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Summary record of the 2550th meeting

Topic:
Law and practice relating to reservations to treaties

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2550th MEETING

Tuesday, 28 July 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,¹ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)

GUIDE TO PRACTICE (*continued*)

DRAFT GUIDELINES 1.1.5 AND 1.1.6 (*concluded*)

1. Mr. PELLET (Special Rapporteur) said it was gratifying to see that the discussion (2549th meeting) of the draft Guide to Practice contained in his third report on reservations to treaties (A/CN.4/491 and Add.1-6) had been productive; he wished to make some general comments on the results. First, there was a need to get back to the real meaning of the definition of reservations given in the Vienna Conventions, namely that a reservation excluded the legal effect of a provision in a treaty. It was therefore inaccurate to assert that a reservation could exclude the provisions of a treaty, just as it was inaccurate to say, as Mr. Melescanu had (2549th meeting), that it could not. Similarly, it was wrong to contend, as Mr. Economides and Mr. Simma had (*ibid.*), that the Vienna Conventions defined reservations as purporting to limit the legal effect of the provisions of a treaty, for the term used in the Vienna Conventions was “modify”; hence the problem of extensive reservations.

2. His second general comment concerned the essential question of whether a State could increase the obligations of other States by making a reservation. Two distinct facets of that question had to be discerned. First, one had to determine whether a reservation could increase the obligations that would normally be imposed on the parties under a treaty. The response, in his view, was quite plainly yes, since by excluding the application of the pro-

visions of a treaty, the reserving State neutralized them. The situation then reverted to the application of general international law which, if a reservation was made, was likely to impose more obligations on the contracting States than would the treaty. Although it was theoretically possible (the specific case was the subject of draft guideline 1.1.5), it was unlikely that a State would make a reservation under such circumstances.

3. Secondly, one might ask whether the reserving State could increase the obligations of the other contracting States in relation not only to the treaty itself but also to general international law. In other words, could the reserving State exploit the act of reservation to modify customary law to its own advantage? That seemed hard to imagine since a State could obviously not modify customary international law in its own favour by a unilateral act. But the Vienna definition did not say that a reservation could do nothing but limit the obligations arising from a treaty: it said it could modify them, and modification could operate in both directions. If they were not expressly accepted, modifying reservations that would increase the rights of the reserving State and the obligations of the other contracting States were impermissible reservations that went against customary international law. That highly academic view of the problem did not address a very serious consequence, namely that States often neglected to object to reservations and were deemed to have accepted them after a period of 12 months had elapsed. While the consequences were minimal for large industrialized States that had well-organized legal departments, they could be very serious for small underdeveloped States that would be bound by “legislation” imposed upon them from outside. The section devoted to the definition of reservations was perhaps not the appropriate place to try to offset those drawbacks, but the very academic debate on the subject masked a practical problem with political undertones.

4. The final general comment he wished to make concerned the consensus that seemed to have emerged from the Commission’s discussion about the wording of the draft guidelines. Members were, on the whole, against retaining the reference in draft guideline 1.1.5 to “rules applicable to unilateral legal acts”. But if the declarations covered in the draft were not to be characterized as reservations, it was hard to imagine them being anything other than unilateral acts. Like Mr. Rodríguez Cedeño (*ibid.*), he thought that nuance should be explicated in the commentary. A number of members had proposed the phrase “offer of negotiation”, but he counselled against introducing that idea in the guideline itself and thought it would be better to do so in the commentary.

5. Members of the Commission seemed to have similar doubts about the final phrase in draft guideline 1.1.6: “unless it adds a new provision to the treaty”. Those doubts seemed to stem more from the form than from the content of the phrase, most members apparently espousing the underlying idea that some unilateral declarations, termed reservations by their authors, were in fact draft amendments purporting either to increase or reduce the obligations of third States. Such was the case with the famous Israeli reservation, according to which Israel had tried to add the Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conven-

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

tions of 12 August 1949.² That type of reservation was in fact a sort of amendment that would enter into force only if accepted by the other States. The problem was to know whether such “reservations” should be classified as such, in view of the phenomenon he had just described: the tacit acceptance of reservations. In that situation, too, States, particularly those of the third world, ran the risk of being unwittingly bound by a convention that was not the one they had adopted or ratified.

