public agency which steps in to undertake such measures could subsequently recover the costs of such operations from the operator.

C. Some elements of civil liability

122. To understand fully the scheme of civil liability, which focuses on the liability of the operator, some of its elements may be noted.

123. The principal judicial means for obtaining reparation for damage resulting from transfrontier harm, in common law, are based on different theories. Nuisance, which refers to excessive and unreasonable hindrance to the private utilization or enjoyment of real property, provides one such basis. Trespass, which is the cause of action for direct and immediate physical intrusion into the immovable property of another person, is another. Negligence and the rule of objective liability stated in the *Rylands v. Fletcher* case¹⁵⁶ have also been the basis for several claims in common law. In addition, the doctrine of public trust (State, as a trustee of natural resources) and that of riparian rights (rights of owners of property bordering a watercourse) also provide a basis for seeking remedies for such damage.¹⁵⁷ Similarly in a civil law system, the obligation to repair a transfrontier damage may above all flow from neighbourhood law (duty of owner of a property or installation, especially one carrying industrial activities, to abstain from any excesses which may be detrimental to the neighbour's property), from a special rule of liability for damage to the environment, or still further from the general principles governing civil liability (burden of proof; strict liability with exoneration in the case of damage due to an independent cause such as accident or *force majeure*).¹⁵⁸

124. The various legal bases for seeking remedies noted above in turn give rise to other legal issues.

1. THE PROBLEM OF CAUSATION

125. The principle of causation is linked to questions of foreseeability and proximity or direct loss. It is noted that a negligence claim could be brought to recover compensation for injury to land if the plaintiff establishes that: (a) the defendant owed a duty to the plaintiff to conform to a specified standard of care; (b) the defendant breached that duty; (c) the defendant's breach of duty proximately caused the injury to the plaintiff; and (d) the plaintiff suffered damage. Further, certain types of environmental

¹⁵⁴ The point was made that given the limits imposed upon liability in many recent conventions, which is essentially for economic reasons, "it is useful to return to fundamental tort theories which the regulations have avoided: actions based on responsibility for fault" (Kiss and Shelton, *International Environmental Law*, p. 375). See also Boyle, "Making the polluter pay? ...", p. 365, where he noted that the principle of strict liability for all its promise "may not meet these transboundary costs in full". He noted further that although less onerous than strict liability, "responsibility for a failure of due diligence may in practice entail a more extensive obligation of reparation" (p. 366).

¹⁵⁵ Jones, *loc. cit.*, p. 22. The author noted: "If there is something about environmental damage cases ... which makes it particularly problematic for plaintiffs to demonstrate fault there may well be a good argument for altering ordinary civil liability rules so as to reverse the onus of proof". He also pointed out that "ultimately the difference between fault-based liability and strict liability may not be as great as may sometimes be suggested or imagined. A regime even of strict liability may contain within its particulars a number of defences enabling a defendant to avoid liability in certain situations. Moreover, even where liability remains fault-based experience suggests that there may be opportunities for judges to rule that the fault threshold has been satisfied on relatively little, or none too grave, evidence".

¹⁵⁶ See footnote 150 above.

¹⁵⁷ For a discussion of the various grounds under the common law, see Schoenbaum, "Environmental damages in the common law: an overview".

¹⁵⁸ For a survey of various national positions on these aspects or bases of liability, see Bernasconi, *op. cit.*, pp. 16–26.

degradation, such as contamination by hazardous substances, may give rise to strict liability under the common law doctrine of *Rylands v. Fletcher*.¹⁵⁹ In the *Cambridge Water* case,¹⁶⁰ the House of Lords held that the principle of foreseeability applied not only to actions in negligence and nuisance, but also to *Rylands v. Fletcher* actions. According to Schoenbaum, actions in common law could adequately cover various claims of transboundary harm involving, for example, “air pollution, water pollution, soil and groundwater contamination, wetland degradation, and releases of toxic substances”. However, he adds that common law is still deficient “in the definition and measurement of damages”.¹⁶¹

126. Courts in different countries have applied the principle and notions of proximate cause, adequate causation, foreseeability, and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different countries have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *conditio sine qua non* theory over the foreseeability (“adequacy”) test to a less stringent causation test requiring only the “reasonable imputation” of damage. Further, the foreseeability test could become less and less important with the progress made in medicine, biology, biochemistry, statistics and other relevant fields. Given these reasons, it is suggested that it would seem difficult to include such tests in a more general analytical model on loss allocation.¹⁶²

2. DISCHARGE OF DUTY OF CARE

127. The discharge of duty of care prescribed by law would involve proof of fault or negligence or strict liability. It would also involve determinations of whether the conduct is lawful, reasonable or excessive. However, proof of fault on the part of the injured party is not required for the application of the neighbourhood law under the civil law system. All that is needed is to show that the harm resulting from the particular conduct exceeded the limits of tolerance that neighbours owe each other. The test for determining the excess involved is that of a reasonable person of average sensitivity.

128. Further, under article 684 of the Swiss Civil Code, which provides for no-fault application of the neighbourhood law, it is immaterial whether the activity which produced the excessive harm is lawful or not. An additional difficult question concerns the value and recognition to be given to a permit of authorization granted by a country to an activity within its territory which produced excessively harmful effects in the neighbouring country. The problem in such a case might revolve around the law that is deemed applicable. A choice has to be made between the law of the State of authorization and the law of the State where the injury occurred. Different answers are

¹⁵⁹ See footnote 150 above.

¹⁶⁰ *Cambridge Water Co. v. Eastern Counties Leather plc*, *The Law Reports*, Appeal Cases (1994), No. 2, p. 264 (House of Lords).

¹⁶¹ Schoenbaum, “Environmental damages in the common law ...”, p. 215.

¹⁶² See Wetterstein, “A proprietary or possessory interest: a *conditio sine qua non* for claiming damages for environmental impairment?”, p. 40.

possible depending upon the particular policy favoured. For example, the law of the State of authorization would be favoured if primacy were given to foreign rule and the link between that rule and the situation which caused the damage and the need to enforce the decision in the country of authorization. On the other hand, the law of the injured State would be favoured if the emphasis were placed on the need to comply with some minimum substantive standards while granting authorization, and the due respect to be given to the law of the State where the injury was produced. Once again, no particular solution is widely favoured.¹⁶³

129. Under common law, liability for nuisance is modulated by the principle of mutual accommodation between two neighbouring landowners. The conflict in uses is judged according to whether or not the interference is reasonable. There could be an overlap between actions for nuisance and negligence¹⁶⁴ and as between nuisance and trespass,¹⁶⁵ but the legal bases on which such claims are judged are different. Furthermore, while in the United Kingdom strict liability is treated as a special application of the nuisance doctrine, in United States practice, the doctrine is distinct from nuisance and is more an application of the polluter-pays principle.¹⁶⁶

3. DEFINITION OF DAMAGE AND COMPENSATION

130. Even if a causal link is established, there may be difficult questions regarding claims eligible for compensation, such as for economic loss, pain and suffering, permanent disability, loss of amenities or of consortium, as well as those based on an evaluation of the injury. Similarly, a damage to a property, which could be repaired or replaced, could be compensated on the basis of the value of the repair or replacement. However, it is difficult to compensate damage caused to objects of historical or cultural value, except on the basis of arbitrary evaluations made on a case-by-case basis. Further, the looser and less concrete the link with the property which has been damaged, the less certain that the right to compensation exists. A question has also arisen as to whether a pure economic loss involving a loss of the right of an individual to enjoy a public facility, but not involving a direct personal loss or injury to a proprietary interest, qualifies for compensation.¹⁶⁷ Pure economic losses such as the losses suffered by a hotel, for example, are payable in Sweden and in Finland, but not in some other jurisdictions.¹⁶⁸

(a) *Damage to the environment per se or natural resources*

131. The analysis of various schemes of allocation of loss above has revealed that in general there is no support

¹⁶³ See Bernasconi, *op. cit.*, pp. 41–44.

¹⁶⁴ Schoenbaum, “Environmental damages in the common law ...”, p. 214, footnote 5.

¹⁶⁵ Bernasconi, *op. cit.*, p. 17.

¹⁶⁶ Schoenbaum, “Environmental damages in the common law ...”, p. 214, footnote 6.

¹⁶⁷ Wetterstein, “A proprietary or possessory interest ...”, p. 32.

¹⁶⁸ Dunné, “Liability for pure economic loss—rule or exception? A comparatist’s view of the civil law: common law split on compensation of non-physical damage in tort law”, cited in Bernasconi, *op. cit.*, p. 24, footnote 108.

for accepting liability for damage to the environment *per se*. This limitation is, however, partially remedied if there is damage to persons or property as a result of damage to the environment. Further, in the case of damage to natural resources or the environment, there is also agreement to provide for the right of compensation or reimbursement for costs incurred by way of reasonable or, in some cases, the approved or authorized preventive or responsive measures of restoration or reinstatement. This is further limited in the case of some conventions to measures *actually* undertaken, excluding loss of profit from the impairment of the environment.¹⁶⁹ Some countries, such as Canada, Denmark, Finland, France, Italy, Norway, the United Kingdom, the United States, and to some extent Germany, have special legislation relying upon strict liability for this purpose.¹⁷⁰ The reasonableness criterion is also included in many international treaties. Several have also included a definition of damage and, in particular, specification of measures of reinstatement eligible for compensation. "Reasonableness" is defined in some cases as those measures which are found in the law of the competent court to be appropriate and proportionate, having regard to all the circumstances.¹⁷¹

132. The aim is not to restore or return the environment to its original state, but to enable it to maintain its permanent functions. In the process it is not expected that expenditures will be incurred which are disproportionate to the results desired, and such costs should be cost-effective. Subject to these considerations, if restoration or reinstatement of the environment is not possible, it is reasonable to introduce the equivalent of those components into the environment.¹⁷²

¹⁶⁹ See the Lugano Convention and other conventions referred to above.

¹⁷⁰ See Wetterstein, "A proprietary or possessory interest ...", pp. 47–48. On CERCLA and the Oil Pollution Act of 1990 of the United States, see paragraphs 55–61 above. Also for an analysis of same as well as for a brief review of the treatment of environmental protection in the national laws of different countries emphasizing some of the differences that exist in those national approaches, see Bernasconi, *op. cit.*, pp. 20–25. In the case of France, the French courts have interpreted article 1384 of the Civil Code, which originally dealt with only exceptional cases of liability for damage caused by things like animals or buildings, to mean liability without fault. However, the Russian Federation provides for fault liability. On the question of computation of damages, the Russian Federation provides for fixed rates of indemnities, attributing to different natural items an abstract and arbitrary value, taking into consideration their ecological and commercial importance. Where they are not prescribed, costs for restoring the environment would be taken into consideration in order to determine the money damages.

¹⁷¹ The Protocol to amend the Vienna Convention on civil liability for nuclear damage (art. 2, para. 4) refers to such factors as: (a) the nature and extent of damage incurred or, in the case of preventive measures, the nature and extent of the risk of such damage; (b) the extent to which such measures are likely to be effective; and (c) the relevant scientific and technical expertise. The United States Court of Appeals, in *Commonwealth of Puerto Rico v. S. S. Zoe Colocotroni* (see footnote 111 above), "stated that the determination of whether costs of reinstatement were reasonable depended on factors such as technical feasibility of the restoration, the ability of the ecosystem to recover naturally, and the expenditures necessary to rehabilitate the affected environment" (Wetterstein, "A proprietary or possessory interest ...", p. 47, footnote 94).

¹⁷² For an analysis of the definition of the environment and the compensable elements of damage to the environment, see Mr. Barboza's eleventh report, *Yearbook ... 1995* (footnote 80 above), pp. 53–59, paras. 3–37, especially para. 28. For an interesting account of the problem of damage, definition of harm, adverse effects and damage valuation, see Fitzmaurice, *loc. cit.*, pp. 225–232.

(b) Measuring damages

133. The *Amoco Cadiz* case (1978)¹⁷³ illustrated the approach of courts with regard to measuring damages in the case of harm to the environment. France and other injured parties brought a claim to the United States District Court in respect of the oil tanker spill which had caused extensive damage to the coast of Brittany. A claim was not filed under the Civil Liability and Fund Conventions because France was not a party to the Fund Convention at the time of the accident. Further, the amount of compensation allowable under the Civil Liability Convention was too low (about 77 million French francs or one tenth of the amount claimed), and it was felt that it would be difficult to persuade the French court to find fault and privity and hold the owner liable. Moreover, it was uncertain whether a French judgement could be enforced against a Liberian shell company with no assets in France. It was furthermore unlikely that the parent company, the Standard Oil Company of Indiana, would freely agree to bear the liability.¹⁷⁴ The plaintiffs claimed US\$ 2.2 billion as compensation for: (a) clean-up operations by public employees; (b) gifts made by local communities, and the time of volunteers; (c) costs of material and equipment purchased for the clean-up; (d) costs of using public buildings; (e) coastline and harbour restoration; (f) lost enjoyment; (g) lost reputation and public image of the towns; (h) individual claims; and (i) ecological harm.

134. The United States District Court awarded only US\$ 85.2 million. This covered costs for clean-up operations by public employees, including their travel costs; costs of material and equipment less the residual value of the purchased items, provided the acquisition was reasonable and the equipment was actually used and the residual value could be proved; costs of using the public buildings; and several individual claims including the claims of hotels, restaurants, campsites and other businesses applying as a general rule the loss of income for one year. Claims for lost enjoyment and a claim by the Departmental Union of Family Associations were rejected on the ground that the French law did not recognize them.

135. On the ecological harm, the United States District Court did not award compensation for injury to biomass, the totality of life in the sea and on the bottom in the affected zone, deeming the claim to be complex, attenuated, speculative and based on a chain of assumptions. The Court also felt that the damage was to "*res nullius*", for which no one had a standing to claim compensation. It furthermore felt that compensation for damage to ecosystems was covered by compensation to fishermen and fishing associations based on the reduction in their catches and their resultant profits. On the other hand, the Court allowed expenses incurred by the French Government to reintroduce species which had suffered from the pollution and its consequences.

¹⁷³ U.S. Court of Appeals, 654 F2d 1279 (7th Cir 1992). For an account of the case, see Kiss and Shelton, *op. cit.*, pp. 355–356.

¹⁷⁴ See, for an account, Fontaine, "The French experience—'Tanio' and 'Amoco Cadiz' incidents compared: advantages for victims under the compensation system established by the international conventions", p. 103.

136. In the end, the *Amoco Cadiz* experience did not prove very beneficial to the victims. The litigation lasted 13 years and the plaintiffs had to offer burdensome proof, resulting in a substantial reduction of the claim of the State and an overwhelming reduction in the claims of the communes. In the end, the Breton communities were awarded barely one tenth of the amount claimed.

137. The *Amoco Cadiz* experience appeared to have only highlighted the importance of an institutionalized compensation mechanism.¹⁷⁵ A case for comparison arose with the *Tanio* incident, which also resulted in pollution of the Brittany coast and took place only two years after the *Amoco Cadiz* incident, on 7 March 1980. By that time, the Fund Convention had come into force. Nearly 100 claimants presented claims to the IOPC Fund, totalling FF 527 million. To adhere to the policy of the Fund, no claim for environmental damage was filed. The French State's claim related to expenses for pumping oil from the sunken ship, for clean-up operations and restoration and for the amounts paid by the State to private parties to compensate for their loss. The claim was for about double the amount available under the Civil Liability Convention and the Fund, that is FF 244 million of which FF 22 million represented the shipowners' limitation fund.

138. After negotiations, in accordance with an agreement reached, the amount payable was determined at FF 348 million, resulting in a payment of nearly 70 per cent of that amount, within three to five years of the incident.

4. STANDING TO SUE

139. Standing to sue is based generally on proprietary right, or a legally protected right, and in the case of harm to a public facility, it is reserved to a governmental authority.¹⁷⁶ A further common-law cause of action is the public trust doctrine, which finds greater application in the United States. By virtue of that doctrine, the State holds title to certain natural resources in trust for the benefit of its citizens. It exists in United States law as a licence that allows the State, and even private citizens, to intervene to protect wildlife and natural resources.¹⁷⁷ This capability is strengthened by the Oil Pollution Act of 1990 as well as other laws which currently provide for the recovery of natural resource damages: the Federal Water Pollution Control Act (or Clean Water Act);¹⁷⁸ and CERCLA. As noted above, under these Acts, designated trustees may bring claims for natural resource damages. Under the Norwegian scheme, private organizations and societies have the right to claim restoration costs.¹⁷⁹ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters gives standing to NGOs to act on behalf of public environmental interests. Article 2, paragraph 5, holds that the public affected or likely to be affected by, or having

an interest in, environmental decision-making shall be deemed to have an interest.

140. The proposal for a directive of the European Commission (see paragraphs 96–106 above) also provides to certain recognized NGOs the right to sue in case of environmental damage.

5. PROPER JURISDICTION

141. With respect to the question of the proper jurisdiction to settle claims of compensation, it could be found either in the State of the injured or of the victim or in the courts of the State within the territory of which the activity producing harmful consequences is situated. State practice in these matters is not uniform. The doctrine of *forum non conveniens* comes into play, for example, in the United States and it is left to the courts to decide which is the best forum. There is some presumption under United States law in favour of not disturbing the choice of the plaintiff, but this is not uniformly applied.¹⁸⁰

142. The principle of giving the plaintiff the choice of the forum to litigate claims concerning transboundary harm appeared to have a better reception under the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. In the *Handelskwekerij G. J. Bier BV. v. Mines de Potasse d'Alsace S.A.* case¹⁸¹, the Court of Justice of the European Communities held that article 5, paragraph 3, of the Convention, which conferred jurisdiction in matters relating to "tort, delict or quasi-delict, in the courts for the place where the harmful event occurred", should be interpreted to mean that the choice of the forum between the State in which the harm was suffered and the State in which the harmful activity was situated was left to the plaintiff. Accordingly, the Court noted that the article should be read to encompass both locations, the choice in a given case to be made in the interest of the plaintiff. In the instant case the matter was therefore returned to the Rotterdam court for a decision on the merits. That court had initially declined jurisdiction in the case, in the matter of the pollution of the Rhine by a defendant company situated in France. The company (Mines de Potasse d'Alsace S.A.) had discharged over 10,000 tons of chloride every 24 hours into the Rhine river in France and the damage had been suffered by horticultural businesses in the Netherlands. The Netherlands plaintiffs wished to bring the suit in the Netherlands rather than in France.¹⁸²

143. In the *Oceanic Sun* case,¹⁸³ the High Court of Australia retained harassment as the standard against which to judge inconvenience to the defendant. One commentator noted that that would make it difficult for Australian residents and companies to escape local jurisdiction if they were taken to court in Australia by a foreign plaintiff. He argued that the Court's approach provided "an incentive for companies based in Australia to

¹⁷⁵ *Ibid.*, p. 104, and for the details on the *Tanio* incident.

¹⁷⁶ Wetterstein, "A proprietary or possessory interest ...", pp. 30–32.

¹⁷⁷ See Schoenbaum, "Environmental damages in the common law ...", p. 216, footnote 30.

¹⁷⁸ *United States Code*, title 33, chap. 26, sects. 1251 *et seq.*

¹⁷⁹ Wetterstein, "Environmental damage in the legal systems of the Nordic countries and Germany", pp. 237 and 242.

¹⁸⁰ See Kiss and Shelton, *op. cit.*, p. 365, footnote 37.

¹⁸¹ Case 21/76, Court of Justice of the European Communities, *Reports of Cases before the Court*, 1976, No. 8 (Luxembourg), p. 1735. See also Sands, *op. cit.*, p. 160.

¹⁸² Sands, *op. cit.*, p. 160.

¹⁸³ *Oceanic Sun Line Special Shipping Company Inc v. Fay*, *Commonwealth Law Reports*, vol. 165 (1988), p. 197.

adopt similar industrial safety and environmental standards in their overseas activities as they are required to domestically".¹⁸⁴ Two years after the *Oceanic Sun* decision, the Court affirmed a stricter test in *Voth v. Manildra Flour Mills Pty Ltd.*¹⁸⁵ In that case, the Court argued that an Australian court would need to be "clearly inappropriate" before a stay on *forum non conveniens* grounds could be granted to a defendant. The relatively successful resolution of the *Ok Tedi Mining Ltd. case, Dagi and Others v. BHP*, hinged on Australia's approach to *forum non conveniens*.¹⁸⁶

144. The environmental effects of the *Ok Tedi* mine and the highly publicized lawsuit brought against the mine operators redefined a whole range of issues pertaining to mineral resource extraction. Participation in the process of litigation represented a turning point for the mining industry, the State, non-traditional stakeholders, local and foreign NGOs (and academics). The *Ok Tedi* case involved environmental damage allegedly caused by Ok Tedi Mining Limited, a 60 per cent subsidiary of BHP (Broken Hill Proprietary Company), a major Australian mining corporation, in its operations in the Ok Tedi and Fly River systems of Papua New Guinea.

