



UNITED STATES MISSION TO THE UNITED NATIONS

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United States Statement
63rd UN General Assembly Sixth Committee – October 2008 –
Agenda Item 75:
Report of the International Law Commission on the Work of its 60th Session
Chapters I-III & XII (Introduction and other decisions); Shared Natural Resources
(Chapter IV); Effects of Armed Conflict on Treaties (Chapter V)
October 29, 2008

Thank you, Mr. Chairman. My government appreciates your efforts in guiding the work of this Committee and welcomes the opportunity to submit a few observations on topics considered by the International Law Commission at its 60th Session.

The United States recognizes that universal respect for international law is essential to orderly and peaceful relations among States and commends the International Law Commission on its indelible contributions to the progressive development and codification of international law. We would like to convey our special thanks to the Chairman of the Commission, Mr. Edmundo Vargas Carreño for his fine stewardship. We also wish to thank the Special Rapporteurs for the topics discussed at the Commission's past session for the manner in which they have diligently guided the Commission on important — and complex — topics.

I will comment today on the first cluster of items on the Committee's agenda, with the understanding that my delegation will have an opportunity to address the others when they are presented to the Committee for its consideration.

Shared Natural Resources

The United States commends the Commission for its completion of the draft articles on the law of transboundary aquifers and congratulates the Special Rapporteur, Ambassador Chusei Yamada, for his excellent stewardship in bringing this topic to completion.

We believe the Commission's recommendation to the General Assembly is a prudent compromise for future action. We continue to think context-specific arrangements are the best way to address pressures on transboundary groundwaters, as there is still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice vary widely. The draft articles also clearly go beyond current law and State practice. For those reasons, the United States had supported

recasting such articles as recommendatory, non-binding principles — as was done in the case of liability for transboundary harm — for use in such specific contexts.

Nevertheless, we think that the Commission's first recommendation — to urge states to use the draft articles in context-specific bilateral and regional arrangements — is a helpful alternative approach. While the draft articles go beyond current law and State practice and, therefore, do not reflect customary international law, we believe that they still can provide helpful guidance to States seeking to effectively manage their transboundary aquifers. As a result, the United States echoes the call for concerned states to look to the draft articles for such guidance.

Regarding the later elaboration of a convention, we continue to believe that another global treaty like the 1997 Convention seems unlikely to garner much support or to make much difference in State practice. We therefore have reservations about the value of further discussing the possibility of a treaty within the Commission or the General Assembly.

Finally, for the reasons set forth in its statement on the work of the Commission last year, my government believes that it would not be productive for the Commission to consider matters related to transboundary oil and gas resources.

Effects of Armed Conflict on Treaties

I would like to begin by expressing our thanks to the Special Rapporteur, Professor Ian Brownlie, for his scholarship and hard work over the years on this important topic. Due in large part to his leadership, and to the contributions of the Working Group led by Mr. Lucius Caflisch, the Commission was able this year to conclude its first reading of the draft articles on the effects of armed conflicts on treaties, together with a set of commentaries. In light of the many difficult questions in this complex area, and the disparate views that have been expressed by Governments regarding this subject, we commend the Special Rapporteur for this achievement.

The United States has consistently supported an approach to this subject that preserves the reasonable continuity of treaty obligations during armed conflict, takes into account particular military necessities, and provides practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict. We are pleased that the draft articles reflect this approach.

We have, however, raised certain concerns regarding issues that remain outstanding in the draft articles. For example, we feel strongly that attempting to define the term “armed conflict,” as in draft article 2(b), is likely to be confusing and counterproductive. The wide variety of views that have been expressed about what the definition should be is evidence of the challenges that such an exercise involves. A better approach would be to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the Geneva Conventions (*i.e.*, international and non-international armed conflicts). We have also expressed concerns that draft article 2(b)

conflates “occupation” and “armed conflict,” when the two terms refer to separate concepts in the law of armed conflict. Thus, if occupation continues to be covered, it should be referred to *in addition* to armed conflict, rather than *as part of* armed conflict. Moreover, we have noted that the text should clearly state that international humanitarian law is the *lex specialis* that governs in armed conflict.

In addition to these and other comments we have made in the past, we recall that the Special Rapporteur made clear that the draft articles would be without prejudice to their final form. We agree with this approach and note that, should the draft articles *not* ultimately take the form of binding articles, the need for the so-called “savings clauses” contained in the draft articles should be reconsidered. Moreover, we believe that draft article 8.2 regarding the effective date of notification of termination, withdrawal or suspension should be made subject to the proviso: “unless the notice states otherwise.” Finally, we note that we continue to review several other draft articles, including in particular draft article 15.

These and other issues will continue to require further study. We therefore appreciate that the Commission transmitted the draft articles to Governments so they may provide their comments and observations during the upcoming year. We look forward to continuing our review of the draft articles on the effects of armed conflicts on treaties.

New Topics

With respect to the new topics proposed for the Commission’s long-term agenda, we recognize that the task of identifying topics that are suitable for progressive development or codification is not necessarily an easy or objective one. While we may disagree with some of the Commission’s decision on new topics, we appreciate the effort that goes in to identifying such topics.

We do have concerns, however, about the inclusion of the topics “Most-Favored-Nation clause” and “Subsequent agreement and practice with respect to treaties” in the Commission’s long-term work program. As regards MFN, we applaud the Working Group Chair Don McRae for his significant work on this project; however, we continue to believe that this issue is not appropriate for progressive development or codification. MFN provisions are principally a product of treaty formation and tend to differ considerably in their structure, scope and language. They also are dependent on other provisions in the specific agreements in which they are located, and, as a result, resist easy categorization or study. In light of these observations, we question the utility of the Commission taking on a topic for which case-by-case analysis is invariably required.

We also question the inclusion of the topic “Subsequent agreement and practice with respect to treaties” for a number of reasons. At the outset, we do not have a clear understanding of what the Commission would study. This topic has the potential to be large in scope and implicate many subject areas, which leads us to question whether it is sufficiently concrete and suitable for progressive development and codification. Moreover, we are not aware of any pressing real-world issues that necessitate the

Commission's taking on this topic at this time. Subsequent agreement and practice regarding treaties will necessarily depend on the treaty or treaties at issue, and will require a case-by-case analysis of the particular circumstances.

Thank you Mr. Chairman.