

## Chapter III

### SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

25. In response to paragraph 13 of United Nations General Assembly resolution 56/82 of 12 December 2001, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work.

#### A. Reservations to treaties

26. The Commission would welcome comments from Governments on the following issues:

(a) In paragraph 2 of draft guideline 2.1.6, adopted at the current session on first reading, the Commission considered that the communication of a reservation to a treaty could be made by electronic mail or facsimile, but that, in such a case, the reservation must be confirmed in writing. With a view to the second reading of the draft guidelines, the Commission would like to know whether this provision reflects the usual practice and/or seems appropriate.

(b) In his seventh report (A/CN.4/526/and Add.1 to 3), the Special Rapporteur on reservations to treaties proposed the adoption of draft guideline 2.5.X, which reads:

2.5.X *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

“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.”

Following the discussions in the Commission, the Special Rapporteur withdrew this proposal, which does not relate primarily to the question of the withdrawal of reservations. As the problem will necessarily be discussed again when the Commission deals with the question of the consequences of the inadmissibility of a reservation or when it reconsiders the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, that it adopted at its forty-ninth session,<sup>4</sup> the Commission would welcome comments by States on this point.

#### B. Diplomatic protection

27. The Commission would welcome the views of Governments as to whether protection given to crew members who hold the nationality of a third State<sup>5</sup> is a form of protection already adequately covered by the United Nations Convention on the Law of the Sea or whether there is a need for the recognition of a right to diplomatic protection vested in the State of nationality of the ship in such cases. If so, would similar arguments apply to crews of aircraft and spacecraft?

28. In the *Barcelona Traction*<sup>6</sup> 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?

#### C. Unilateral acts of States

29. The Commission once again encourages States to reply to the questionnaire of 31 August 2001, which invited States to provide information regarding State practice on unilateral acts.<sup>7</sup>

<sup>5</sup> See *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10.

<sup>6</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment, ICJ Reports 1970, p. 3.

<sup>7</sup> <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.

<sup>4</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

**D. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities)**

30. The Commission would welcome comments on the different points raised in the report of the Working Group (see Chap. VII, sect. C below), particularly with regard to the following issues:

- (a) The degree to which the innocent victim should participate, if at all, in the loss;
- (b) The role of the operator in sharing the loss;
- (c) The role of the State in sharing the loss, including its possible residual liability;
- (d) Whether particular regimes should be established for ultra-hazardous activities;
- (e) Whether the threshold for triggering the application of the regime on allocation of loss caused should be “significant harm”, as in the case of the articles on prevention, or whether a higher threshold should be determined;
- (f) The inclusion of the harm caused to the global commons within the scope of the current endeavour;

(g) Models which could be used to allocate loss among the relevant actors;

(h) Procedures for processing and settling claims of restitution and compensation, which may include inter-State or intra-State mechanisms for the consolidation of claims, the nature of available remedies, access to relevant forums and the quantification and settlement of claims.

**E. The responsibility of international organizations**

31. The Commission would welcome comments on the proposed scope and orientation of the study on the responsibility of international organizations. In particular, the views of Governments are sought as to:

(a) Whether the topic should, in accordance with the approach taken in the draft articles on State responsibility for internationally wrongful acts, be limited to issues relating to responsibility for internationally wrongful acts under general international law; and

(b) Whether it would be preferable, as is being proposed, to limit the study to intergovernmental organizations, at least at the initial stage, as opposed to also considering other types of international organizations.