145. As at Bougainville where RTZ-CRA had a copper mine, *Ok Tedi* involved the disposal of mine waste into neighbouring river systems with catastrophic environmental and social consequences. In both cases, the Government of Papua New Guinea did its utmost to disenfranchise the locals. Australia had approved the Bougainville mine while Papua New Guinea was still a mandated protectorate, and after Bougainville turned to armed rebellion the mine closed in 1989, leaving a huge mess. While Bougainville had resulted in armed rebellion and the forced closure of the mine, the *Ok Tedi* case was resolved more or less peacefully through the willingness of an Australian court to hear the case. The case provides an important example of choice of law in relation to transboundary harm.

146. In the *Ok Tedi* case, as the Papua New Guinea Government had largely denied local villagers access to domestic justice, recourse was had to the Supreme Court of Victoria, Australia, where BHP was based. Test cases were initiated by four writs against BHP lodged in Melbourne, in the names of Rex Dagi, John Shackles, Baat Ambetu and Alex Maun (representing three clans numbering 73 people) and Daru Fish Supplies Pty Ltd (a commercial fishing company). Thereafter writs for the balance of 500 clans' claims were lodged in the National Court of Papua New Guinea. At all times, BHP contended that it acted legally with authorization from the Government of Papua New Guinea and by virtue of the various leases and licences issued to the defendants.

¹⁸⁴ Prince, "Bhopal, Bougainville and OK Tedi: why Australia's *forum non conveniens* approach is better", p. 574.

¹⁸⁵ *Voth v. Manildra Flour Mills Pty Ltd* (1990), *Commonwealth Law Reports*, vol. 538, p. 171.

¹⁸⁶ *Dagi and Others v. The Broken Hill Proprietary Company Ltd. and Another*, Supreme Court of Victoria, Judgement of 22 September 1995 (Judge: Byrne J.), *Victorian Reports* (1997), No. 1, p. 428. An excellent summation of the case and its repercussions can be found in Hunt, "Opposition to mining projects by indigenous peoples and special interest groups", paras. 94 *et seq.*

147. The Supreme Court of Victoria recognized that "[a]t common law, a court will refuse to entertain a claim which essentially concerns rights, whether possessory or proprietary, to or over foreign land in the sense that those rights are the foundation or gravamen of the claim".¹⁸⁷ Therefore Judge Byrne ruled that the claim for damages and other relief founded on trespass by the defendants could not be entertained in Victoria. However, he also ruled that the claim for negligence for damage *other* than to land could proceed. Judge Byrne concluded that the basis of the plaintiffs' cause of action in negligence was the plaintiffs' loss of amenity or enjoyment of the land. He ruled that that was not based on a possessory or proprietary right to the land.

148. Following *Oceanic Sun* and *Voth v. Manildra Flour Mills Pty Ltd*, BHP did not argue that the court should decline jurisdiction on the grounds of *forum non conveniens*. This meant that BHP could not escape the application of Australian legal standards in its mining operations. The resulting negotiated settlement applied higher Australian environmental standards to determine appropriate remedial action by BHP and other compensation: this included \$A 400 million for construction of a tailings containment system and up to \$A 150 million compensation for environmental damage.¹⁸⁸ There have been some subsequent issues in relation to the process and settlement, but the judgement nonetheless demonstrates that the law can be used effectively in such cases, particularly when political considerations in lesser-developed resource-rich nations make local redress difficult. The matter returned to court in 1997, however, in proceedings which echoed the sentiment of article 2 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and demonstrated an ongoing "liberalization in terms of the recognition of new forms of compensable harm".¹⁸⁹

149. The Australian "clearly inappropriate forum"¹⁹⁰ position in *Ok Tedi* can be contrasted with the United States and (then) British "most suitable forum"¹⁹¹ approaches, which in the United States is largely based on the *Piper Aircraft* case.¹⁹²

¹⁸⁷ *Victorian Reports* (see footnote 186 above), p. 429.

¹⁸⁸ Prince, *loc. cit.*, p. 595.

¹⁸⁹ Bowman, "Biodiversity, intrinsic value, and the definition and valuation of environmental harm", p. 42. See also *Dagi and Others v. BHP* (footnote 186 above), cited in Bowman, *loc. cit.*, footnote 5.

¹⁹⁰ See footnote 185 above.

¹⁹¹ Prince, *loc. cit.*, p. 574.

¹⁹² *Piper Aircraft Co. v. Reyno*, 454 US 235 (1981). Through reference to the Bhopal litigation (among others), Prince stated that the United States approach openly discriminates in favour of local litigants by placing unfair obstacles in the way of foreign plaintiffs wishing to sue United States companies in the United States. In contrast with a positive view of the Australian situation in *Ok Tedi*, it can be seen that foreign environmental damage cases have done much to create the perception that United States law allows its multinationals to avoid United States legal standards when operating overseas. Prince argued that an Australian approach to Bhopal would have made it very difficult for a court to accept that a parent company should not accept some or all of the responsibility for the Bhopal disaster. Obviously, complex issues would have remained had the case stayed in the United States, such as to what extent a parent company should be held liable for a foreign subsidiary, but it is also likely that a far fairer result would have been achieved (Prince, *loc. cit.*, pp. 580 and 595).

CHAPTER III

Summation and submissions for consideration

150. A review of the civil liability system makes it clear that the legal issues involved are complex and can be resolved only in the context of the merits of a specific case. Such resolution also would depend upon the jurisdiction in which the case is taken up and the applicable law. It is possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, but no general conclusions can be drawn with regard to the system of civil liability. Such an exercise, if at all considered desirable, would properly belong to forums concerned with the harmonization and progressive development of private international law.

151. Similarly, various recent and well-established models of liability and compensation schemes have also been reviewed. These models make one point very clear. They demonstrate that States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss. While the schemes do show common elements, they also show that each scheme is tailor-made for its own context. It does not follow that in every case that duty is best discharged by negotiating a liability convention, still less one based on any particular set of elements. The duty could equally well be discharged, if it is considered appropriate, as in European Community law, by allowing forum shopping and letting the plaintiff sue in the most favourable jurisdiction, or by negotiating an *ad hoc* settlement, as in the Bhopal litigation.

152. Further, given the need to give States sufficient flexibility to develop schemes of liability to suit their particular needs, the model of allocation of loss that the Commission might wish to endorse should be both general and residuary in character.

153. In developing this model, and taking into consideration some of the earlier work of the Commission on the topic, the following submissions are made for appropriate consideration:

(a) Any regime that may be recommended should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. The model of allocation of loss to different actors in case of transboundary harm need not be based on any system of liability, such as strict or fault liability;

(b) The Commission may endorse the recommendation of its 2002 Working Group¹⁹³ that any such regime should be without prejudice to claims under international law and in particular the law of State responsibility;

(c) The scope of the topic for the purpose of the present scheme of allocation should be the same as the one adopted for the draft articles on prevention of transboundary harm from hazardous activities. It is clear from the survey of the various schemes of liability and

compensation that they all endorsed some threshold or other as a basis for the application of the regime. Accordingly, it is suggested that the same threshold of significant harm as defined and agreed in the context of the above-mentioned draft articles should be adopted. It is neither efficient nor desirable to reopen discussion on this point;

(d) The various models of liability and compensation have also confirmed that State liability is an exception and is accepted only in the case of outer space activities. Accordingly liability and obligation to compensate should be first placed at the doorstep of the person most in control of the activity at the time the accident or incident occurred. Thus, it need not always be the operator of an installation or a risk-bearing activity;

(e) The liability of the person in command and control of the hazardous activity could ensue once the harm caused could reasonably be traced to the activity in question. It must be noted that there are views to the effect that liability should be dependent upon strict proof of the causal connection between the harm and the activity. Given the complicated nature of the hazardous activities, both scientifically and technologically, and the transboundary character of the harm involved, it is believed that the test of reasonableness should better serve the purpose. The test of reasonableness, however, can be overridden, for example, on the ground that the harm might be the result of more than one source; or on the ground that there is intervention of other causes, beyond the control of the person in command and control, but for which the harm could not have occurred;

(f) Where the harm is caused by more than one activity and could be reasonably traced to each one of them, but cannot be separated with any degree of certainty, the liability could either be joint and several¹⁹⁴ or could be equitably apportioned. Or this option could be left to States to decide in accordance with their national law and practice;

(g) The limited liability should be supplemented by additional funding mechanisms. Such funds may be developed out of contribution from the principal beneficiaries of the activity or from the same class of operators or from earmarked State funds;

¹⁹⁴ For a discussion on joint and several liability, see Bergkamp, *op. cit.*, pp. 298–306. This is generally imposed in situations where a joint action by defendants or action in concert is responsible for the damage. It is also imposed in cases where independent action of two or more defendants causes single indivisible injury. Another possibility is where such independent action causes “practically” indivisible injury. It is also imposed in case of a single or two independent actions causing a different proportion of injury which together amounts to one single injury. In the author’s view, “joint and several liability should be imposed only in a limited number of situations. Joint and several liability rules should be used sparsely because they carry with them a number of disadvantages, including unfairness, ‘over-deterrence’, problems of insurability, uncertainty, and high administrative cost” (*ibid.*, p. 306). The industry generally dislikes the idea and the victims equally generally favour it. Therefore some balance is required.

¹⁹³ See footnote 3 above.

(h) The State, in addition to the obligation to earmark national funds, should also take responsibility to design suitable schemes specific to address problems concerning transboundary harm. Such schemes could address protection of its citizens against possible risk of transboundary harm; prevention of such harm from spilling over or spreading to other States on account of activities within its territory, institution of contingency and other measures of preparedness; and putting in place necessary measures of response, once such harm occurred;

(i) The State should also ensure that recourse is available within its legal system, in accordance with evolving international standards,¹⁹⁵ for equitable and expeditious compensation and relief to victims of transboundary harm;

¹⁹⁵ The need to evolve remedies for transnational harm in accordance with international standards was the subject of draft articles on remedies for transboundary damage in international watercourses, discussed at the Sixty-seventh Conference of the International Law Association in 1996 (see Cuperus and Boyle, "Articles on private law remedies for transboundary damage in international watercourses"). See also Hohmann, "Articles on cross-media pollution resulting from the use of the waters of an international drainage basin". For the discussion, see International Law Association, *Report of the Sixty-seventh Conference, Helsinki, 12–17 August 1996*, pp. 419–425.

(j) The definition of damage eligible for compensation as has been seen above is not a well-settled matter. Damage to persons and property is generally compensable. Damage to the environment or natural resources within the jurisdiction or in areas under the control of a State is now well accepted. However, compensation in such a case is limited to costs actually incurred on account of prevention or response measures as well as measures of restoration. Such measures must be reasonable or authorized by the State or provided for under its laws or regulations or adjudged as such by a court of law. Costs could be regarded as reasonable if they are proportional to the results achieved or achievable in the light of available scientific knowledge and technological means. Where actual restoration of the damaged environment or natural resources is not possible, costs incurred to introduce equivalent elements could be reimbursed;

(k) Damage to the environment *per se*, not resulting in any direct loss to proprietary or possessory interests of individuals or the State, is not considered a fit case for compensation. Similarly, loss of profits and tourism on account of environmental damage is not likely to get compensated.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 7]

DOCUMENT A/CN.4/532

First report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur

[Original: English]
[26 March 2003]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	105
Works cited in the present report	106
	<i>Paragraphs</i>
INTRODUCTION.....	1–2 106
<i>Chapter</i>	
I. EARLIER WORK OF THE COMMISSION ON THE TOPIC	3–11 107
II. SCOPE OF THE PRESENT STUDY	12–34 109
Article 1. Scope of the present draft articles	34 115
Article 2. Use of term	34 115
III. GENERAL PRINCIPLES RELATING TO RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS.....	35–39 115
Article 3. General principles	39 116

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	<i>Source</i>
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Introduction

1. After the completion by the International Law Commission of its second reading of the draft articles on responsibility of States for internationally wrongful acts, the General Assembly, in its resolution 56/82 of 12 December 2001, recommended that the Commission take up the subject of responsibility of international organizations.¹ During its fifty-fourth session in 2002, the Commission decided to include the topic “Responsibility of international organizations” in its current programme of work.² The present writer was appointed Special Rapporteur and a working group was established.³ The Working

Group on the responsibility of international organizations in its report⁴ briefly considered the scope of the topic, the relations between the new project and the draft articles on responsibility of States for internationally wrongful acts, questions of attribution, issues relating to the responsibility of Member States for conduct that is attributed to an international organization, and questions relating to content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.⁵

2. The present report first surveys the previous work of the Commission relating to the responsibility of international organizations. It then discusses the scope of the work to be undertaken. Finally, it attempts to set out general principles concerning responsibility of international organizations, dealing with issues that correspond to those that were considered in chapter I (General principles, arts. 1–3) of the draft articles on responsibility of States for internationally wrongful acts.⁶

¹ The draft articles on responsibility of States for internationally wrongful acts are reproduced in *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76. The text of the articles with the related commentaries may also be found in *ibid.*, p. 30, para. 77.

² *Yearbook ... 2002*, vol. II (Part Two), p. 93, para. 461. Two years earlier, the Commission had included the topic in its long-term programme of work, *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729. The Commission’s report then included an illustration of the topic by Mr. Alain Pellet (*ibid.*, annex, sect. 1, pp. 135–140).

³ The Working Group was composed of Mr. G. Gaja (Chairman), Mr. J. C. Baena Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. M. Kamto, Mr. J. L. Kateka, Mr. M. Koskeniemi, Mr. W. Mansfield, Mr. B. Simma, Mr. P. Tomka, Mr. C. Yamada and Mr. V. Kuznetsov (*ex officio*) (*Yearbook ... 2002* (see footnote 2 above), p. 10, para. 10 (b)).

⁴ *Ibid.*, pp. 93–96, paras. 465–488.

⁵ *Ibid.*, p. 93, para. 464.

⁶ *Yearbook ... 2001* (see footnote 1 above).

CHAPTER I

Earlier work of the Commission on the topic

3. Responsibility of international organizations was identified in 1963 as a special question that deserved the attention of the Commission. This was in Mr. Abdullah El-Erian's first report on relations between States and intergovernmental organizations. He also noted that "[t]he continuous increase of the scope of activities of international organizations [was] likely to give new dimensions to the problem of responsibility of international organizations".⁷

4. In the same year, a Sub-Committee on State Responsibility, which discussed the scope of the study that eventually led to the draft articles on responsibility of States for internationally wrongful acts, concluded that "the question of the responsibility of other subjects of international law, such as international organizations, should be left aside".⁸ Several members of the Sub-Committee had expressed the view that consideration of the topic should be postponed.⁹ The same view was then voiced by other members of the Commission in the plenary.¹⁰ Thus, Mr. Ago, who had been appointed Special Rapporteur on State responsibility, could state in his first report on State responsibility that:

The Sub-Committee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.¹¹

5. While issues relating to the responsibility of international organizations were not generally considered in the draft articles on State responsibility that the Commission adopted on first reading, two provisions concerning attribution of conduct referred to international organizations. One of them dealt with the case of an international organization placing one of its organs at the disposal of a State. Article 9 stated:

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.¹²

⁷ *Yearbook ... 1963*, vol. II, document A/CN.4/161 and Add.1, p. 184, para. 172.

⁸ *Ibid.*, annex I, document A/CN.4/152, report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, p. 228, footnote 2.

⁹ *Ibid.*, appendix I, interventions by Messrs. de Luna (p. 229), Ago (pp. 229 and 234), Tunkin (p. 233) and Yasseen (p. 235). While practical considerations were given great weight, Mr. Ago also held that it "was even questionable whether such organizations had the capacity to commit internationally wrongful acts" (*ibid.*, p. 229) and said that "[i]nternational organizations were too recent a phenomenon and the question of a possible international responsibility by reason of alleged wrongful acts committed by such organizations was not suited to codification" (*ibid.*, p. 234).

¹⁰ The same view was later voiced in the interventions by Mr. Nagendra Singh (*Yearbook ... 1969*, vol. I, p. 108, para. 40) and Mr. Eustathiades (*ibid.*, p. 115, para. 13).

¹¹ *Yearbook ... 1969*, vol. II, document A/CN.4/217 and Add.1, p. 140, para. 94.

¹² *Yearbook ... 1974*, vol. I, 1278th meeting, p. 154, para. 39.

When illustrating his proposal, contained in his third report,¹³ for the text that eventually became the above-quoted article, the Special Rapporteur, Mr. Ago, also referred to the case of "acts of organs placed by States at the disposal of international organizations".¹⁴ In the debate within the Commission on that text, several remarks addressed the question of who was responsible: (a) in the case of an organ being placed by an international organization at a State's disposal; and (b) in the reciprocal case of an organ of a State being placed at an organization's disposal.¹⁵ However, the draft article adopted on first reading and the related commentary only considered the question of attribution of conduct when an international organization lends one of its organs to a State.¹⁶

6. The reference to the lending by an international organization of one of its organs was dropped on second reading. Article 6 bears the title "Conduct of organs placed at the disposal of a State by another State" and only considers the case of a State lending one of its organs to another State.¹⁷ However, the commentary acknowledged that "[s]imilar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority".¹⁸ The commentary further observed that this case "raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles".¹⁹ A reference was then made by the commentary to the general savings clause which is contained in article 57 of the draft articles adopted on second reading. This clause will be considered below (para. 9). However, it is interesting to note at this stage that the commentary to article 57 includes the following passage:

¹³ *Yearbook ... 1971*, vol. II (Part One), document A/CN.4/246 and Add.1-3, p. 274, para. 214. The report included an analysis of issues relating to the military interventions in the Republic of Korea and the Congo (now the Democratic Republic of the Congo) (*ibid.*, pp. 272-273, paras. 211-212).

¹⁴ *Yearbook ... 1974*, vol. I, 1260th meeting, p. 47, para. 39.

¹⁵ See especially the interventions by Messrs. Reuter (*ibid.*, para. 41, and 1261st meeting, p. 50, para. 18); Tabibi (*ibid.*, 1260th meeting, p. 48, paras. 43-44); Elias (*ibid.*, 1261st meeting, para. 1); Yasseen (*ibid.*, p. 49, para. 2); Ushakov (*ibid.*, para. 6, and 1262nd meeting, p. 59, para. 44); Ago (*ibid.*, 1261st meeting, pp. 49-50, paras. 10-11, and 1263rd meeting, p. 60, para. 10); Tsuruoka (*ibid.*, 1261st meeting, p. 52, para. 29); Bedjaoui (*ibid.*, para. 34); Calle y Calle (*ibid.*, p. 53, paras. 39-41); Sette Câmara (*ibid.*, paras. 45-46); Martínez Moreno (*ibid.*, 1262nd meeting, p. 56, para. 21); Quentin-Baxter (*ibid.*, p. 57, paras. 28-30); El-Erian (*ibid.*, para. 33); and Bilge (*ibid.*, p. 58, para. 36).

¹⁶ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 286-290.

¹⁷ *Yearbook ... 2001* (see footnote 1 above), p. 43. The reference to international organizations was deleted in conformity with a proposal contained in Mr. James Crawford's first report on State responsibility, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1-7, p. 46, para. 231.

¹⁸ *Yearbook ... 2001* (see footnote 1 above), p. 45, para. (9) of the commentary to article 6.

¹⁹ *Ibid.* The commentary also mentioned "those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty. In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct" (*ibid.*).

Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State ... As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been "placed at the disposal of" a State in the sense of article 6, and there is no need to provide expressly for the possibility.²⁰

7. In the draft articles adopted on first reading, a reference to international organizations was also made in article 13. This considered one aspect of the issues of attribution of conduct arising in the relations between a State and an organization when an organ of that organization acted on the State's territory. Article 13 read:

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.²¹

In the discussion that preceded the adoption of this text, various issues relating to the responsibility of international organizations were raised, especially those of the legal personality of international organizations²² and of the responsibility of States for the conduct of international organizations of which they are members.²³ The commentary to article 13 refrained from taking up a position on any of these issues:

[A]rticle 13 is not to be taken as defining the responsibility of international organizations or the problems of attribution which such responsibility presents. It merely affirms that the conduct of organs of an international organization acting in that capacity is not attributable to a State by reason only of the fact that such conduct has taken place in the territory of the State in question or in some other territory under its jurisdiction.²⁴

No provision corresponding to article 13 appears in the draft articles adopted on second reading. Several provisions concerning attribution which were contained in the first-reading draft articles were deleted, particularly those which, like article 13, contained a negative, rather than a positive, criterion for attribution of conduct.²⁵

8. The cases considered on first reading in articles 9 and 13 were far from dealing exhaustively with questions in which State responsibility appeared to be related to the responsibility of international organizations. However, the first-reading draft articles did not contain a general

savings clause in order to exclude from their scope matters related to the responsibility of international organizations. It is true that the title of the draft articles (State responsibility) conveyed the idea that the text only dealt with cases in which the responsibility of a State was involved. Thus, one could have understood that the draft articles omitted consideration of whether an international organization was responsible in relation to the unlawful conduct of a State. However, no justification existed for silence about the reciprocal case of a State being responsible in relation to the unlawful conduct of an international organization. For instance, a State could conceivably be held responsible because it was a member of an international organization or because it aided, assisted or coerced an international organization when committing a wrongful act.²⁶ A savings clause would also have been useful for a further reason: there may well be cases in which a State is responsible towards an international organization, while part two (Content, forms and degrees of international responsibility) and part three (Settlement of disputes) of the first-reading draft articles only concerned relations between States.²⁷ Also in this regard, the absence of any reference to international organizations could not be viewed as implied by the title of the draft articles.

9. Article 57 of the draft articles on responsibility of States for internationally wrongful acts adopted on second reading reads as follows:

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.²⁸

This provision makes it clear that various issues relating to the responsibility of international organizations and, more generally, to their conduct are not considered in the draft articles. With regard to the case of a State being responsible towards an international organization, which is not covered by the savings clause included in article 57, article 33, paragraph 2, contains a further savings clause, concerning part two of the draft articles (Content of the international responsibility of a State). The latter provision, which certainly also concerns international organizations although it does not mention them explicitly, reads:

²⁶ Articles 27–28 of the draft articles adopted on first reading only dealt with aid, assistance or coercion by a State in the commission of a wrongful act by another State (*Yearbook ... 1978*, vol. II (Part Two), p. 99, and *Yearbook ... 1979*, vol. II (Part Two), p. 94). In his eighth report on State responsibility, the Special Rapporteur, Mr. Ago, said:

"Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered, because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future."

(*Yearbook ... 1979*, vol. II (Part One), document A/CN.4/318 and Add.1–4, p. 5, para. 3)

²⁷ *Yearbook ... 1978* (see footnote 26 above), p. 76, para. 86.

²⁸ *Yearbook ... 2001* (see footnote 1 above), p. 141. The proposal for this provision was made by the Special Rapporteur, Mr. Crawford, in his first report on State responsibility, *Yearbook ... 1998* (see footnote 17 above), p. 51, para. 259.

²⁰ *Ibid.*, p. 142, para. (3).

²¹ *Yearbook ... 1975*, vol. I, p. 216, para. 36. The text had originally been adopted as article 12 *bis*.

²² *Ibid.* See the interventions by Messrs. Reuter (p. 45, para. 29); El-Erian (*ibid.*, p. 46, para. 35); Ago (*ibid.*, pp. 52, para. 4, 59, para. 37, and 60, para. 42); Martínez Moreno (*ibid.*, p. 53, para. 16); Tsuruoka (*ibid.*, p. 55, para. 31); Ramangasoavina (*ibid.*, para. 34); and Calle y Calle (*ibid.*, p. 57, para. 11).

²³ *Ibid.* Interventions by Messrs. Ustor (pp. 44, para. 14, and 61, para. 54); Ushakov (*ibid.*, p. 47, para. 6); Kearney (*ibid.*, p. 55, para. 29); Ramangasoavina (*ibid.*, para. 34); Bilge (*ibid.*, p. 58, para. 19); and Ago (*ibid.*, p. 59, para. 37).

²⁴ *Yearbook ... 1975*, vol. II, document A/10010/Rev.1, p. 90, para. (12) of the commentary to article 13.

²⁵ As formulated by the Special Rapporteur, Mr. James Crawford, in his first report on State responsibility: "As a statement of the law of attribution, article 13 raises awkward *a contrario* issues without resolving them in any way." (*Yearbook ... 1998* (see footnote 17 above), p. 51, para. 259)

This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.²⁹

10. The commentary to article 57 states that the provision refers to intergovernmental organizations possessing “separate legal personality under international law” and that such an organization “is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials”.³⁰ After referring to the case of a State organ which is put at an organization’s disposal and to the converse case,³¹ the commentary goes on to say that the draft articles do not consider “those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization”.³² The final paragraph of the commentary notes that “article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not

²⁹ *Yearbook ... 2001* (see footnote 1 above), p. 94; the related commentary is on pages 94–95.

³⁰ *Ibid.*, p. 141, para. (2).

³¹ See paragraph 6 above.

³² *Yearbook ... 2001* (see footnote 1 above), p. 142, para. (4).

being conduct performed by an organ of an international organization”.³³

11. This brief survey shows that, in the long itinerary leading to the adoption of the draft articles on responsibility of States for internationally wrongful acts, some of the most controversial issues relating to the responsibility of international organizations had already been referred to. Moreover, certain issues had also given rise to discussion within the Commission. While the draft articles adopted on second reading have left all the specific questions open, the Commission’s work on State responsibility cannot fail to affect the new study. It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on responsibility of States for internationally wrongful acts should be followed both in the general outline and in the wording of the new text.

³³ *Ibid.*, para. (5).

CHAPTER II

Scope of the present study

12. The Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) expressly refers to international organizations in its article 5, which states that the Convention applies to “any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”. The presence of this reference to international organizations prompted the inclusion in article 2, paragraph 1(i), of the following definition for the purposes of the Convention: “[I]nternational organization” means an intergovernmental organization.” This concise definition was reproduced in article 1, paragraph 1 (1), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (hereinafter the 1975 Vienna Convention), article 2, paragraph 1 (n), of the Vienna Convention on Succession of States in respect of Treaties (hereinafter the 1978 Vienna Convention), and article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

13. The definition of international organizations as “intergovernmental organizations” has always been given for the purposes of a particular convention, but the fact that it has found acceptance in a variety of contexts may suggest that it could also be used with regard to issues of responsibility. It is to be noted that the Commission accepted the same definition in its commentary to article 57 of the draft articles on responsibility of States for

internationally wrongful acts.³⁴ However, in a study that is specifically devoted to the responsibility of international organizations, some further reflections are required. First, the definition significantly affects the scope of the draft articles to be written. Thus, it is necessary to consider whether it is entirely appropriate for the purposes of the present draft articles. Secondly, even if the definition is regarded as appropriate, the option of writing a less concise, and more precise, definition should also be considered.

14. The main difficulty in reaching a satisfactory definition of international organizations is related to the great variety that characterizes organizations that are currently considered to be “international”. One aspect of this variety concerns their membership. The definition of international organizations as “intergovernmental” appears to give decisive importance to the fact that membership of the organizations is composed of States.³⁵ In contrast,

³⁴ The Commission said that:

“In accordance with the articles prepared by the Commission on other topics, the expression ‘international organization’ means an ‘intergovernmental organization’”.

(*Ibid.*, p. 141, para. (2))

³⁵ Characterization of an organization as “governmental” refers to membership rather than to functions or the internal structure. A different view was expressed by Schermers and Blokker, *International Institutional Law: Unity within Diversity*, p. 40, who consider as “fundamental characteristics of intergovernmental organizations” that the “decision-making powers are in fact exercised by representatives of governments” and that “[i]n important matters, governments cannot be bound against their will”.

an organization is regarded as non-governmental when it does not have States among its members. A related aspect is the nature of the organization's constituent instrument. Intergovernmental organizations are generally established by treaty, while non-governmental organizations (NGOs) are based on instruments that are not governed by international law. However, with respect to both membership and constituent instruments, some organizations do not fall clearly into one or the other category. Thus, some organizations have a mixed membership, including States and non-State entities.³⁶ Some other organizations, although they have only States as their members, have not been established by treaty, but apparently by a non-binding instrument of international law³⁷ or even by parallel acts pertaining to municipal laws.³⁸ In these cases, should one assume the existence of an implied agreement under international law, one would be justified in assimilating the resulting organizations to those established by treaty. However, there are also examples of organizations which were established by States only under an instrument governed by one or more municipal laws.³⁹

15. When considering a definition of international organizations that is functional to the purposes of draft articles on responsibility of international organizations, one has to start from the premise that responsibility under international law may arise only for a subject of international law. Norms of international law cannot impose on an entity primary obligations or secondary obligations in case of a breach of one of the primary obligations unless that entity has legal personality under international law. Conversely, an entity has to be regarded as a subject of international law even if only a single obligation is imposed on it under international law. Thus, should an obligation exist for an international organization under international law, the question of that organization's responsibility may arise. Logically, a study on responsibility of international organizations should consider all the organizations that are subjects of international law.

16. The question of the legal personality of international organizations has evolved considerably since 1949, when ICJ assessed the legal personality of the United Nations in its advisory opinion in the *Reparation for Injuries* case.⁴⁰ The Court then asserted the Organization's legal

personality on the basis of some specific features that were not likely to be replicated in other organizations. The key passage of the advisory opinion runs as follows:

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person.⁴¹

In order to show the evolution in this area of international law, it suffices to contrast the passage quoted above with the language that the Court used in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.⁴² The Court in its opinion considered international organizations in general, although, it could be said, with implicit reference to an organization of the same type as WHO, and stated:

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁴³

17. The ICJ assertion of the legal personality of international organizations needs to be viewed in the context of its more recent approach to the question of legal personality in international law. The Court stated in the *LaGrand* case that individuals are also subjects of international law.⁴⁴ This approach may lead the Court to assert the legal personality even of NGOs. It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members.

18. Some constituent instruments of international organizations contain a provision analogous to Article 104 of the Charter of the United Nations, which reads as follows:

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

This type of provision is not designed to confer legal personality under international law on the organization concerned. It is noteworthy that in its advisory opinion in the *Reparation for Injuries* case, ICJ did not draw from Article 104 of the Charter any argument in favour of the Organization's legal personality, but said that the question of the Organization's international personality "[was]

³⁶ For instance, WMO. Article 3 (d)-(f) of the Convention of the World Meteorological Organization entitles entities other than States, referred to as "territories" or "groups of territories", to become members.

³⁷ One example is the World Tourism Organization. See Gilmour, "The World Tourism Organization: international constitutional law with a difference". Another example is OSCE. See Sapiro, "Changing the CSCE into the OSCE: legal aspects of a political transformation"; Schweisfurth, "Die juristische Mutation der KSZE: eine internationale Organisation in statu nascendi"; Seidl-Hohenveldern, "Internationale Organisationen aufgrund von soft law"; Bortloff, *Die Organisation für Sicherheit und Zusammenarbeit in Europa: eine völkerrechtliche Bestandsaufnahme*; Bertrand, "La nature juridique de l'Organisation pour la sécurité et la coopération en Europe (OSCE)"; and Mariño Menendez, "La Organización para la Seguridad y la Cooperación en Europa (O.S.C.E.)".

³⁸ For instance, the Nordic Council before the Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden entered into force.

³⁹ See Seidl-Hohenveldern and Loibl, *Das Recht der internationalen Organisationen einschliesslich der supranationalen Gemeinschaften*, pp. 57-58.

⁴⁰ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

⁴¹ *Ibid.*, p. 179.

⁴² *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73.

⁴³ *Ibid.*, pp. 89-90, para. 37.

⁴⁴ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77. The Court referred to the Vienna Convention on Consular Relations and concluded "that Article 36, paragraph 1, creates individual rights".

not settled by the actual terms of the Charter”.⁴⁵ The purpose of Article 104 of the Charter and of similar provisions is to impose on Member States an obligation to recognize the Organization’s legal personality under their domestic law.⁴⁶ A similar obligation is generally imposed by a headquarters agreement on the State, whether it is a member of the organization or not, on whose territory the organization has its headquarters.⁴⁷ Legal personality under municipal law is then acquired directly on the basis of the constituent instrument or of the headquarters agreement or, if it is so required by the municipal law of the State concerned, on the basis of implementing legislation.⁴⁸ The domestic law of a State may also confer legal personality irrespective of the existence of any obligation to that effect for the State.⁴⁹ Legal personality under international law does not necessarily imply legal personality in domestic law. On the other hand, the absence of legal personality under domestic law does not affect its status under international law, and hence the possibility that the organization incurs international responsibility.

19. Even if a treaty provision were intended to confer international personality on a particular organization, the acquisition of legal personality would depend on the actual establishment of the organization. It is clear that an organization merely existing on paper cannot be considered a subject of international law. The entity further needs to have acquired a sufficient independence from its members so that it cannot be regarded as acting as an organ common to the members. When such an independent entity comes into being, one could speak of an “objective international personality”, as ICJ did in its advisory opinion in the *Reparation for Injuries* case.⁵⁰ The characterization of an organization as a subject of international law thus appears as a question of fact.⁵¹ Although

⁴⁵ *I.C.J. Reports 1949* (see footnote 40 above), p. 178.

⁴⁶ This point has been clearly developed by Seidl-Hohenveldern and Rudolph, “Article 104”.

⁴⁷ This view was upheld, for instance, by the Italian Court of Cassation in its judgement No. 149 of 18 March 1999, in *Istituto Universitario Europeo v. Piette*, where the Court found that “[t]he provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States” (*Giustizia civile*, vol. XLIX (1999), part I, p. 1313).

⁴⁸ The constitutional requirements for the conclusion of the treaty may also be relevant in this respect. For instance, the Belgian Court of Cassation, in its judgement of 12 March 2001 in *Ligue des États arabes v. T.*, found that “Belgian courts could not refuse to entertain a case because of jurisdictional immunity provided for in a treaty concluded by the King in the absence of Parliament’s approval” (*Pasicrisie belge*, vol. 188 (2001/3) (Brussels, Bruylant, 2003), p. 398).

⁴⁹ Once an international organization acquires legal personality in a member State, this may entail legal consequences in a non-member State. As Lord Templeman, giving the reasons for the majority in the House of Lords, said in *Arab Monetary Fund v. Hashim and Others (No. 3)*, *The All England Law Reports, 1991*, vol. 1 (London, Butterworths, 1991), p. 875, “when the AMF [Arab Monetary Fund] Agreement was registered in the UAE [United Arab Emirates] by means of Federal Decree No. 35 that registration conferred on the international organisation legal personality and thus created a corporate body which the English courts can and should recognise”. Article two of the Agreement in question stated: “The Fund shall have an independent juridical personality and shall have, in particular, the right to own, contract and litigate.” (*Ibid.*, p. 873)

⁵⁰ *I.C.J. Reports 1949* (see footnote 40 above), p. 185.

⁵¹ Fitzmaurice (“The law and procedure of the International Court of Justice: international organizations and tribunals”, pp. 4–5), noted that according to the Court “the international personality of the Organization

the view has been expressed that an organization’s personality exists with regard to non-member States only if they have recognized it,⁵² this assumption cannot be regarded as a logical necessity. Should a State conclude a headquarters agreement with an organization of which it is not a member, it is hard to imagine that by so doing the State bestows on the organization a legal personality that would not otherwise exist. The very conclusion of the headquarters agreement shows that the organization is already a subject of international law. It should be noted that the organization’s legal personality does not necessarily imply that the organization is entitled to enjoy immunities from non-member States under general international law.⁵³ Nor can it be assumed that member States’ responsibility for the conduct of an organization of which they are members is identical towards other members and towards non-members.

20. While it may be held that a large number of international organizations have a legal personality in international law, the great variety of existing international organizations would make it difficult to state general rules applying to all types of organization. It would be as if the Commission considered questions of international responsibility concerning States and individuals at the same time. It is clearly preferable only to address questions relating to a relatively homogeneous category of international organizations. If the present study is intended to be a sequel to the draft articles on responsibility of States for internationally wrongful acts,⁵⁴ it is appropriate to limit the scope of this study to questions relating to organizations that exercise certain functions, that are similar, and possibly identical, to those exercised by States. These functions, whether legislative, executive or judicial, may be called governmental.

21. This choice would imply first of all that the study should not encompass questions of responsibility of

was a question of fact” and that “the existence of international personality as an objective fact is ... capable of producing consequences outside the confines of the Organization”. The term “objective fact” was used by Judge Krylov in his dissenting opinion (*I.C.J. Reports 1949* (see footnote 40 above), p. 218). The view that international organizations have an objective international personality was strongly advocated by Seyersted, “Objective international personality of intergovernmental organizations: do their capacities really depend upon the conventions establishing them?”, the inferences that the author drew from the organizations’ personality are not relevant in the present context.

⁵² Thus Seidl-Hohenveldern and Loibl, *op. cit.*, p. 52.

⁵³ The view that, in the absence of an agreement, a non-member State is not under an obligation to grant immunity to an international organization was held, for instance, by the Paris Court of Appeal in its judgement of 13 January 1993, *Communauté économique des États de l’Afrique de l’Ouest and others v. Bank of Credit and Commerce international (Journal du droit international, vol. 120, No. 2, 1993, p. 357)*. The same opinion was expressed by the Supreme Court of Justice of Argentina in its judgement of 31 August 1999, *Duhalde v. Pan American Health Organization* (see www.oas.org). Some other decisions on this issue are examined by Reinisch, *International Organizations before National Courts*, pp. 152–157.

⁵⁴ Various delegations made statements in the Sixth Committee stressing this point. See the statements by China (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 20th meeting (A/C.6/57/SR.20)*, para. 34); the Czech Republic (*ibid.*, 21st meeting (A/C.6/57/SR.21), para. 54); Israel (*ibid.*, para. 61); Poland (*ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 15); New Zealand (*ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 21); Italy (*ibid.*, 24th meeting (A/C.6/57/SR.24), para. 29); Myanmar (*ibid.*, para. 62); Brazil (*ibid.*, para. 65); Romania (*ibid.*, 25th meeting (A/C.6/57/SR.25), para. 22); Switzerland (*ibid.*, para. 36); and Chile (*ibid.*, 27th meeting (A/C.6/57/SR.27), para. 13).

NGOs, because they do not generally exercise governmental functions⁵⁵ and moreover would not raise the key question of the responsibility of member States for the conduct of the organization. This delimitation of the scope of application of the future draft articles corresponds to the views expressed by a large number of delegations in the Sixth Committee in response to an invitation to comment addressed by the Commission.⁵⁶ It is true that some delegations incidentally expressed the view that the exclusion of NGOs from the scope of the study should be made at the initial stage,⁵⁷ thus suggesting that the Commission could later review the delimitation and possibly widen the object of its enquiry. If this suggestion were followed, the way would be left deliberately open to reconsider the decision initially taken on the basis of further reflections. However, if the Commission so acted, it would have to rewrite some of the draft articles that it might already have provisionally adopted, a task that reminds one of Penelope's tactics for deferring the choice of a new spouse. It thus seems preferable, at least on first reading, to settle from the outset the question relating to the scope of application of the draft articles. Should a relatively homogeneous category of organizations be selected, there is in any case little risk that the decision to leave other organizations aside would affect the results of the study.

22. When approaching the question of the definition of international organizations for the purposes of new draft articles, the weight of precedents cannot be ignored, although one should not follow precedents automatically. As was recalled above,⁵⁸ international organizations were succinctly defined as intergovernmental organizations in several codification conventions and also in the Commission's commentary on article 57 of the draft articles on responsibility of States for internationally wrongful acts. On the basis of the premise that the Commission would take the decision to leave NGOs aside, one might be tempted to reproduce in a draft article the same definition that has been adopted several times in the past.⁵⁹

⁵⁵ One may acknowledge the existence of some exceptions, like ICRC.

⁵⁶ Statements by China (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 20th meeting (A/C.6/57/SR.20)*, para. 34); Israel (*ibid.*, 21st meeting (A/C.6/57/SR.21), para. 61); Cyprus (*ibid.*, 22nd meeting, (A/C.6/57/SR.22), para. 12); New Zealand (*ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 21); the United Kingdom (*ibid.*, para. 39); Russian Federation (*ibid.*, para. 70); Austria (*ibid.*, 24th meeting (A/C.6/57/SR.24), para. 20); Italy (*ibid.*, para. 26); Belarus (*ibid.*, para. 56); Myanmar (*ibid.*, para. 62); Brazil (*ibid.*, para. 65); Romania (*ibid.*, 25th meeting (A/C.6/57/SR.25), para. 22); Switzerland (*ibid.*, para. 36); Japan (*ibid.*, para. 43); Jordan (*ibid.*, para. 56); India (*ibid.*, 26th meeting (A/C.6/57/SR.26, para. 15); Nepal (*ibid.*, para. 19); Greece (*ibid.*, para. 32); Slovakia (*ibid.*, para. 38); Venezuela (*ibid.*, para. 52); Cuba (*ibid.*, para. 64); the Republic of Korea (*ibid.*, para. 71); Argentina (*ibid.*, para. 79); and Chile (*ibid.*, 27th meeting (A/C.6/57/SR.27), para. 13).

⁵⁷ See the statements by Cyprus (*ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 12); New Zealand (*ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 21); the United Kingdom (*ibid.*, para. 39); Belarus (*ibid.*, 24th meeting (A/C.6/57/SR.24), para. 56); Myanmar (*ibid.*, para. 62); Switzerland (*ibid.*, 25th meeting (A/C.6/57/SR.25), para. 36); Japan (*ibid.*, para. 43); Greece (*ibid.*, 26th meeting (A/C.6/57/SR.26), para. 32); and the Republic of Korea (*ibid.*, para. 71).

⁵⁸ Para. 12 above.

⁵⁹ Venezuela (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 26th meeting (A/C.6/57/SR.26)*, para. 52) and Argentina (*ibid.*, para. 79) appeared to favour the reproduction of the definition of international organizations as intergovernmental

However, every codification convention expressly stated that the definition was only given for the purposes of the convention concerned. If the meaning of this is taken at face value, it is necessary to enquire whether the traditional definition would also be appropriate when delimiting the scope of a study on responsibility of international organizations. It should be noted that most conventions deal with international organizations only marginally and therefore are not very meaningful precedents. The 1975 Vienna Convention is not significant in this regard, because, after defining international organizations as "intergovernmental organizations", article 1 defined "international organization of a universal character", to which the scope of the Convention was limited according to article 2.⁶⁰ No doubt the 1986 Vienna Convention was concerned with international organizations in general and nevertheless still referred to intergovernmental organizations; however, that Convention implied a substantial restriction because it considered only those organizations possessing a treaty-making power. In its commentary on the corresponding draft article, the Commission noted that several Governments had favoured a different definition, but the Commission had decided to keep the traditional definition of international organizations as "intergovernmental organizations"

because it [was] adequate for the purposes of the draft articles. Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.⁶¹

Should one accept the same general definition in the present study, one would be confronted with the very large number of intergovernmental organizations for which obligations under international law exist: in view of the developments concerning the legal personality of international organizations under international law,⁶² there is a much greater variety of organizations than those which the definition was intended to include when it was originally made. Thus it seems reasonable that the Commission should delimit the scope by drafting a definition that is more appropriate for the present study. This new definition would have to comprise a more homogeneous category of organizations. It would also provide greater precision,⁶³ given the fact that the traditional definition of international organizations as intergovernmental organizations does not go very far.

23. The one element of the traditional definition of international organizations that should not be lost when

organizations. However, their remarks were made in the context of arguing for the exclusion of NGOs and thus it cannot necessarily be assumed that the two delegations intended to oppose the inclusion of a more detailed definition.

⁶⁰ Article 1, paragraph 1 (2), of that Convention states that "international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a worldwide scale".

⁶¹ *Yearbook ... 1981*, vol. II (Part Two), p. 124, para. (22) of the commentary to draft article 2.

⁶² See paragraphs 16–17 above.

⁶³ The suggestion that it would be worthwhile to consider the definition of the term "intergovernmental organizations" was made by the Russian Federation (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee, 23rd meeting (A/C.6/57/SR.23)*, para. 70).

attempting to write a definition that is functional to the purposes of the present study is their “intergovernmental” character. As was observed above,⁶⁴ this characterization appears to refer to membership: in other words, what matters is which entities ultimately control the running of the organization and may modify or terminate its activity. What is important is actual rather than original membership. In an intergovernmental organization States have a decisive role, whether or not the organs of the organization are composed of State delegates.

24. In a less succinct definition than the one generally used in codification conventions, it is possible to specify that an international organization does not need to have only States among its members. The presence of some non-State members does not necessarily alter the nature of the organization, nor the problems that arise in terms of the respective responsibility of the organization and its States members. In a definition for the purposes of the present study it could be useful to state that international organizations to which the draft articles apply may include other international organizations among their members.⁶⁵ This would convey from the outset that the discussion of the responsibility of an international organization also comprises questions relating to its membership of other organizations. However, since it is not strictly necessary to specify that among the non-State members of an international organization there may be other international organizations, it may appear preferable to draft a simpler definition.

25. In the literature current definitions of the term “international organization” often state that an organization may be characterized as such only if it was established by an agreement under international law.⁶⁶ Some examples have been given above of important organizations that do not meet this formal requirement, although in those cases one could assume the existence of an implicit, even if possibly subsequent, agreement.⁶⁷ What seems to be significant for the purposes of the present report is not so much the legal nature of the instrument that was adopted for establishing the organization, as the functions that the organization exercises. A reference to the governmental functions that the organization exercises

is directly relevant, while the nature of the constituent instrument has only a descriptive value. Even if it is true that in most cases an agreement was concluded under international law for establishing the organization, it is not necessary to mention the existence of such an agreement in the definition. Should two States intend to cooperate between themselves by creating an organization for constructing and running an industrial plant, they may do so through a contract that is concluded under one of the municipal laws. They could also achieve the same purpose by concluding an agreement under international law. It is less likely that they would establish by contract an organization that is endowed with certain governmental functions, but there is no necessary link between the constituent instrument of an organization and its functions.

26. As was noted above,⁶⁸ in a study that is regarded as a sequel to that on responsibility of States for internationally wrongful acts, what appears to be relevant is the fact that the organization exercises certain normative, executive or judicial functions that may briefly be indicated with the term “governmental”.⁶⁹ In order to keep some homogeneity in the object of the Commission’s enquiry, the study should concern an organization only insofar as it actually exercises one of these functions, not the organization in general. It is not essential that governmental functions are exercised at the international level. When this occurs, it is likely that the organization concerned will have acquired obligations under international law in relation to those functions, and the question of the existence of breaches may arise more frequently. However, obligations under international law certainly also affect the exercise of governmental functions at the internal level. It seems superfluous to state in a definition the requirement that the organization is the addressee of obligations under international law. Should an organization be so fortunate that it does not have any obligations under international law, the question of the international responsibility of that organization would probably never arise in practice, but this does not seem a sufficient reason for not considering the organization in the present study.

27. For an organization to be held as potentially responsible it should not only have legal personality and thus some obligations of its own under international law. What is also required is that in the exercise of the relevant functions the organization may be considered as a separate entity from its members and that thus the exercise of these functions may be attributed to the organization itself. If in exercising governmental functions the organization, which may otherwise be a separate entity, acts as an organ of one or more States, its conduct should be attributed to the State or States concerned, according to articles 4 or 5 of the draft articles on responsibility of States for internationally wrongful acts.⁷⁰ Practice relating to cases

⁶⁴ Para. 14 above.

⁶⁵ For instance, in November 1991, the FAO Constitution was amended to allow the admission of regional economic integration organizations. The European Economic Community, as it was then called, was admitted a few days later. See Marchisio, “Lo status della CEE quale membro della FAO”.

⁶⁶ Thus Schermers and Blokker, *op. cit.*, p. 23, define international organizations “as forms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law”. Sands and Klein, *Bowett’s Law of International Institutions*, p. 16, state that an international organization “must be established by treaty”. According to Rama-Montaldo, “International legal personality and implied powers of international organizations”, pp. 154–155, international organizations “possess international personality when they fulfil certain objective preconditions: an international agreement creating an association of States endowed with at least one organ which expresses a will detached from that of the member States and possessing defined aims or purposes to be attained through the fulfilment of functions or powers”. The requirement of a “conventional basis” was also stated in Mr. El-Erian’s first report on relations between States and intergovernmental organizations, *Yearbook ... 1963* (see footnote 7 above), p. 167, para. 60.

⁶⁷ See paragraph 14 above.

⁶⁸ Para. 20.

⁶⁹ The term “governmental” may be taken to include the function of monitoring the implementation of treaties, to which Austria referred (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 24th meeting (A/C.6/57/SR.24), para. 20).

⁷⁰ *Yearbook ... 2001* (see footnote 1 above), pp. 40 and 42. Article 4 may be relevant because even if it refers to “the internal law of the State” for the purposes of identifying State organs, it does not consider this a necessary requirement. The text of article 5 refers to “a person or entity

in which an organization exercises functions as an organ of one or more States should be considered in the present study only insofar as it may be useful for illustrating by contrast those instances in which conduct may on the contrary be attributed to an organization.

28. A tentative definition, along the lines hereto suggested, appears below, in paragraph 34. The definition figures in draft article 2 because it seems preferable to start the overall text with a general description of the scope of the draft articles and to specify in a subsequent provision what is intended by “international organization”. The two provisions are in any case linked, because they both contribute to delimiting the scope of the draft articles. The order here proposed finds several precedents. Several codification conventions give a general indication of the scope before the provision on the “use of terms”. Examples are provided by the 1969 Vienna Convention, the 1978 Vienna Convention, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, the 1986 Vienna Convention, and the Convention on the Law of the Non-navigational Uses of International Watercourses.

29. The provision on the scope of the draft articles should first of all make it clear that the present study is only concerned with responsibility under international law. Thus, issues of civil liability, which have been at the centre of recent litigation before municipal courts,⁷¹ will be left aside. This is not intended to deny the interest of some judicial decisions on civil liability, because these decisions either incidentally address questions of international law or develop some arguments with regard to a municipal law that may be used by analogy.⁷² However, the choice of leaving out questions of civil liability is not only dictated by the fact that the draft articles on responsibility of States for internationally wrongful acts did not deal with questions of civil liability. A further reason is that to state rules on civil liability would almost entirely be an exercise in progressive development of international law. It is in any event doubtful whether the Commission would be the most appropriate body for studying these questions.

30. The scope of the present study should be delimited in order to make it clear that the aim of the draft articles is only to consider questions of international responsibility for wrongful acts. The Commission has currently undertaken to examine as a separate study the topic “Internation-

l liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)”.⁷³ This topic raises several problems which could also be analysed in relation to international organizations. For the purposes of defining the scope of the present topic, it is important to note that issues arising out of acts not prohibited in international law are heterogeneous with respect to those considered in the draft articles on responsibility of States for internationally wrongful acts. Most delegations that responded in the Sixth Committee to a request by the Commission for comments clearly expressed their preference that the present study should consider only issues relating to the responsibility of international organizations for wrongful acts.⁷⁴ Thus, should the Commission intend to undertake a study of the international liability of international organizations for acts that are not prohibited by international law, it would be more logical to do so either in the context of the current study on international liability or in a future sequel to that study.

31. The solutions advocated in the two preceding paragraphs could be seen as implied in a text that was analogous to article 1 of the draft articles on responsibility of States for internationally wrongful acts.⁷⁵ This type of provision would link international responsibility with the commission of an act that is wrongful under international law, and therefore make it clear that the scope of the study includes neither questions of civil liability nor issues of international liability for acts not prohibited in international law.

32. Responsibility of an international organization under international law will generally be caused by the wrongful conduct of that organization. However, it is conceivable that an organization is also responsible when the conduct is performed by a State or another international organization. This may occur in circumstances such as those considered in articles 16–18 of the draft articles on responsibility of States for internationally wrongful acts:⁷⁶ for instance, in the case of aid or assistance given for the commission of an internationally wrongful act by a State or another organization. Responsibility of an international organization may also arise because of the unlawful conduct of another organization of which the

⁷³ *Ibid.*, pp. 89–92, paras. 430–457; the question of the international liability of international organizations was not touched upon in this part of the Commission’s report.

⁷⁴ See the interventions by Israel (*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/57/SR.21), para. 61); Cyprus (*ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 12); Poland (*ibid.*, para. 15); New Zealand (*ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 21); the United Kingdom (*ibid.*, para. 39); Italy (*ibid.*, 24th meeting (A/C.6/57/SR.24), para. 26); Switzerland (*ibid.*, 25th meeting (A/C.6/57/SR.25), para. 36); India (*ibid.*, 26th meeting (A/C.6/57/SR.26), para. 15); Greece (*ibid.*, para. 32); Slovakia (*ibid.*, para. 38); Venezuela (*ibid.*, para. 52); Cuba (*ibid.*, para. 64); and the Republic of Korea (*ibid.*, para. 71). Belarus (*ibid.*, 24th meeting (A/C.6/57/SR.24), para. 56) suggested that the Commission should study the liability of international organizations “alongside” their responsibility for internationally wrongful acts. Jordan (*ibid.*, 25th meeting (A/C.6/57/SR.25), para. 56) held that the topic of responsibility of international organizations should not be limited to responsibility for internationally wrongful acts.

⁷⁵ *Yearbook ... 2001* (see footnote 1 above), p. 32.

⁷⁶ *Ibid.*, pp. 65–70, for the text of the relevant articles and the related commentary.

(Footnote 70 continued.)

which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority”. The Commission’s commentary does not mention international organizations in these contexts.

⁷¹ Especially the litigation concerning the International Tin Council. One of the related cases, in which the liability of the European Economic Community was invoked, was brought before the Court of Justice of the European Communities. See *Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*, case C-241/87, which was removed from the register by an order of the Court of Justice of the European Communities, but not before the advocate-general delivered a lengthy opinion (*Reports of Cases before the Court of Justice and the Court of First Instance* (1990–5), p. I-1797).

⁷² This point had already been made by the Working Group on the responsibility of international organizations in its report (*Yearbook ... 2002*, vol. II (Part Two), p. 96, para. 487).

first organization is a member. All these questions should certainly come within the scope of the present study. The scope should thus not be limited to questions relating to the responsibility of an international organization for conduct that may be regarded as its own.

33. The scope of the present study also needs to comprise matters that concern the responsibility of States, but were left out in the draft articles on responsibility of States for internationally wrongful acts because they are related to the wrongful conduct of an international organization. As was recalled above,⁷⁷ article 57 of those draft articles expressly left aside “any question of the responsibility under international law of an international organization” and also “of any State for the conduct of an international organization”. The latter case concerns conduct which, unlike that of international organizations acting as State organs,⁷⁸ is to be attributed to an organization. According to circumstances, the responsibility of a State may nevertheless arise either because it has contributed to the organization’s unlawful act or else because it is a member of the organization. These questions concerning the responsibility of States need to be addressed in the present study. The text concerning the scope should therefore not be limited to questions relating to the responsibility of international organizations. It is necessary to point out that the questions concerning the responsibility of States would be included within the scope of the study

⁷⁷ Para. 9 above.

⁷⁸ See paragraph 27 above.

entirely without prejudice to the way in which these questions should be answered. Even if the present study were to conclude that States are never responsible for the conduct of the organizations of which they are members, the scope of the present draft articles would not be accurately stated unless it was made clear that it includes those questions that were left out of the draft articles on responsibility of States for internationally wrongful acts because of their relation to issues concerning responsibility of international organizations.

34. In view of the foregoing remarks, the following texts are submitted for the consideration of the Commission:

“Article 1. Scope of the present draft articles

“The present draft articles apply to the question of the international responsibility of an international organization for acts that are wrongful under international law. They also apply to the question of the international responsibility of a State for the conduct of an international organization.

“Article 2. Use of term

“For the purposes of the present draft articles, the term ‘international organization’ refers to an organization which includes States among its members insofar as it exercises in its own capacity certain governmental functions.”

CHAPTER III

General principles relating to responsibility of international organizations

35. Part one, chapter I (The internationally wrongful act of a State) of the draft articles on responsibility of States for internationally wrongful acts is headed “General principles”.⁷⁹ It states three such principles. The first two principles are easily transposable to international organizations and seem hardly questionable. Article 1 of the draft articles reads as follows:

Every internationally wrongful act of a State entails the international responsibility of that State.⁸⁰

The meaning of responsibility is illustrated elsewhere in the draft articles, in part two (Content of the international responsibility of a State).⁸¹ There is no reason for taking a different approach with regard to international organizations. It can certainly be said, as a general principle, that every internationally wrongful act on the part of an international organization entails the international responsibility of that organization. As an example one may refer to the ICJ advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said:

[T]he Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any

damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts.⁸²

36. Article 2 of the draft articles on responsibility of States for internationally wrongful acts specifies the meaning of an internationally wrongful act, stating its two basic elements: attribution of conduct to a State and characterization of that conduct as a breach of an international obligation. These two elements are then developed in chapters II–III. Article 2 reads as follows:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.⁸³

Again, there is no reason for adopting a different approach with regard to international organizations. One could state a similar general principle by simply replacing the term “State” with the term “international organization”.

⁷⁹ *Yearbook ... 2001* (see footnote 1 above), pp. 32–38.

⁸⁰ *Ibid.*, p. 32.

⁸¹ *Ibid.*, pp. 86–116.

⁸² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, pp. 88–89, para. 66.

⁸³ *Yearbook ... 2001* (see footnote 1 above), p. 34.

37. The third general principle, which is stated in article 3 of the draft articles on the responsibility of States for internationally wrongful acts, reads as follows:

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.⁸⁴

As the Commission did not fail to note at the outset in its comment on this draft article: “Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned.”⁸⁵ It is doubtful whether it is really necessary to restate this principle in the draft articles. It is in any case clear that an internationally wrongful act is so characterized under international law. Other systems of law could hardly affect such a characterization. Moreover, the reference to the “internal law” would be problematic when applied to international organizations, since at least their constituent instruments generally pertain to international law. Furthermore, while compliance with the internal rules of the organization may not exclude the existence of a breach on the part of the organization of one of its obligations under international law towards a non-member State, this cannot be said in similar terms with regard to States that are members of the organization. According to Article 103 of the Charter of the United Nations, the constituent instrument and possibly binding decisions taken on the basis of the Charter prevail,⁸⁶ but this is not a rule that can be generalized and applied to organizations other than the United Nations. Whether these questions need to be examined in the context of the present draft articles remains to be seen. They certainly cannot be satisfactorily addressed in a provision stating a general principle, the main purpose of which would in any event only be to stress the need to consider questions of international responsibility exclusively in relation to international law.

38. The two principles recalled in the preceding paragraphs do not cover the question of the responsibility

⁸⁴ *Ibid.*, p. 36.

⁸⁵ *Ibid.*, para. (1) of the commentary to article 3.

⁸⁶ Reference may be made to what ICJ said in its orders on provisional measures in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 15, para. 39, and *ibid.* (*Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 126, para. 42.

which States may incur as members of an international organization. They also do not comprise the case in which an international organization is responsible as a member of another organization, because the relevant conduct would in that case be attributable to the latter organization and not to the former. Also the case in which a State is responsible because it aids, assists or coerces an international organization does not come under the two said principles. However, while these principles would not apply to all the issues that come within the scope of the draft articles on responsibility of international organizations, they do not affect the solution of the issues that are not covered by the said principles. Saying that an international organization is responsible for its own unlawful conduct does not imply that other entities may not also be held responsible for the same conduct. Thus there appears to be no harm in stating the two principles as suggested above.

39. In stating the two general principles, it is not necessary to reproduce in two separate provisions the contents of articles 1–2 of the draft articles on responsibility of States for internationally wrongful acts. The main reason for stating the first principle in a separate article 1 appears to have been the wish to start the text with the solemn proclamation that a wrongful act entails international responsibility. As was said in the commentary to article 1, this is “the basic principle underlying the articles as a whole”.⁸⁷ Since in the present draft articles the first provision concerns the scope, it is preferable to include both principles in one provision, given the fact that the second principle basically represents a specification of the first one. Thus, the following text is here suggested:

“Article 3. General principles

“1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

“2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

“(a) Is attributed to the international organization under international law; and

“(b) Constitutes a breach of an international obligation of that international organization.”

⁸⁷ *Yearbook ... 2001* (see footnote 1 above), p. 32, para. (1).

SHARED NATURAL RESOURCES

[Agenda item 9]

DOCUMENT A/CN.4/533 and Add.1

First report on shared natural resources: outlines, by Mr. Chusei Yamada, Special Rapporteur

[Original: English]
[30 April and 30 June 2003]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	118
Works cited in the present report	118

PART ONE: OUTLINES OF THE TOPIC

	<i>Paragraphs</i>	
INTRODUCTION.....	1-5	119
<i>Chapter</i>		
I. BACKGROUND OF THE TOPIC.....	6-18	120
II. CONFINED TRANSBOUNDARY GROUNDWATERS.....	19-25	122

PART TWO: OVERVIEW OF GROUNDWATER RESOURCES

INTRODUCTION.....	26-29	124
III. CONFINED VERSUS DECOUPLED AQUIFERS	30-32	125
IV. CHARACTERISTICS OF GROUNDWATER AND AQUIFERS	33-39	125
A. General characteristics.....	33-34	125
B. Characteristics of aquifers.....	35-37	126
C. International versus transboundary aquifers	38	126
D. Transboundary aquifer systems	39	126
V. GROUNDWATER RESOURCES OF THE WORLD AND THEIR USE.....	40-48	127
A. EUROPE.....	41	127
B. India	42	127
C. China.....	43	127
D. North America.....	44	127
E. Central America	45	127
F. South America.....	46	128
G. Africa and the Middle East	47	128
H. Australia.....	48	128
VI. CAUSES AND ACTIVITIES THAT ADVERSELY AFFECT THE RESOURCE	49-58	128
A. Groundwater quality	49	128
B. Groundwater pollution.....	50-52	128
C. Groundwater protection and management	53	129
D. Transboundary groundwater contamination problems	54	129
E. Transboundary shallow aquifer contamination problems.....	55-56	129
F. Transboundary deeper aquifer contamination problems.....	57	130
G. Transboundary fossil aquifer contamination problems.....	58	130

	<i>Paragraphs</i>	<i>Page</i>
VII. PRACTICES OF STATES WITH REGARD TO NATIONAL MANAGEMENT OF GROUNDWATER.....	59	130
VIII. PRELIMINARY SURVEY OF SHARED AQUIFERS UNDER PRESSURE FROM CROSS-BORDER PUMPING OR FROM CROSS-BORDER POLLUTION.....	60	131
IX. SOCIAL, ECONOMIC AND ENVIRONMENTAL ASPECTS OF THE MANAGEMENT OF NON-CONNECTED GROUNDWATERS: SPECIAL FOCUS ON NON-RENEWABLE GROUNDWATER.....	61–63	131
A. General.....	61	131
B. Non-connected groundwater resources: risk combined with scientific and policy uncertainty.....	62	132
C. Ethical versus scientific standards.....	63	132
X. CONCLUSIONS.....	64–65	132

LIST OF FIGURES

1. Hydrogeological cycle.....	133
2. Transboundary flow.....	134
3. Groundwater pollution.....	135

ANNEXES

I. Terminology used in this report.....	136
II. Case studies.....	137

Multilateral instruments cited in the present report

	<i>Source</i>
Final Act of the Congress (Vienna, 9 June 1815)	<i>British and Foreign State Papers, 1814–1815</i> , vol. II, p. 3.
General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia (Paris, 30 March 1856)	<i>Ibid.</i> , 1855–1856, vol. XLVI, p. 8.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	United Nations, <i>Treaty Series</i> , vol. 1936, No. 33207, p. 269.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49</i> , vol. III, resolution 51/229, annex.

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PART ONE: OUTLINES OF THE TOPIC

Introduction

1. This first report is a very preliminary one, dealing with the outlines of the topic “Shared natural resources”. It consists of the present introduction, the background on how the current topic of shared natural resources has been formulated and a review of the problems that should be addressed concerning “confined transboundary groundwater”.¹

2. The General Assembly, at its fifty-fourth session in 1999, encouraged the International Law Commission “to proceed with the selection of new topics for its next quinquennium corresponding to the wishes and preoccupations of States and to present possible outlines for new topics and information related thereto in order to facilitate decision thereon” by the Assembly.² The Commission, at its fifty-second session in 2000, considered its long-term programme of work and after careful examination of the preliminary studies on the various subjects, agreed that the following topics were appropriate for inclusion in the long-term programme of work:³

1. Responsibility of international organizations;
2. Effects of armed conflict on treaties;
3. Shared natural resources of States;
4. Expulsion of aliens;
5. Risks ensuing from fragmentation of international law.

3. At its fifty-fifth session in 2000, the General Assembly only took note of the report of the Commission “with regard to its long-term programme of work, and the syllabuses on new topics”.⁴ Subsequently, the Commission, at its fifty-third session in 2001, decided, in order to use the time available more efficiently, “to give priority during the first week of the first part of its fifty-fourth session to the appointment of two Special Rapporteurs on two of the five topics included in its long-term programme of work”.⁵ During the debate in the Sixth Committee at the fifty-sixth session of the Assembly in 2001, delegations saw particular merit in the proposed five “new topics in view of the potential need for clarification of the law in areas in which practical problems might arise. Many delegations were of the view that the topic “Responsibility of international organizations” was ripe for codification and that the Commission should give priority to it from among the five recommended topics. Some delegations also expressed support for consideration of the topic “Shared natural resources”.⁶ The Assembly thereupon

requested the Commission “to begin its work on the topic “Responsibility of international organizations” and to give further consideration to the remaining topics to be included in its long-term programme of work, having due regard to comments made by Governments”.⁷

4. At the first part of its fifty-fourth session in 2002, the Commission decided on the inclusion in the programme of work of the Commission of the item entitled “Shared natural resources”, the appointment of a Special Rapporteur on the item and the establishment of a working group to assist the Special Rapporteur.⁸ During the second part of the session, the Special Rapporteur prepared a discussion paper for consideration in informal consultations,⁹ in which he described the background underlying the proposal of the topic in the Planning Group of the Commission and indicated his intention to deal with confined transboundary groundwaters, oil and natural gas under the topic. While the Special Rapporteur recognized that a single mineral deposit may exist under the jurisdiction of more than two States, that many marine living resources are also shared resources and that animals on land and birds may also migrate across borders, he was of the view that it was not appropriate to deal with those resources under the present topic as they had characteristics that were far too different from those of groundwaters, oil and gas, and could be and in fact were dealt with more appropriately elsewhere. He also proposed to adopt a step-by-step approach to the study of the topic, first taking up groundwaters. He then proposed the following work programme in the current quinquennium:

- | | |
|------|--|
| 2003 | First report on outlines |
| 2004 | Second report on confined groundwaters |
| 2005 | Third report on oil and gas |
| 2006 | Fourth report on comprehensive review. |

Members of the Commission offered various valuable suggestions and were generally supportive of the approach suggested by the Special Rapporteur.

5. During the debate in the Sixth Committee at the fifty-seventh session of the General Assembly in 2002, very few delegations commented on the topic of “Shared natural resources”. Those delegations that did so generally supported the study of the topic. A concern was expressed with regard to the appropriateness of the title of the topic. According to another view, the topic should be limited to the issue of groundwater as a complement to the past work of the Commission on transboundary waters. Other areas of transboundary resources were not ripe for consideration. Apart from the area of transboundary watercourses, real conflicts rarely arose between States, and

¹ *Yearbook ... 1994*, vol. II (Part Two), p. 135.

² General Assembly resolution 54/111 of 2 February 2000, para. 8.

³ *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

⁴ General Assembly resolution 55/152 of 19 January 2001, para. 8.

⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 206, para. 259.

⁶ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session (A/CN.4/521), para. 122.

⁷ General Assembly resolution 56/82 of 18 January 2002, para. 8.

⁸ *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 (a).

⁹ ILC (LIV)/IC/SNR/WP.1 (8 August 2002).

when they did, practical accommodations suitable to the specific situation had been reached. According to this view, an effort to extrapolate customary international law from that divergent practice would not be a productive exercise.¹⁰ The Assembly at its fifty-seventh session only took note of the decision of the Commission to include

¹⁰ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session (A/CN.4/529), para. 236.

in its programme of work the topic “Shared natural resources”.¹¹ In view of the very limited responses from States so far, the Special Rapporteur intends to proceed along the lines suggested in paragraph 4 above at least for the time being, although the study on groundwaters might require much longer time than envisaged there.

¹¹ General Assembly resolution 57/21 of 21 January 2003, para. 2.

CHAPTER I

Background of the topic

6. The first time that the Commission dealt with the problem of shared natural resources was when it deliberated on the law of the non-navigational uses of international watercourses. A brief review of its codification would be useful for the work. The legal regime of international rivers was first taken up at the Congress of Vienna in 1815 where the principle of free navigation on the international rivers in Europe was proclaimed.¹² The Danube was of special importance in the development of the European law on international rivers. The European Danube Commission established by the Peace Treaty of Paris of 1856¹³ regulated through international cooperation the navigation on the Danube and set the examples for other river commissions to follow. The development of international law on rivers was at first almost totally concerned with the rights of free navigation.

7. It later also became necessary to deal with such other uses of international rivers as for the production of energy, irrigation, industrial processes, transportation other than navigation (logging), and recreation. In most major river systems, downstream States utilize waters to the full extent. New uses of waters by upstream States are bound to affect in some way the historically acquired interest of the downstream States. Such uses of waters also pose environmental concerns by their attendant risks of pollution. There exists a fundamental difference between the navigational regime and the non-navigational use regime. The aim of the navigational regime is to provide the concerted administrative measures to guarantee free navigation on the river system. The non-navigational use regime must focus on providing an equitable balance of interests to the States concerned and to safeguard against adverse effects on the environment.

8. In 1970 the General Assembly recommended that the Commission should “take up the study of the law on the non-navigational uses of international watercourses with a view to its progressive development and codification”.¹⁴ The work in the Commission began in 1971 and continued until 1994 with five successive Special Rapporteurs, Messrs. Richard D. Kearney, Stephen M. Schwebel, Jens Evensen, Stephen C. McCaffrey and Robert Rosenstock.

¹² Final Act of the Congress.

¹³ General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia, art. XVII.

¹⁴ General Assembly resolution 2669 (XXV) of 8 December 1970, para. 1.

From the outset of the work, the Commission received ample input from States: almost half of the States made their positions known to the Commission. The draft articles prepared by the Commission on its first reading in 1991¹⁵ received hardly any criticism. The final draft articles,¹⁶ incorporating only minor changes to the 1991 draft, were formulated and presented to the Assembly in 1994 by the Commission. The Assembly thereupon decided to set aside two years for reflection by States and to convene a Working Group of the Whole of the Sixth Committee in 1996 to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles formulated by the Commission.

9. The Working Group of the Whole of the Sixth Committee was convened in 1996 and 1997 and succeeded in the elaboration of the Convention on the Law of the Non-navigational Uses of International Watercourses on 4 April 1997. Upon the recommendation of the Working Group, the General Assembly adopted the Convention on 21 May 1997 by a vote of 103 to 3, with 27 abstentions.¹⁷ The Convention has not yet received the 35 ratifications required for it to enter into force.

10. The main feature of the Convention on the Law of the Non-navigational Uses of International Watercourses is that it was conceived as a framework convention which would provide residual rules. The general principles it embodies are equitable and reasonable utilization and participation by States in the uses of international water resources on the one hand, and the obligation of States, in utilizing international watercourses in their territories, to take all appropriate measures not to cause significant harm to other watercourse States, on the other. These principles are to be put into effect through cooperation among the watercourse States concerned, in particular through the system of notification of planned measures. Before a watercourse State implements or permits the implementation of planned measures that may have a significant adverse effect upon other watercourse States, it should provide those States with timely notification thereof. The exchange of relevant information, consultations and negotiations is required. The protection and preservation of the ecosystems of international watercourses and the

¹⁵ *Yearbook ... 1991*, vol. II (Part Two), p. 66.

¹⁶ *Yearbook ... 1994* (see footnote 1 above), p. 89.

¹⁷ By means of its resolution 51/229.

prevention, reduction and management of the pollution of international watercourses are also stipulated. It is noteworthy that the settlement of disputes includes compulsory reference to an impartial fact-finding commission, although its findings are not binding upon the States concerned.

11. There were three major issues of contention during the negotiations in the Working Group of the Sixth Committee. The first involved the nature of the framework convention and its relationship to watercourse agreements for specific rivers. The downstream States insisted on the priority of the special agreements over the framework convention, while the developing upstream States wanted the principles in the framework convention to prevail. These are two practical considerations to be kept in mind. In any event, the consent of all watercourse States is required. And in reality, the principles enunciated in the framework convention would certainly affect the special watercourse agreement. The second issue was the balance between the principle of equitable and reasonable utilization and participation (art. 5) and that of the obligation not to cause significant transboundary harm (art. 7). This was indeed the core of the contention. The upstream States contended that unless this principle of utilization was given precedence over the no harm principle, they would not be able to execute development projects. On the other hand, the downstream States upheld the *sic utere tuo ut alienum non laedas* maxim (one should use his own property in such a manner as not to injure that of another). This point of contention was finally resolved by the package of linking the two principles by the words “having due regard for” in article 7, paragraph 2. This rather weak linkage might seem to favour the upstream States. Nevertheless, the upstream States must abide by the stringent regulations for new development projects as stipulated in part III of the Convention on the Law of the Non-navigational Uses of International Watercourses, and the total balance is achieved. The third issue related to dispute settlement, in particular whether it was necessary to have a compulsory fact-finding regime. This was solved through the tacit understanding that States might enter reservations if they could not accept compulsory referral to a fact-finding commission. All the above issues and solutions achieved thereto would be very relevant when the legal regime of any other shared natural resources is to be considered.

12. During the consideration of the law of the non-navigational uses of international watercourses in the Commission, the question of groundwater was raised in the context of the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses. The Special Rapporteur, Mr. McCaffrey, presented a detailed study on the subject.¹⁸ In his analysis of the components of a watercourse to be included in the definition of “international watercourse”, he emphasized two aspects of groundwater. One was its quantity: the most astonishing feature of groundwater is its sheer quantity in relation to surface water. Groundwater constitutes approximately 97 per cent of the fresh water on earth, excluding polar ice caps and glaciers.¹⁹ The other

aspect was its use: groundwater is heavily relied upon to satisfy basic human needs, particularly in the developing world. To Mr. McCaffrey, the fundamental characteristic of groundwater seemed to be that while its flow is slow in comparison with that of surface water, it is constantly in motion, and while it may in exceptional cases exist in areas where there is virtually no surface water, it is normally closely associated with rivers and lakes. These two features of groundwater—its mobile nature and its inter-relationship with surface water—indicate that the actions of one watercourse State involving its groundwater may affect the groundwater or surface water in another watercourse State. Thus, in the view of the Special Rapporteur, groundwater needed to be included in the scope of the Convention. The Commission debated his proposal and finally agreed to include in the draft Convention groundwater related to surface water. The draft article adopted by the Commission on first reading defined “watercourse” as “a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus” (art. 2 (b)).²⁰ The rationale for including groundwater was that because the surface and underground waters formed a system of a unitary whole, human intervention at one point in such a system might have effects elsewhere within the same system. It follows from the unity of the system that the term “watercourse” so defined in the draft articles does not include “confined” groundwater, which is unrelated to any surface water. It was suggested that confined groundwater could be the subject of a separate study by the Commission with a view to the preparation of draft articles.

13. Mr. Rosenstock, who succeeded Mr. McCaffrey as Special Rapporteur in 1992, reopened the issue of groundwater. In introducing his first report²¹ in 1993, he was inclined to include “unrelated confined groundwaters” in the topic. If the Commission was receptive to that idea, he would then prepare relevant changes in the draft articles. Mr. Rosenstock presented his study on “unrelated” confined groundwaters as an annex to his second report²² in 1994. He contended that his study had demonstrated the wisdom of including unrelated confined groundwaters in the draft articles and noted that the recent trend in the management of water resources had been to adopt an integrated approach. Inclusion of “unrelated” confined groundwaters was the bare minimum in the overall scheme of the management of all water resources in an integrated manner. He was convinced that the principles and norms applicable to surface water and related groundwaters were equally applicable to unrelated confined groundwaters. In his view the changes required in the draft to achieve this wider scope were relatively few and uncomplicated and he prepared such changes as required to the draft articles. Extensive substantive discussions on his proposal took place in the Commission in 1993 and 1994.²³ While some members agreed with Mr. Rosenstock’s proposal to include unrelated confined

²⁰ See footnote 15 above.

²¹ *Yearbook ... 1993*, vol. II (Part One), p. 179, document A/CN.4/451.

²² *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/462, p. 123.

²³ *Yearbook ... 1993*, vol. I, summary records of the 2309th, 2311th–2316th and 2322nd meetings; and *Yearbook ... 1994*, vol. I, summary records of the 2334th–2339th, 2353rd–2356th meetings.

¹⁸ *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/436, pp. 50–60, paras. 8–58.

¹⁹ *Ibid.*, p. 52, para. 17.

groundwaters in the scope, many members had reservations. They did not see how “unrelated” groundwaters could be envisaged as part of a system of water that constituted a unitary whole. In their view, the use of confined groundwaters was relatively new and little was known about such resources. However, they agreed that, in view of the fact that groundwater was of great importance in some parts of the world and that the law relating to confined groundwater was more akin to that governing the exploitation of natural resources, especially oil and gas, the separate treatment was warranted.

14. In the end, the Commission decided not to include unrelated confined groundwaters in the draft Convention on the Law of the Non-navigational Uses of International Watercourses²⁴ and adopted draft article 2 as formulated on first reading with minor reduction. In 1997, the General Assembly adopted article 2 without substantial change to the draft of the Commission. The final text is:

Article 2

Use of terms

For the purposes of the present Convention:

(a) “Watercourse” means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(b) “International watercourse” means a watercourse, parts of which are situated in different States;

...

15. At the same time, the Commission adopted and submitted the following resolution to the General Assembly commending States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate, in regulating transboundary groundwater:

The International Law Commission,

Having completed its consideration of the topic “The law of the non-navigational uses of international watercourses”,

Having considered in that context groundwater which is related to an international watercourse,

Recognizing that confined groundwater, that is groundwater not related to an international watercourse, is also a natural resource of vital importance for sustaining life, health and the integrity of ecosystems,

²⁴ *Yearbook ... 1994* (see footnote 1 above), p. 90, para. (4) of the commentary to article 2.

Recognizing also the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater,

Considering its view that the principles contained in its draft articles on the law of the non-navigational uses of international watercourses may be applied to transboundary confined groundwater,

1. *Commends* States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate, in regulating transboundary groundwater;

2. *Recommends* States to consider entering into agreements with other State or States in which the confined transboundary groundwater is located;

3. *Recommends also* that, in the event of any dispute involving transboundary confined groundwater, the States concerned should consider resolving such dispute in accordance with the provisions contained in article 33 of the draft articles, or in such other manner as may be agreed upon.²⁵

16. The General Assembly did not take any action on the recommendation of the Commission on confined transboundary groundwater.

17. When the Commission selected “shared natural resources” as one of the new topics in 2000 for the future quinquennium, it did so on the basis of the syllabus prepared by Mr. Rosenstock.²⁶ Mr. Rosenstock suggested that the Commission could usefully undertake the topic focused exclusively on water, particularly confined groundwaters, and such other single geological structures as oil and gas. The effort should be limited to natural resources within the jurisdiction of two or more States. The environment in general and the global commons raised many of the same issues but a host of others as well.

18. It is against this background that the Special Rapporteur proposes to take up confined groundwaters, oil and gas under the current topic and to begin first with confined groundwaters. It is furthermore noted that the current work of the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law is also of relevance to the work on shared natural resources. Although it does not address the use of resources as such, it deals with the activities within the jurisdiction of a State which could have transboundary effects in other States.

²⁵ See footnote 1 above.

²⁶ *Yearbook ... 2000* (see footnote 3 above), annex, sect. 3, p. 141.

CHAPTER II

Confined transboundary groundwaters

19. It follows from the discussion above that the scope of “groundwater” which is supposed to be addressed covers water bodies that are shared by more than two States but are not covered by article 2 (a) of the Convention on the Law of the Non-navigational Uses of International Watercourses. Various terms are in use to refer to such water body: “unrelated confined groundwaters”, “confined groundwaters”, “confined transboundary

groundwaters”, “internationally shared aquifer”, and others. The term applies to a body of water which is an independent body that does not contribute water to a common terminus via a river system or receive a significant amount of water from any extant surface water body. It is necessary to formulate a precise definition of such a water body on the basis of a correct understanding of its hydrogeological characteristics. Until a decision can be

reached on the definition, the Special Rapporteur intends to use the term “confined transboundary groundwaters” for purposes of convenience.

20. It was perhaps a wise decision by the Commission to conduct a separate study on confined transboundary groundwaters. It is obvious that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses are also applicable to confined transboundary groundwaters. However, there exist distinct differences between these two water bodies. To cite an example, while surface water resources are renewable, groundwater resources are not. This means that when groundwater is extracted, it will be quickly depleted, as recharge will take years. When groundwater is contaminated, it will remain so for many years. In the case of surface water, the activities to be regulated are those involving the uses of such resources. In the case of groundwater, one may also have to regulate activities other than the uses of the resources that might adversely affect the condition and quality of groundwater. Additional principles need to be considered to address these unique problems.

21. Although water is the most widely occurring substance on earth and 70 per cent of the earth's surface is covered by water, merely 2.53 per cent of it is fresh water. Still further, two thirds of this fresh water is locked up in ice in the polar districts and in glaciers.²⁷ The portion of fresh water available for human consumption is therefore only 1 per cent. Per capita usage is increasing, with enhanced lifestyles and the rapid growth of the world population. As a consequence, fresh water is becoming scarce. Moreover, freshwater resources are being increasingly polluted due to human activities. Fifty per cent of the population in developing countries is currently exposed to unsafe water resources; 6,000 infants in the developing world die every day as a result of dirty, contaminated water—the equivalent of 20 jumbo passenger jet crashes daily; or of the entire population of central Paris being wiped out annually.²⁸ We are headed for a world water crisis. This is the challenge that the World Water Forum is designed to cope with through international cooperation.²⁹

22. In contrast to surface water, human knowledge of underground water resources is still limited despite their massive volume and their high and pure quality. One estimate puts the total amount of groundwater resources at 23,400,000 km³, compared with 42,800 km³ in rivers.³⁰ The science of the hydrogeology of groundwater is rapidly developing, but it seems to be treating groundwater as a whole rather than distinguishing between groundwater related to surface water and that unrelated to it. Management of confined transboundary groundwaters is still in its infancy and there is a clear need for initiating international cooperation for that purpose. Under the

²⁷ *Water for People, Water for Life: The United Nations World Water Development Report* (UNESCO and Berghahn Books, 2003), p. 8.

²⁸ Newsletter of the United Nations University, issued for World Water Day (22 March 2003).

²⁹ The Third World Water Forum was held in Kyoto, Osaka and Shiga, Japan, from 16 to 23 March 2003.

³⁰ *Water for People, Water for Life* (see footnote 27 above), p. 25.

auspices of UNESCO and the International Association of Hydrogeologists (IAH) in cooperation with FAO and UNECE, a programme proposal for an international initiative on Internationally Shared (Transboundary) Aquifer Resources Management (ISARM) was prepared. The objective of the programme is to support cooperation among States to develop their scientific knowledge and to eliminate potential for conflict. It will provide training, education and information and provide inputs for policies and decision-making, based on good technical and scientific understanding.³¹

23. Ms. Alice Aureli of the UNESCO International Hydrological Programme, who is in charge of ISARM, has kindly offered assistance to the Special Rapporteur. On the occasion of the Third World Water Forum, a “groundwater theme” was held in Osaka, Japan, from 18 to 19 March 2003, at which Ms. Aureli organized a meeting between the support group,³² consisting of representatives from UNESCO, FAO and IAH, and the Special Rapporteur. The support group suggested the formation of a group of experts to advise the Special Rapporteur and is ready to provide services for those experts. Approximately 20 experts³³ will be selected in the areas of legal affairs and hydrogeology on the basis of experience and representation of different regions. The Special Rapporteur is indeed grateful to the valuable assistance being offered.

24. In order to formulate rules regulating confined transboundary groundwaters, an inventory of these resources worldwide and a breakdown of the different regional characteristics of the resources are needed. National, regional and international organizations are currently studying and assessing such major aquifer systems as the Guarani aquifer (South America), the Nubian Sandstone aquifers (Northern Africa), the Karoo aquifers (Southern Africa), the Vechte aquifer (Western Europe), the Slovak Karst-Agtelek aquifer (Central Europe) and the Praded aquifer (Central Europe). The Guarani aquifer, shared by Argentina, Brazil, Paraguay and Uruguay, has a storage volume of 40,000 km³, enough water to supply a population of 5.5 billion people for 200 years at a rate of 100 litres per day per person.³⁴ Mr. Didier Operti Badan has provided the Special Rapporteur with the text of the Memorandum of Understanding between the Government of Uruguay and the OAS General Secretariat for the execution of the “Environmental Protection and Sustainable Development of the Guarani Aquifer System Project”. The Special

³¹ UNESCO, *Internationally Shared (Transboundary) Aquifer Resources Management—Their Significance and Sustainable Management: A Framework Document* (Paris, UNESCO, 2001), para. 1.1.

³² The support group consists of Alice Aureli and Annukka Lipponen (both hydrogeologists) of UNESCO, Kerstin Mechlem (Legal Officer) and Jacob Burke (Senior Water Policy Officer) of FAO and Shammy Puri of IAH.

³³ Tentative list of experts: Alice Aureli, Annukka Lipponen and Bo Appelgren of UNESCO; Shammy Puri, H. Wong and Mario A. Lenzi of IAH; Stefano Burchi, Kerstin Mechlem and Jacob Burke of FAO. Hydrogeologists: M. Bakhbaki, Yongxin Xu, Marie A. Habermehl, F. T. K. Sefe. Legal experts: Stephen C. McCaffrey, Lilian del Castillo Laborde, Marcella Nanni, S. U. Upadhyay and J. Ntambirweki.

³⁴ *Groundwater Briefing*, “Managing transboundary groundwater resources for human security”, presented by UNESCO and IAH at the Third World Water Forum, Kyoto, Japan, 16–23 March 2003. See also www.iah.org.

Rapporteur is indeed grateful for this contribution, which will certainly advance his understanding of the problem.

25. In addition to the necessary studies as described in paragraph 24 above, the following aspects must also be studied:

(a) Socio-economic importance: groundwater is becoming increasingly important for all populations, but particularly for the populations of the developing world. The development aspects of groundwater are being extensively studied by the World Bank Groundwater Management Advisory Team;

(b) The practice of States with respect to use and management;

(c) Contamination: causes and activities which adversely affect the resources as well as its prevention and remedial measures;

(d) Cases of conflicts;

(e) Legal aspects: existing domestic legislation and international agreements for management of the resources;

(f) Bibliography of materials of direct relevance to the work of the Commission.

PART TWO: OVERVIEW OF GROUNDWATER RESOURCES

Introduction

26. This part of the present report is intended to provide an overview of groundwater resources in the eyes of hydrogeologists. In part one of the report, the Special Rapporteur stated that the scope of groundwaters that the Commission is supposed to address covers water bodies that are shared by more than two States but are not covered by article 2 (a) of the Convention on the Law of the Non-navigational Uses of International Watercourses and that such water bodies should be termed for the time being "confined transboundary groundwaters".³⁵ It is essential, however, for the Commission to know exactly what the scope of such groundwater resources should be in order to regulate and manage them properly for the benefit of humankind. The legal norms that the Commission is to formulate must be easily understood and able to be readily implemented by hydrogeologists and administrators. With a view to having a dialogue with hydrogeologists and administrators who have profound knowledge of groundwater resources, the Special Rapporteur has requested the assistance of Alice Aureli, hydrogeologist of the UNESCO International Hydrological Programme, who co-opted expertise from ISARM, the programme coordinated by UNESCO jointly with FAO, UNECE and IAH.

27. This part is based on the contribution of the following experts: Jacob Burke (FAO), Bo Appelgren (ISARM/UNESCO), Kerstin Mechlem (FAO), Stefano Burchi (FAO), Raya M. Stephan (UNESCO), Jaroslav Vrba (Chairman of the IAH Commission on Groundwater Protection), Yongxin Xu (UNESCO Chair in Hydrogeology, University of the Western Cape, South Africa), Alice Aureli (UNESCO), Giuseppe Arduino (UNESCO), Jean Margat (UNESCO) and Zusa Buzás (ISARM/UNECE Task Force on Monitoring and Assessment on Transboundary Waters).³⁶ The Special Rapporteur expresses

his deepest appreciation to all those experts, who provided contributions and data. He, however, takes full responsibility for the wording and content of this part of the report.

28. Groundwater is contained within sets of aquifer systems throughout the earth's crust. Groundwater provides the globe with its largest store of fresh water, exceeding the volumes stored in lakes and watercourses. From the human perspective, groundwater is a vital resource. It is often the only source of water in arid and semi-arid regions and on small islands. Groundwater plays an important role in maintaining soil moisture, stream flow, springs discharge, river base flow, lakes, vegetation and wetlands. In general groundwater is ubiquitous, relatively cheap to lift and of high quality, usually requiring little or no pre-treatment for potable use. Owing to these characteristics, during the past few decades there has been a rapid expansion in groundwater use, particularly in developing countries. Over half of the world's population depends on groundwater for its potable water, and approximately 35 per cent of the world's irrigation relies on continued access to groundwater.

29. This part will deal with the following issues: basic terminology; characteristics of groundwater, including transboundary aquifers; groundwater resources of the world and their use; causes and activities that adversely affect the resource; practices of States with regard to national management of groundwater; preliminary survey of shared groundwater aquifers under pressure from cross-border pumping or from cross-border pollution; and social, economic and environmental aspects of management of non-connected groundwaters, with a special focus on non-renewable groundwater.

³⁵ See paragraph 19 above.

³⁶ The following data have been extracted: *Internationally Shared (Transboundary) Aquifer Resources Management* (see footnote 31 above); Zaporozec and Miller, *Ground-Water Pollution*; Zektser and Everett, *Groundwater and the Environment: Applications for the Global Community*; Foster and others, *Utilization of Non-Renewable*

Groundwater: a Socially-Sustainable Approach to Resource Management; Regional Groundwater Reports, Natural Resources/Water Series Nos. 12–27 (1983–1990) (United Nations publications); and Burke and Moench, *Groundwater and Society: Resources, Tensions And Opportunities*.

CHAPTER III

Confined versus decoupled aquifers

30. It is the intention of the Special Rapporteur to deal with confined transboundary groundwaters. The term “confined” is already contained in the Commission’s resolution on confined transboundary groundwater. In the preamble of the resolution the Commission defined “confined groundwater” as “groundwater not related to an international watercourse”.³⁷ Hence, it seems to employ the term “confined” as meaning “unrelated”. This differs from the definition hydrogeologists use for “confined”. In hydrogeological terms, a confined aquifer is an aquifer overlain and underlain by an impervious or almost impervious formation, in which water is stored under pressure. Confinement is thus a matter of hydraulic state and not a question of being connected or related to a body of surface waters. The Commission did not, in fact, mean to refer to “confined” aquifers in the hydrogeological sense, but simply to those groundwaters not connected to bodies of surface waters. In this sense, it used the term “confined” simply to distinguish groundwaters that were not connected or were decoupled from a body of surface water that may or may not be confined in the strict hydraulic sense.

31. Groundwater connected with a body of surface water can fall within the scope of the Convention on the Law of Non-navigational Uses of International Watercourses. The Convention applies to “international watercourses”. A “watercourse” is a “system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus” (art. 2 (a)). An “international watercourse” is “a watercourse, parts of which are situated in different States” (art. 2 (b)). For groundwater to be covered by the Convention, four criteria must hence be fulfilled: (a) it must be part of a *system* of surface and groundwaters; (b) this system must be part of a *unitary whole*; (c) the system must normally flow into a *common*

terminus; and (d) parts of the system must be located in *different States*. Looking at groundwater, this definition poses a number of problems that cannot be discussed in detail here. Groundwater does not normally flow into a common terminus and also the “unitary whole” criteria is more suitable for surface water than for groundwater. What are excluded from the scope of the Convention are groundwaters emplaced in aquifer systems that are decoupled from active surface water systems. Such aquifer systems may or may not be confined—i.e. contain water under pressure. A subset of these aquifers, which have received no contemporary recharge, are often called fossil aquifers. As indicated, these aquifers can be confined or unconfined. It is the fact that they are not renewable under present climate regimes that renders them distinctive, not the degree of pressure under which these waters are stored.

32. Fossil aquifers can be considered depletable resources like oil and gas. The Commission is therefore considering dealing with aquifer systems decoupled from surface water systems, providing particular focus to a subset of these aquifers called fossil aquifers. Fossil aquifers should also fall under a specific legal regime, as they are particularly vulnerable to pollution and depletion. While the waters of these aquifers are of vital importance for many arid regions of the world they are almost impossible to clean once polluted, as there is almost no flow within the aquifer. This sheds doubt on the suitability of the “significant harm” principle and raises the question whether a stricter standard should apply. Furthermore, these waters can only be depleted over shorter or longer periods of time and the law should deal with the question of what this means for the principle of equitable and sustainable utilization. The remainder of the text covers groundwater resources in general in order to give a more comprehensive picture of this important resource. Where the specific characteristics of fossil aquifers merit special attention this will be pointed out.

³⁷ See footnote 1 above.

CHAPTER IV

Characteristics of groundwater and aquifers**A. General characteristics**

33. Groundwater occurs in aquifers, or, broadly, geological formations capable of producing usable amounts of water. Aquifers are rarely homogeneous and their geological variability conditions the nature of the groundwater flowing through their respective lithologies and structures. The greatest variations in groundwater flow patterns occur where changes in rock types—for example, limestone overlying sediments and a hard crystalline rock—induce discontinuities in flow and may bring groundwater flow to the surface on the junction between the two rock types. Practically all groundwater originates as precipitation. Rain falling or collecting on the earth’s surface soaks through the ground and moves downward

through the unsaturated zone (see fig. 1, p. 133). Once it reaches the top of the saturated zone, the water table, it recharges the aquifer system, building up hydrostatic pressure at the point of recharge and inducing pressure changes where the aquifer happens to be capped by a confining layer of impermeable material.

34. Aquifer systems constitute the predominant reservoir and strategic reserve of freshwater storage on planet Earth.³⁸ But it should be noted that only a fraction of the quantity of groundwater is economically recoverable and it is the groundwater levels, not the volumes of stored water, that are significant in determining access to

³⁸ Shiklomanov, “Global renewable water resources”.

groundwater resources. Groundwater can move sideways as well as up or down. This movement is in response to gravity, differences in elevation, and differences in pressure. As a general rule, groundwater moves along hydraulic gradients driven by differences in hydrostatic pressure and ultimately discharges in streams, lakes, and springs and into the sea. Groundwater moves through the aquifers very slowly, with flow velocities measured in fractions of metres per day or metres per year, compared to metres per second for stream flow. Time and space scales are the key phenomena for understanding groundwater regime and flow dynamics. Aquifer systems are composed of inter-related subsystems, mainly controlled by the hydrogeological properties of the soil/rock environment, climatic conditions, landscape topography and surface cover. Flow in aquifer systems should be studied with respect to the infiltration rate in recharge areas, transition zone and upward rising groundwater flow in discharge areas. Under natural conditions a steady state or dynamic equilibrium prevails when recharge and discharge rates are in long-term balance. Some aquifer systems form a unitary whole with surface waters while others do not. In this case what is being considered is groundwater that is stored under confining pressures but which, owing to the geological structure, is not coupled to one specific watercourse in a unitary whole to be unrelated confined groundwater.

B. Characteristics of aquifers

35. Generally, three types of aquifers (both national and transboundary) should be recognized:

Shallow aquifers—usually occur in fluvial, glacial and aeolian deposits and in rock weathered zones, and are mostly unconfined or semi-confined, highly vulnerable because the unsaturated zone is of low thickness and frequently polluted (diffuse pollution of shallow aquifers below arable land is often recorded). They are characterized by active groundwater flushing and a single flow system. Porous permeability and high hydraulic conductivity prevail, particularly in aquifers in fluvial deposits. Short residence time in the order of years and tens of years and low mineralization are their feature. Interface with surface water (discharge of groundwater into streams or ponds, and/or surface water bank filtration from the surface water bodies to adjacent shallow aquifers) is often recorded. However, many shallow aquifers have no direct contact with surface water and discharge through springs. These systems can also be shared by two countries. Low development cost and easy accessibility of groundwater through simple shallow wells has led to the wide exploitation of shallow aquifers by public or domestic water supply wells.

36. *Deeper aquifers*—are of major regional extent, often confined and usually of lower vulnerability. However, many deeper aquifers can be unconfined and can, owing to the permeability of the unsaturated zone, be vulnerable. Owing to geological heterogeneity, the deeper aquifers may consist of a number of laterally and/or vertically interconnected groundwater flow systems of various orders of magnitude. Groundwater in deeper aquifers is renewable, flows at greater distance compared to shallow groundwater systems and discharges into big rivers, lakes, or coastal areas of oceans or seas. Deeper

groundwater basins do not often coincide with the surface water catchment areas. In deeper aquifers, temperature, pressure and time and space contact between rock and groundwater gradually increase and groundwater flow velocity decreases. Groundwater in deeper aquifers is decades to hundreds of years old. Many deeper aquifers are shared between two or more countries. Potential conflicts are foreseen for aquifers with their recharge area in one country and discharge area in another country. Interrelationship between shallow and deeper aquifers is observed particularly in regions with highly fractured rocks with fissured permeability.

37. *Fossil aquifers*—can be considered as non-renewable groundwater resources of a very low vulnerability. Fossil waters are not part of the present hydrologic cycle. Major recharge of these aquifers occurred in the last pluvial periods. Under wetter conditions, these aquifers would be renewable. Contamination of fossil confined aquifers is recorded exceptionally only (e.g. in the drilling of deep wells). Chloride-rich, highly mineralized fossil water is usually old; its age may vary from a few thousand to millions of years. Many fossil aquifers are internationally shared between two or more countries. Uncontrolled mining of fossil transboundary aquifers could lead to serious political and diplomatic problems, particularly in water-scarce arid and semi-arid zones.

C. International versus transboundary aquifers

38. In order to develop a uniform terminology it is suggested that a distinction be made between international aquifers and transboundary aquifers. An aquifer can be regarded as international if it is part of a system where groundwater interacts with surface water that is at some point intersected by a boundary. In the case of an aquifer and a river that are hydrologically linked, both resources can be intersected by a boundary or only one of the two, making the whole system international in character. Even an aquifer that is located entirely within the territory of one State can be regarded as an international aquifer (that would fall within the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses when the other criteria of the Convention are fulfilled) when it is linked with a body of surface water that is intersected by an international boundary. A transboundary aquifer is in contrast a groundwater body that is intersected by a boundary itself. Hence, transboundary aquifers could be considered a subcategory of international aquifers. Fossil aquifers need to be transboundary ones in order to be regarded as internationally shared resources, as they are decoupled from all other waters.

D. Transboundary aquifer systems

39. Certain aquifers associated with continuous sedimentary basins can extend uniformly over very large land areas, extending across international boundaries. The key features of transboundary aquifers in general include a natural subsurface path of groundwater flow, intersected by an international boundary. Such water transfers, however slowly, from one side of the boundary to the other (see fig. 2, p. 134). In many cases, the aquifer might receive the majority of its recharge on one side of the border, while the majority of its discharge would be on the other.

It is this feature that requires wise governance and agreement in order to avoid or minimize harmful transboundary impact and, in general, to ensure accommodation of the competing interests of the countries concerned. Activities such as withdrawals of the natural recharge on one side of the boundary could have subtle impact on base flows and wetlands on the other side of the boundary. In most

transboundary aquifers, these impacts can be widespread and delayed by decades. The same holds true for pollution, both from direct discharges and from land-based activities. Many years may pass before the impacts are detected by monitoring. A worldwide survey of significant transboundary aquifers has recently been initiated under the ISARM initiative (UNESCO, FAO, UNECE and IAH).

CHAPTER V

Groundwater resources of the world and their use

40. The total amount of groundwater use depends on different factors such as population, climatic and hydrogeological conditions, availability of surface water resources and their degree of contamination. Rapid expansion in groundwater exploitation occurred during 1950–1975 in many industrialized nations and during 1970–1990 in most parts of the developing world. Systematic statistics on abstraction and use are not available, but globally groundwater is estimated to account for about 50 per cent of current potable water supplies, 40 per cent of the demand of self-supplied industry, and 20 per cent of water use in irrigated agriculture. These proportions vary widely, however, from one country to another. Compared to surface water, groundwater use often brings large economic benefits per unit volume, because of ready local availability, drought reliability and good quality requiring minimal treatment.³⁹ Water for general household use includes water for drinking, cooking, dishes, laundry and bathing. Today, with a global withdrawal rate of 600–700 km³/year, groundwater is the world's most extracted raw material, and, for example, forms the cornerstone of the Asian green agricultural revolution, providing 70 per cent of piped water supply in the European Union and supporting rural livelihoods across extensive areas of sub-Saharan Africa.⁴⁰ In arid and semi-arid regions, where water scarcity is endemic, groundwater plays an immense role in meeting domestic and irrigation demands.

A. Europe

41. Analysis of the data available shows that groundwater is the main source for public water supply in European countries accounting for more than 70 per cent of the total water resources used for this purpose. Rural populations and small and medium towns rely mainly on groundwater for drinking. In general, more than 90 per cent of big cities and towns are supplied exclusively by groundwater. Groundwater use for industrial water supply represents about 22 per cent of the total withdrawal, including mine-water drainage in some countries (e.g. France, Germany). Extensive groundwater use in industries is characteristic of such countries as France, Germany, the Russian Federation, and the United Kingdom of Great Britain and Northern Ireland.

B. India

42. Groundwater has been used in India since the Vedic times, for over 6,000 years. The irrigation potential created from groundwater has increased from 6 million ha in 1951 to 36 million ha in 1997. Stress on groundwater resources, also due to increasing water demands, has caused problems related to overexploitation, such as declining groundwater levels, sea-water intrusion, quality deterioration.

C. China

43. Distribution of groundwater use by sectors in China is as follows: urban residential use, 7.4 per cent; urban industrial use, 17.5 per cent; rural residential use, 12.8 per cent; farmland irrigation, 54.3 per cent; rural enterprises and others, 8 per cent.

D. North America

44. Groundwater represents perhaps less than 5 per cent of Canada's total water use;⁴¹ however, more than 6 million people, or about one fifth of the population, rely on groundwater for municipal and domestic use. About two thirds of these users live in rural areas, and the rest primarily in smaller municipalities. About 50 per cent of the population of the United States of America depends on groundwater for domestic uses. More than 95 per cent of the households that supply their own drinking water rely on groundwater. The use of groundwater in the United States increased steadily from 1950 to 1980, and has declined slightly since 1980, in part in response to more efficient use of water for agricultural and industrial purposes, greater recycling of water and other conservation measures.

E. Central America

45. Groundwater is an important source of potable water throughout much of Mexico and Central America. In Mexico, where desert and semi-arid conditions prevail over two thirds of the country, groundwater is widely used. Groundwater provides most of the domestic, drinking, and industrial water needs of Nicaragua. Costa Rica, El Salvador, and Guatemala also use substantial groundwater, whereas Belize, Honduras, and Panama are less dependent on groundwater. In most rural areas of Central America, more than 80 per cent of the population is supplied by either private or municipal well systems. Urban areas in Mexico and Central America that

³⁹ *Water for People, Water for Life* (see footnote 27 above), p. 78.

⁴⁰ *Ibid.*

⁴¹ Leeden, Troise and Todd, *The Water Encyclopedia*.

use groundwater as their sole or principal source of water supply include Mexico City, Guatemala City, Managua, and San José.

F. South America

46. Based on the latest United Nations estimates, in South America groundwater use is mainly to supply domestic and industrial demands. However, the present use of groundwater is very low, in comparison with the renewable resources available. The region has sufficient water but the availability of safe water is becoming a major socio-economic issue.

G. Africa and the Middle East

47. In general, groundwater is overdeveloped in Northern Africa, i.e. in the Arab countries, which occupy the semi-arid, arid and hyper-arid belt north of the Sahara. The economy of the region largely depends on groundwater resources. Large aquifers underlie North Africa and the Middle Eastern countries. In these regions several countries share the groundwater resources existing in transboundary aquifer systems. In the humid equatorial and tropical African regions, groundwater is underdeveloped, because rainfall and surface water is abundant in

major rivers and their tributaries. However, countries in these regions have recently realized that provision of safe drinking water to small towns and rural areas can only be guaranteed by utilizing groundwater sources. In the arid and semi-arid region of Southern Africa, there is an urgent need to use groundwater for rural water supply. With the exception of the countries of North Africa, and a few countries in Western and Southern Africa, adequate and reliable information on water use is lacking or scarce in Africa. Lack of rules and national regulations is also an evident problem.

H. Australia

48. The total amount of groundwater used in Australia annually was about $2,460 \times 10^6 \text{ m}^3$ in 1983, equivalent to about 14 per cent of the total amount of water used. In Australia, the surficial aquifers are generally the groundwater sources most intensively used for irrigation and for urban and industrial water supplies. The intensive use of groundwater in some areas, especially for irrigation, has led to the overdevelopment of some regional confined aquifers. Groundwater is vital to the pastoral industry (cattle and sheep) throughout large parts of Australia, and the mining industry is also heavily dependent on groundwater.

CHAPTER VI

Causes and activities that adversely affect the resource

A. Groundwater quality

49. The value of groundwater lies not only in its widespread occurrence and availability but also in its consistently good quality, which makes it an ideal supply of drinking water. The term "quality of water" refers to the physical, chemical, and biological characteristics of the water as they relate to its intended use. Groundwater also is cleaner than most surface water because the earth materials can often act as natural filters to screen out some bacteria and impurities from the water passing through. Most groundwater contains no suspended particles and practically no bacteria or organic matter. It is usually clear and odourless. Most of the dissolved minerals are rarely harmful to health, are in low concentrations and may give the water a pleasant taste. Recognition of the fact that some of these dissolved substances may be objectionable or even detrimental to health has resulted in the development of drinking water standards. These standards serve as a basis for appraisal of the results of chemical analyses and are based on the presence of objectionable properties or substances (taste, odour, colour, dissolved solids, iron, etc.) and on the presence of substances with adverse physiological effects. A cause of negative impacts is the intensive exploitation of the aquifer. Equilibrium conditions can be disturbed by intensive aquifer exploitation. Intensive use of groundwater can lead to groundwater depletion and groundwater quality degradation.

B. Groundwater pollution

50. In view of the diverse uses of groundwater, it is essential to keep it free from any kind of pollution. While

groundwater is less vulnerable to pollution than surface water, the consequences of groundwater pollution last far longer than those from surface water pollution. Pollution of groundwater is not easily noticed and in many instances it is not detected until pollutants actually appear in drinking water supplies, by which time the pollution may have affected a large area. The vulnerability of the aquifer systems to pollutants is dependent on a number of factors, including soil type, characteristics and thickness of materials in the unsaturated zone, depth to groundwater and recharge to the aquifer. Groundwater pollution is a modification of the physical, chemical, and biological properties of groundwater, restricting or preventing its use in a manner for which it had previously been suited. Substances that can pollute groundwater can be divided into substances that occur naturally and substances produced or introduced by human activities (see fig. 3, p. 135).⁴²

51. *Naturally occurring* substances causing pollution of groundwater include iron, manganese, toxic elements, and radium. Some of them are quite innocuous, causing only inconveniences, such as iron and manganese. But others may be harmful to human health, e.g. toxic elements (such as arsenic or selenium), fluoride, or radionuclides (radium, radon, and uranium). Arsenic is widely distributed in the environment and is usually found in compounds with sulphates. Arsenic is highly toxic at concentrations above 0.01 mg/l, and high doses cause rapid death.

52. *Polluting substances resulting from human activities* primarily include organic chemicals, pesticides,

⁴² Zaporozec and Miller, *op. cit.*

heavy metals, nitrates, bacteria, and viruses. The type of groundwater pollution of the greatest concern today—at least in the industrialized countries—is pollution from hazardous chemicals, specifically organic chemicals. Pesticides used in agriculture and forestry are mainly synthetic organic compounds. The term pesticide includes any material (insecticide, herbicide, and fungicide) used to control, destroy, or mitigate insects and weeds. Many of the pesticide constituents are highly toxic, even in minute amounts. Nitrate is the most commonly identifiable pollutant in groundwater in rural areas. Although nitrate is relatively non-toxic, it can cause, under certain conditions, a serious blood disorder in infants. The greatest danger associated with drinking water is that it may be polluted by human excreta and lead to the ingestion of dangerous pathogens. Pollution by infiltration is probably the most common groundwater pollution mechanism. A pollutant released at the surface infiltrates the soil through pore spaces in the soil matrix and moves downwards through the unsaturated zone under the force of gravity until the top of the saturated zone (the water table) is reached. After the pollutant enters the saturated zone (an aquifer), it travels in the direction of groundwater flow. Groundwater pollution can also result from the uncontrolled development and abstraction of groundwater. When uncontrolled use of groundwater has significantly exceeded natural rates of aquifer replenishment, negative impacts can affect the aquifer systems. Sometimes it can also lead to land subsidence and to the inflow of saline water from deeper geological formations or the sea. Sea-water intrusion is an ever-present threat to groundwater supplies in overdeveloped coastal aquifers, where under natural conditions fresh groundwater is delicately balanced on top of denser sea water. Often water of poor quality can enter deeper parts of the aquifer from rivers and polluted shallow aquifer systems.

C. Groundwater protection and management

53. Monitoring wells can be installed to discover groundwater pollution from a given activity, detect its extent, and provide advance warning of polluted water approaching important sources of water supply. However, clean-up is difficult and expensive and generally requires long periods of time. Therefore, a major effort should be directed towards preventing pollution from occurring. The cost of groundwater protection through prevention is generally much smaller than the cost of correcting the pollution after it is found. Groundwater resources are vulnerable to human impact particularly in recharge areas, where the hydraulic heads are high and water flow is downward. Important sources of drinking water can be protected by delineating protection zones, in which potentially polluting uses and activities are controlled. Human activities (agriculture, industry, urbanization, deforestation) in the recharge areas should be under control and should be partly or fully restricted by relevant regulations. However, groundwater protection policy should be adequate for different aquifer systems.

D. Transboundary groundwater contamination problems

54. Groundwater contamination can occur through infiltration (the downward influx of contaminants), recharge

from surface water, direct migration and aquifer interface. Infiltration is the most common source of the contamination of shallow aquifers and unconfined deeper aquifers. Water penetrating downwards through the soil and unsaturated zones forms leachate that may contain inorganic or organic contaminants. When it reaches the saturated zone contaminants spread horizontally in the direction of groundwater flow and vertically owing to gravity. Recharge of polluted surface water into shallow aquifers can occur in losing streams, during flooding and when the groundwater level of the aquifer adjacent to a surface stream is lowered by pumping. Leakages from contamination sources located below the groundwater level (e.g. storage tanks, pipelines, basement of waste disposal sites) migrate directly into groundwater and particularly affect shallow aquifers. Contaminant transport in groundwater systems is a complex process, whose description is not the objective of this report and depends on rock permeability (porous, fissured, karstic), contaminant properties, groundwater chemical composition and processes controlling contaminant migration (advection, mechanical dispersion, molecular diffusion and chemical reactions). Various sources of contamination particularly affect shallow aquifers and unconfined deeper aquifers. Vulnerability of deeper confined aquifers to contamination impact is significantly lower and mostly occurs in recharge areas. However, such aquifers may be contaminated by natural constituents, like fluoride, arsenic, copper, zinc, cadmium and others. Fossil aquifers are not vulnerable to human impacts; however they are often more mineralized and of a higher temperature. The movement of contaminants is generally slow, but in fissured rocks and particularly in karst rocks, contaminants can move even several metres per day. Contaminants which migrate in the aquifers over long distances and are sources of contamination of transboundary groundwater are nitrates, oil hydrocarbons and light non-aqueous phase liquids, heavy metals and radionuclides.

E. Transboundary shallow aquifer contamination problems

55. Several scenarios of contamination of shallow transboundary aquifers exist. Many shallow unconfined aquifers are developed in the fluvial deposits in river valleys and pollution can be transported through groundwater flow from one country to another. Hydraulic gradients between surface water and groundwater control the possibility of bank infiltration of surface water to the adjacent aquifers and vice versa. Stream flow response to precipitation reflects short- and long-term changes in the hydraulic head of surface and groundwater bodies. During long dry periods, surface flow depends almost exclusively on groundwater (base flow conditions) and the water quality of the streams reflects the quality of the underlying aquifers. Contamination occurs mostly on the ground surface of fluvial deposits and penetrates to the aquifer. Contaminated groundwater may flow in a shallow aquifer parallel to a river flow, or discharge into a river or other surface water body. In both cases contamination originating in the upstream country affects water quality in the downstream country. Such transboundary contamination should be identified by water quality monitoring systems. Seasonal changes in the hydraulic head always have to

be considered when a groundwater quality monitoring system is established.

56. However, penetration of contaminated surface water into underlying shallow aquifers may also occur far from the contamination source, where the river is a losing stream and conditions of surface water infiltration set in. Owing to the low attenuation capacity of fluvial deposits (mostly gravel and sands), which are unable to retain or remove the contaminants, shallow aquifers become contaminated in the long term. Therefore, to identify water quality in the country borders, monitoring systems of both surface water and groundwater have to be designed. There are many shallow unconfined aquifers developed in rock weathered zones, in higher fluvial terraces or in aeolian deposits that are not directly connected with surface water bodies and discharge frequently in springs. However, such aquifers are often only of a smaller extent. Contamination occurs in recharge and vulnerable areas of such aquifers and may be transported along a flow path over a long distance. Contamination is detectable by sampling springs or using shallow monitoring wells. Transboundary contamination should be identified by shallow monitoring wells.

F. Transboundary deeper aquifer contamination problems

57. Deeper confined aquifers may cover hundreds or even thousands of square kilometres. Groundwaters in recharge areas of deeper aquifers are unconfined and vulnerable to contamination. If contamination occurs, it can be transported laterally over a long distance along a flow path under confined aquifer conditions. The lateral movement of contaminants in the aquifer from recharge to discharge area may be accelerated by intensive aquifer exploitation. Contamination of deep confined transboundary aquifers should be identified by deep monitoring wells located in the country borders, which with respect

to the contaminant properties have to reach the upper part or the bottom of the aquifer. Because the recharge area of deep confined aquifers in one country may be many times larger than the discharge area in the other country, aquifer depletion may occur, particularly if control measures regarding aquifer exploitation are missing. Deeper aquifers may also be unconfined ones, which renders the transit and recharge zone vulnerable. The downward migration of the contaminants to the aquifer depends on soil properties and the thickness and lithology of the unsaturated zone. In conditions of porous permeability it can take many years before the contamination plume reaches the saturated aquifer. However, in aquifers with fissured permeability and in karst aquifers contaminants can reach the aquifer very fast (days, months). The mechanism of lateral contaminant movement in these aquifers is similar to that of confined aquifers. Early-warning quality monitoring of the unsaturated zone and the upper part of the aquifer supports identification of groundwater pollution problems while they are still at the controllable and manageable stage.

G. Transboundary fossil aquifer contamination problems

58. Fossil aquifers are well protected by the geological environment and are typically of very low vulnerability and their contamination is uncommon. Contaminants can enter fossil aquifers through vertical leakage through the seals around well casings when deep wells are drilled for various purposes (e.g. exploitation wells, deep disposal wells) and the drilling process is not controlled. However, many transboundary aquifers can be affected by depletion, particularly if there is mining and non-renewable groundwater storage is continuously depleted. Comprehensive control over the abstraction of transboundary fossil aquifers is a very desirable and urgent task.

CHAPTER VII

Practices of States with regard to national management of groundwater

59. Groundwater resource management has to balance the exploitation of a complex resource (in terms of quantity, quality and surface water interactions) with increasing demands for water and the attitudes of land users who can pose a threat to resource availability and quality. Both in common law and in civil law countries, landownership used to attract all resources above and below the land. However, in response to growing pressure on high-quality reserves from increasing demand, groundwater has been increasingly brought within the scope of legislation regulating the extraction and use of the resource. Also, the threat posed to the quality of groundwater has attracted legislation regulating direct and indirect discharges and preventing and abating groundwater pollution. In many countries, groundwater is protected through the enactment of a basic water law that covers all water resources. Specific provisions for groundwater may be included within this or may be added at a later time. This approach has been followed in Finland, Israel, Italy, Poland, Spain,

the United Kingdom and the United States. In other countries, including France, the Netherlands, Romania and Turkey, groundwater protection has evolved through the adoption of a wide range of regulations dealing with specific aspects of groundwater, such as extraction rates, well depth and environmental protection. Primary jurisdiction for groundwater protection may be centralized at the national level, as in Egypt and Mexico, or may be largely delegated to states or provinces, as in China, India and the United States. In cases where this jurisdiction is delegated, the central government typically retains authority over certain aspects, such as minimum water quality standards, to ensure consistency. One of the key components of effective groundwater management is the establishment of a central agency with responsibility for the implementation of groundwater legislation. A wide variety of regulatory and non-regulatory mechanisms have been developed to protect groundwater resources from overextraction and from pollution.

CHAPTER VIII

Preliminary survey of shared aquifers under pressure from cross-border pumping or from cross-border pollution

60. *Sonora-Arizona border area* of Mexico and the United States (partly covered by agreement (Minute 242 of 1973, of the Mexico-United States International Boundary and Water Commission). This area concerns the Yuma Mesa aquifer and belongs hydrologically to the lower Colorado River basin, but the tension is about the pumping of groundwater.

Huaco Bolson aquifer (United States (Texas)–Mexico (Chihuahua)) (no agreement).

Mimbres aquifer (United States (New Mexico)–Mexico (Chihuahua)) (no agreement).

Generally at least 15 transboundary aquifers at the United States–Mexican border (no agreement except for Minute 242 on the Yuma Mesa).

Araba-Arava groundwater area (Israel and Jordan) covered by the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan (26 October 1994). It could be a case of cooperation. The real tension between Israel and Jordan is about surface water (Jordan and Yarmuk rivers).

Mountain aquifer (Israel and Palestine) (a case of actual conflict) (Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995). The Agreement establishes a joint commission; however, it does not solve the conflict over water, which was supposed to be discussed in the final negotiations).

Disi aquifer (Jordan and Saudi Arabia) (no agreement).

Regional basalt aquifer system (Jordan-Syrian Arab Republic). Technical cooperation between the two countries was developed by ESCWA and the Federal Institute for Geosciences and Natural Resources of Germany to establish information regarding the sustainable development of groundwater resources; the outputs were the

establishment of a geological map of the aquifer, and the study of the prevailing hydrogeological conditions. At the urging of ESCWA, a memorandum of understanding was signed by the Syrian Arab Republic, and will be signed by Jordan for further cooperation regarding the aquifer.

Nubian Sandstone Aquifer System (NSAS) (Chad, Egypt, Libyan Arab Jamahiriya, Sudan). Agreement establishing an NSAS Joint Authority (date uncertain) and two agreements made during 2000 governing access to, and use of, the aquifer database and model (on file with FAO).

North-Western Sahara Aquifer System (Algeria, Libyan Arab Jamahiriya, Tunisia) (no agreement, but joint decision setting up an arrangement for tripartite consultation on the updating and management of the aquifer database and model) (on file with FAO).

Continental Terminal aquifer (Gambia and Senegal) (no agreement).

Guaraní Aquifer (Argentina, Brazil, Paraguay, Uruguay) (no agreement, but a Global Environment Facility project in progress. The main objective of the project is to prepare and implement a common institutional framework for managing and preserving the aquifer. The project agreement provides for a Steering Committee of representatives of the four countries (and one from the South American Common Market (MERCOSUR)).

Eighty-nine transboundary aquifers in Europe have been surveyed and recorded by the UNECE task force on monitoring and assessment set up under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (in Almásy and Buzás, *Inventory of Transboundary Groundwaters*, annex III, pp. 181–283 (copy on file with FAO)). Of these, however, it is not known at this time how many are under actual or foreseeable pressure from extraction or pollution.

CHAPTER IX

Social, economic and environmental aspects of the management of non-connected groundwaters: special focus on non-renewable groundwater**A. General**

61. Water resources are of two types: flows and stocks. The use of flows does not affect future availability, while the use of stocks does. Fossil groundwater represents, by definition, a stock resource. Management of flow resources generally represents a straightforward application of marginal analysis. Stock resources, on the other hand, like any physical capital, have the characteristic that its optimal use requires considering future impacts (as risks or utilitarian values) of current decisions.

Considering non-connected or unrelated groundwaters as a combination resource with conjunctive characteristics, the connection with flow resources is closer to the hydrogeological realities. However, the conjunctive aspects of water make its management more complex and this is probably one reason why this has developed into a principal question of discussion. In a neo-classical paradigm the goal of water resource management is to maximize the (short- and long-run) value of the water resources to society. However, the neo-classical paradigm has increasingly given way to alternatives, such as the political,

evolutionary, institutional and economic paradigm, with greater recognition of evolutionary processes and the prevailing political economy, which in reality governs decisions on the allocation of resources in society. Fossil groundwater resources contained in confined aquifers can be large regional systems shared by two or more countries. Fossil water appears as directly measurable and contained in a receptacle and should therefore be subject to appropriation and regulated by law like any other owned object. However, this is a simplified picture, and the measurable and contained-in-a-receptacle aspects do not accommodate the complex and uncertain hydrogeological, social, economic and political long-term impacts characterized by high risk and uncertainty related to change of climatic and environmental conditions. So far, hydrologists and lawyers have, in fact, few tools to incorporate future uncertainties. This shortcoming requires mechanisms for enhanced participation and communication and enhanced attention to social and environmental water demands. The political will to accommodate uncertainty and incorporate escape clauses and to provide for shared risks at the moment of negotiating international water agreements has already, however, proved to be limited and there is therefore a call for alternative mechanisms for conflict prevention and resolution.

B. Non-connected groundwater resources: risk combined with scientific and policy uncertainty

62. While not, at least not directly, connected to modern annual recharge, fossil groundwaters are generally confined, overpressured and often artesian. The risk of

human-induced abuse coincides with that for annually recharged, connected groundwaters and includes not only inappropriate water and other drilling, casing and capping practices, over-abstraction and inter-aquifer contamination, but also impacts of changing land use, its consequences for recharge, pressure salinization and water quality. While non-connected groundwaters are less vulnerable to point- and non-point-source pollution, sudden expansion and waste discharges from abstraction of partly fossil water could have wide negative (water pollution, salinization and water-logging) and positive (increase in the available water resource, reduced evaporation losses) environmental impacts. Similar to the exploitation of other stock natural resources the practices of transboundary agreement therefore seem to represent one important tool for the joint management and use of transboundary non-connected groundwater.

C. Ethical versus scientific standards

63. While utilization of fossil groundwater had long been labelled as non-sustainable, the rigid attitude based on the rigid hydrogeological safe-yield concept has recently become relaxed and the permissible level of exploitation is no longer a fixed but a relative term related to social, economic and environmental values. It is becoming increasingly recognized that most standards in water and natural resources management are ethical, as the earlier dominance of scientific and utilitarian standards could deviate from and confuse politically agreed and ethically based intentions as expressed by legislators and the public.

CHAPTER X

Conclusions

64. The presentation of groundwater resources in general has shown that:

(a) Transboundary aquifers (be they shallow unconfined, semiconfined, confined) can be connected with international surface water systems;

(b) However, there may be cases where transboundary aquifers are not connected with international surface water systems;

(c) Shallow aquifers are generally more vulnerable (easily exploited and contaminated) than deeper aquifers but all aquifers (confined, unconfined) are vulnerable in their recharge areas;

(d) Fossil aquifers, decoupled from contemporary recharge, need to be treated as a non-renewable resource and planned for accordingly;

(e) Aquifers need to be periodically assessed and monitored, if they are to be managed and allocated in an equitable fashion;

(f) Groundwater development policies need to consider conjunctive use of groundwater and surface water, impacts to dependent ecosystems, coordination with land-use planning and links to social policy and cultural practice.

65. The vulnerability of groundwater, especially fossil groundwater, to depletion and pollution calls for the development of norms of international law that contain stricter standards of use and pollution prevention than those applied to surface waters.

FIGURE 1

Hydrogeological cycle

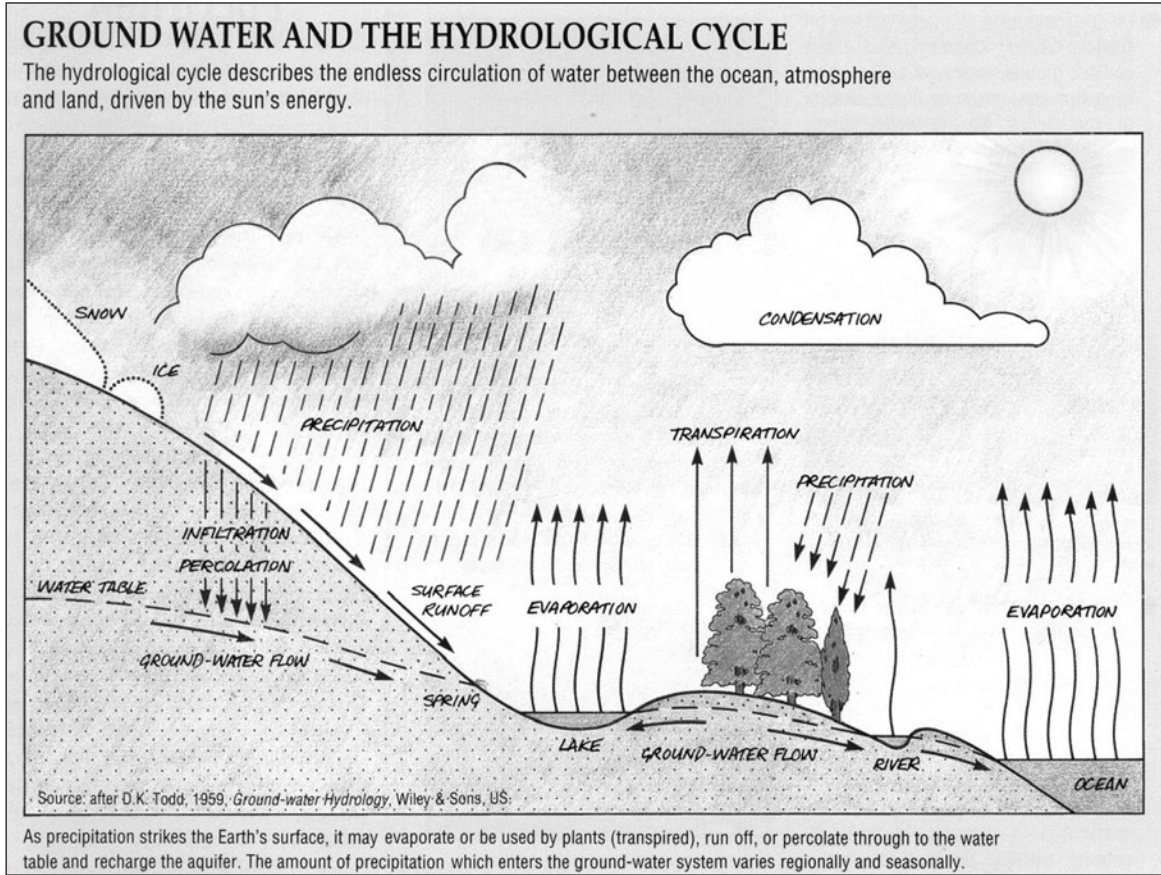
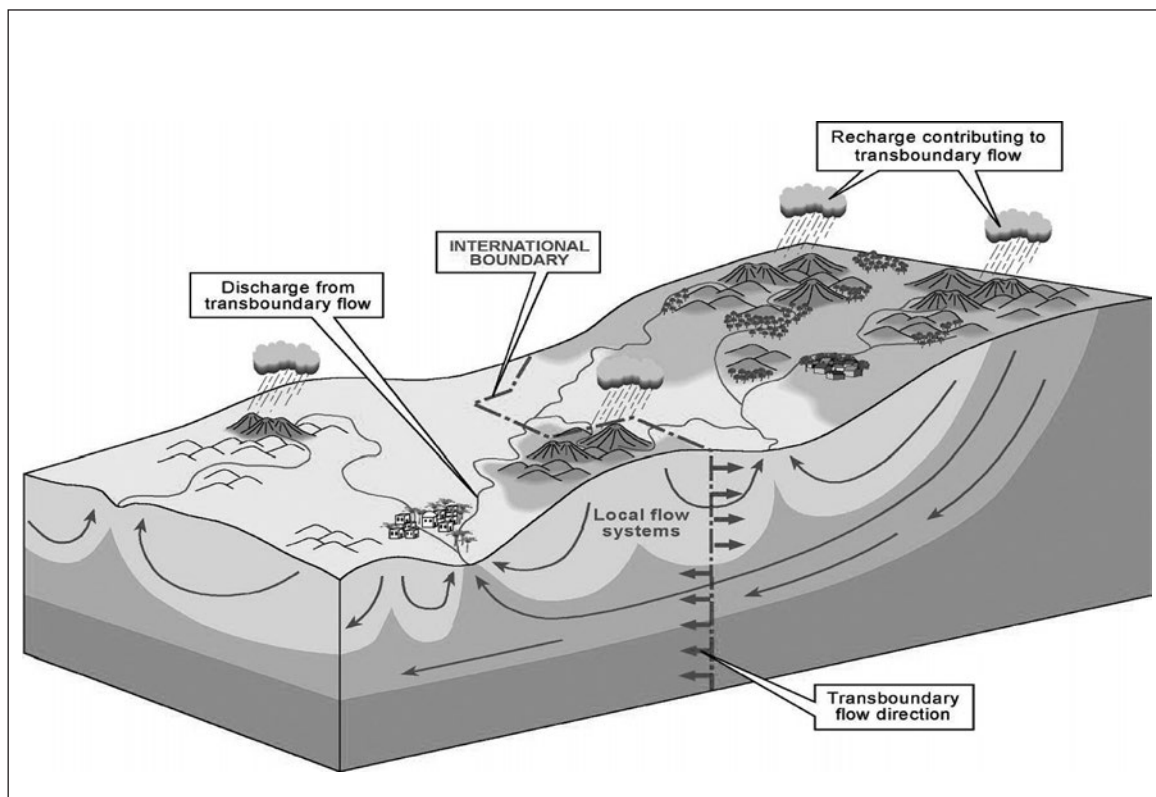


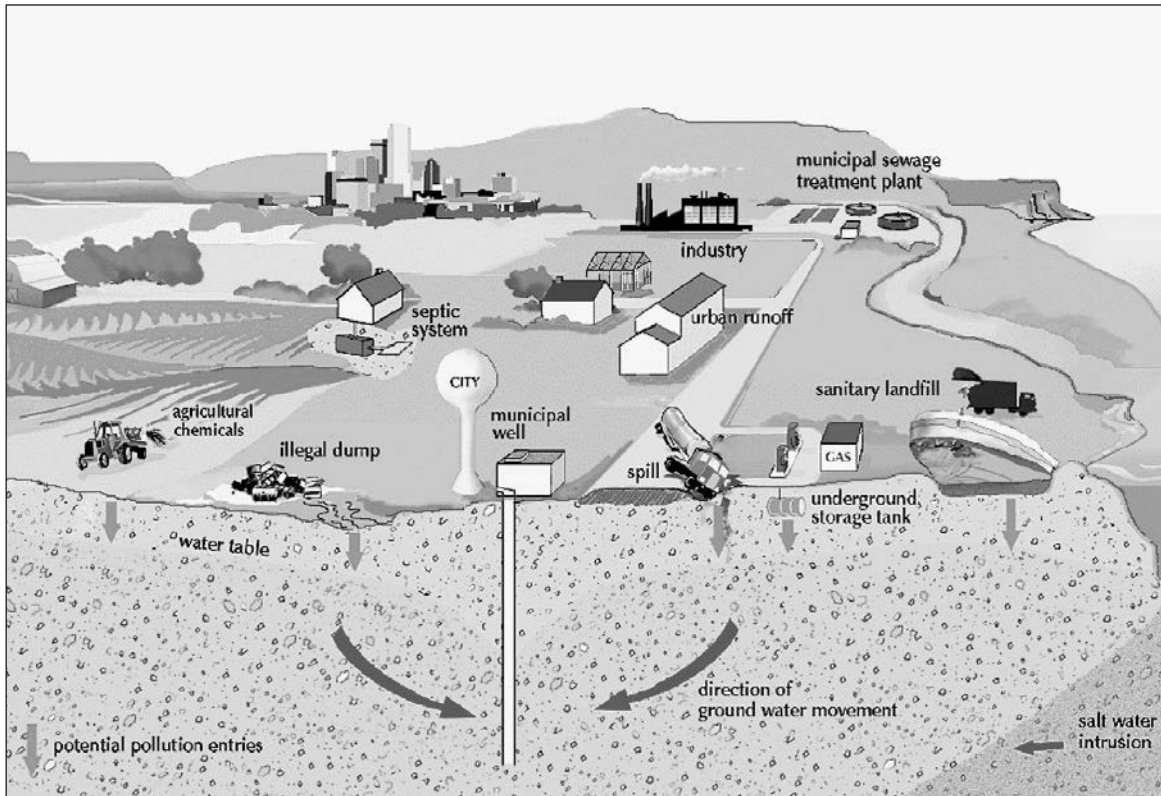
FIGURE 2

Transboundary flow

Source: UNESCO, *Internationally Shared (Transboundary) Aquifer Resources Management—Their Significance and Sustainable Management: A Framework Document* (Paris, UNESCO, 2001), p. 13.

FIGURE 3

Groundwater pollution



Source: Zaporozec and Miller, *Ground-Water Pollution*, p. 1.

*Annex I***TERMINOLOGY USED IN THIS REPORT**

Aquifer	Permeable water-bearing geological formation capable of producing exploitable quantities of water
Confined aquifer	Aquifer overlain and underlain by an impervious or almost impervious formation and in which the groundwater is stored under a confining pressure
Unconfined aquifer	An aquifer that has a water table at atmospheric pressure and is open to recharge
Fossil groundwater	Groundwater that is not replenished at all or has a negligible rate of recharge and may be considered non-renewable
Groundwater	Any water existing below the ground surface
Groundwater resources	Volume of groundwater that can be used during a given time from a given volume of terrain or water body
Groundwater table	The upper limit of the saturated zone where pore water pressure equals atmospheric pressure
Groundwater vulnerability	An intrinsic property of a groundwater system that depends on the sensitivity of that system to human and/or natural impacts
International groundwater	Groundwater that is either intersected by an international boundary or that is part of a system of surface and groundwaters, parts of which are located in different States
Recharge	Replenishment of groundwater from downward percolation of rainfall and surface water to the water table
Surface water	Water that flows over or is stored on the ground surface
Transboundary groundwater	Groundwater that is intersected by an international boundary. It is a subcategory of international groundwater
Unsaturated zone	Part of ground below land surface in which the pore and fissures contain air and water

*Annex II***CASE STUDIES****A. Practice of States in groundwater management and cases of adverse effects on groundwater and their causes. Examples from the Middle East: Jordan, Lebanon and the Syrian Arab Republic***Groundwater resources*

Located in an arid and semi-arid zone, the countries of the Middle East have limited surface water and rely on their groundwater resources.

Of the three countries presented, Jordan has very limited water resources (among the lowest in the world on a per capita basis), and most of it consists of groundwater, in renewable and non-renewable aquifers. Thirteen groundwater basins have been identified, among them two are non-renewable (Al Jafer and the Disi aquifer which is shared with Saudi Arabia) and two (other than the Disi) are shared (one with the Syrian Arab Republic and one with Israel (Wadi Araba)).

As for the Syrian Arab Republic, the country counts seven major surface water basins (of which six are main international rivers like the Tigris and the Euphrates) where seven General Directorates are assigned responsibilities. No reliable data are available on groundwater availability and quality. In some of the hydrological basins, groundwater is more important than in others, and some of it is renewable and some of it is not.

In Lebanon, 65 per cent of the country is composed of a karstic soil, which favours fast water infiltration. However, only part of this water is stored, some of it reappears as surface water (springs), the rest flows underground to the sea or to neighbouring countries.

Groundwater regulations

In all three countries, water is part of the public domain (Lebanon and the Syrian Arab Republic) or State owned (Jordan). Therefore, the pumping and use of groundwater is regulated through a law or a by-law. Well drilling is subject to a permit, which also specifies the volume of water that can be extracted and its use. In Jordan, the Ministry of Water and Irrigation has also developed a groundwater management policy, which sets out the Government's policy and intentions concerning groundwater management aiming at the development of the resource, its protection, management and measures needed to bring the

annual abstractions from the various renewable aquifers to a sustainable rate for each.

Groundwater use

As in most other countries in the Middle East, agriculture is the largest consumer of water. Between 75 and 80 per cent of the water resources in Jordan, Lebanon and the Syrian Arab Republic are used for irrigation and rely heavily on groundwater.

In the Syrian Arab Republic, 60 per cent of all irrigated areas are currently irrigated by groundwater, through wells privately owned and developed. In spite of the by-law regulating the use of groundwater in agriculture and subjecting well-drilling to a permit, almost 50 per cent of the total number of wells in the country are illegal, leading to severe overdraft and pollution problems. Extraction often exceeds recharge, therefore water level declines are occurring in several basins, having major impacts on surface sources, such as spring flows. In the coastal area, groundwater is suffering from sea-water intrusion owing to the overdraft. Mining of non-renewable resources is particularly evident in some of the basins.

In Jordan, the situation is very similar. Privately managed farms in the highlands are irrigated by groundwater from private wells. Highlands irrigation expanded from 3,000 ha in 1976 to an estimated 33,000 ha today and accounts for about 60 per cent of groundwater use. Another 5,000 ha is irrigated by non-renewable groundwater in the Disi area. Groundwater extraction exceeds the safe yield, leading to significant water level decline and salinity increase, drying up of springs and reduced water level and water quality. Enforcement of the by-law regulating groundwater control is also poor. Even if they have been drilled with a permit, most of the wells do not respect the allowed quantity of water to be pumped (broken meters) or the pumping depth.

In Lebanon, most of the wells are drilled illegally. Overpumping has led to the same problems mentioned above for Jordan and the Syrian Arab Republic. In the Bekaa valley, the water table has declined from two metres in 1952 to 160 metres today.

B. Case study: the Nubian Sandstone Aquifer System

The Nubian Sandstone Aquifer System (NSAS) occupies a great portion of the arid Eastern Sahara in north-east Africa. It is shared among four countries: Chad, Egypt, the Libyan Arab Jamahiriya and the Sudan. The NSAS study covers an approximate area of 2.2 million km². The groundwater in storage in the Nubian sandstone aquifers is huge; it is estimated at 457,000 km³. The aquifer system is a transboundary, deep, confined

aquifer system containing non-renewable groundwater resources.

Over the past three decades, Egypt, the Libyan Arab Jamahiriya and the Sudan have made separate attempts to develop the Nubian sandstone aquifers and the overlying arid lands. Since the early 1970s, the three countries have expressed their interest in regional cooperation in studying and developing these shared resources. They agreed to

form a joint authority to study and develop the Nubian sandstone aquifer systems and also agreed to seek international technical assistance to establish a regional project in order to develop a regional strategy for the utilization of NSAS.

In order to assure the sustainable development and continued regional cooperation for the proper management of

the Nubian sandstone aquifer, it was deemed imperative to share the information, monitor the aquifer regionally, and exchange updated information on the behaviour of that shared resource. Therefore, the national coordinators of the four countries signed two agreements in October 2000 that were endorsed later on by the Joint Authority in January 2001.

CHECKLIST OF DOCUMENTS OF THE FIFTY-FIFTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/527 and Add.1–3	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	A/CN.4/527 and Add.2 reproduced in <i>Yearbook ... 2003</i> , vol. II (Part One). A/CN.4/527/Add.1 and 3 mimeographed.
A/CN.4/528	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 2003</i> , vol. II (Part Two), para. 13.
A/CN.4/529	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-seventh session of the General Assembly	Mimeographed.
A/CN.4/530 and Add.1	Fourth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur	Reproduced in the present volume.
A/CN.4/531	First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	<i>Idem.</i>
A/CN.4/532	First report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/533 and Add.1	First report on shared natural resources: outlines, by Mr. Chusei Yamada, Special Rapporteur	<i>Idem.</i>
A/CN.4/534	Sixth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/535 and Add.1	Eighth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.630 [and Corr.2]	Reservations to treaties: titles and texts of the draft guidelines adopted by the Drafting Committee	Text reproduced in <i>Yearbook ... 2003</i> , vol. I, summary record of the 2760th meeting (para. 35).
A/CN.4/L.631	Diplomatic protection: titles and texts of the draft articles 8 [10], 9 [11] and 10 [14] adopted by the Drafting Committee	<i>Idem</i> , summary record of the 2768th meeting (para. 3).
A/CN.4/L.632	Responsibility of international organizations: titles and texts of the draft articles 1, 2 and 3 adopted by the Drafting Committee	<i>Idem</i> , summary record of the 2776th meeting (para. 1).
A/CN.4/L.633	Draft report of the International Law Commission on the work of its fifty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10 (A/58/10)</i> . The final text appears in <i>Yearbook ... 2003</i> , vol. II (Part Two).
A/CN.4/L.634	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-fifth session)	<i>Idem.</i>
A/CN.4/L.635	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.636 and Add.1	<i>Idem</i> : chapter IV (Responsibility of international organizations)	<i>Idem.</i>
A/CN.4/L.637 and Add.1–4	<i>Idem</i> : chapter V (Diplomatic protection)	<i>Idem.</i>
A/CN.4/L.638	<i>Idem</i> : chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities))	<i>Idem.</i>

A/CN.4/L.639 and Add.1	<i>Idem</i> : chapter VII (Unilateral acts of States)	<i>Idem</i> .
A/CN.4/L.640 and Add.1–3	<i>Idem</i> : chapter VIII (Reservations to treaties)	<i>Idem</i> .
A/CN.4/L.641	<i>Idem</i> : chapter IX (Shared natural resources)	<i>Idem</i> .
A/CN.4/L.642	<i>Idem</i> : chapter X (Fragmentation of international law: difficulties arising from the diversification and expansion of international law)	<i>Idem</i> .
A/CN.4/L.643	<i>Idem</i> : chapter X (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.644	Fragmentation of international law—difficulties arising from the diversification and expansion of international law: report of the Study Group	Mimeographed. The final text appears in <i>Yearbook ... 2003</i> , vol. II (Part Two).
A/CN.4/L.645	Programme, procedures and working methods of the Commission, and its documentation: report of the Planning Group	Mimeographed.
A/CN.4/L.646	Unilateral acts of States: report of the Chairman of the Working Group	<i>Idem</i> .
A/CN.4/SR.2751–A/CN.4/SR.2790	Provisional summary records of the 2751st to 2790th meetings	<i>Idem</i> . The final text appears in <i>Yearbook ... 2003</i> , vol. I.

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