6. Responding to a comment made by Mr. Hafner (*ibid.*), he said “opting in” and “opting out” clauses would be covered in chapter III of his report. As he saw it, the opting out clause was a type of reservation since, unlike the opting in clause, it entailed a modification in the application of a treaty. He was sympathetic also to Mr. Hafner’s argument that if “opting in” and “opting out” clauses were reservations, then they fell under the regime of reservations and accordingly, while a reservation was permissible, the rest were prohibited. The solution might be to say that those clauses had such a special character that States making them could hardly be deemed to have the intention of excluding all other reservations.

7. He thought the Drafting Committee should be asked to look into the various solutions that had been proposed and to determine whether the Guide to Practice should contain one or two provisions on the obligations of the reserving State. For his part, he would strive to submit a number of proposals to the Drafting Committee based on what had been said.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 1.1.5 and 1.1.6 to the Drafting Committee.

It was so agreed.

9. Mr. GOCO, recalling the discussion (2549th meeting), said that the use of the word “unilateral” in draft guideline 1.1.1 seemed at variance with the idea of joint formulation of reservations. He wished to know whether draft guidelines other than 1.1.5 and 1.1.6 had been sent to the Drafting Committee.

10. Mr. SIMMA said that the question of whether reservations formulated jointly retained a unilateral character had been considered by the Committee in depth. There was no disparity between the unilateral nature of a reservation and the fact that a reservation could be formulated jointly.

11. In response to a question by Mr. LUKASHUK, he explained that joint formulation of reservations was covered in the section devoted to definitions solely because all the definitions of reservations began by stating that they were unilateral, and that brought up the question of reservations formulated jointly. The problem had been raised at the previous meeting, but it had been agreed that it would be considered in greater depth in the context of States that dissociated themselves from a reservation.

DRAFT GUIDELINE 1.1.7

12. Mr. PELLET (Special Rapporteur), introducing draft guideline 1.1.7, said that like draft guideline 1.1.8, it covered unilateral declarations with specific objectives: it concerned the well-known phenomenon of reservations relating to non-recognition, which took two forms. The first was when State A simply indicated that it did not recognize State B as a State. That type of precautionary declaration, which was in reality futile, was not a reservation because it had no effect on the application of the treaty. The second case was when State A further indicated that it did not intend to enter into contractual relations with entity B. That was a real reservation, even if some writers disagreed on the grounds that it was a reservation *ratione personae* and not *ratione materiae*. Actually, according to the definition, a reservation did not have to be *ratione materiae*: it was any unilateral declaration that had the effect of excluding or modifying the legal effect of a treaty. That was the case with true reservations relating to non-recognition, the effect of which was that their author, which would have been bound by all the provisions of a treaty with entity B that it did not recognize, was freed of such obligations.

13. Three problems had come up during the elaboration of draft guideline 1.1.7. The first was whether there should be two provisions, one for precautionary declarations and the other for true reservations relating to non-recognition. He had decided on a single provision, formulated in such a way that precautionary declarations could be covered by inference.

14. The second problem was whether States were always truly aware of the legal consequences of their declarations. In his view, the answer had to be yes, since practice abounded in that area. But the law of treaties generally eschewed formalism and often accorded greater importance to the intentions of the parties than to the expression of such intentions. Was it then necessary to say that declarations relating to non-recognition were reservations when they purported to exclude the application of a treaty, even when they did not so state explicitly? For reasons more of convenience than of logic, he had preferred wording that did not exclude delving into the intentions of States and that encouraged them not to be vague.

15. The third problem stemmed from the fact that true reservations relating to non-recognition differed from reservations as defined in the Vienna Conventions in that they could be formulated at the time when the reserving State agreed to be bound by the treaty, but also when the non-recognized entity became a party to the same treaty. It would be unduly formalistic to consider that the first case constituted a reservation, but not the second. That was why draft guideline 1.1.7 stated that a reservation relating to non-recognition could be made at any time. It might also be possible to include a phrase, perhaps in the commentary, to explain that reservations could be made when either the reserving State or the non-recognized entity expressed their consent to be bound by the treaty.

16. Mr. BENNOUNA said he endorsed the Special Rapporteur’s analysis of precautionary declarations. International law acknowledged that being a party to a multilateral treaty did not mean that a State recognized all

² See 2549th meeting, footnote 6.

the other parties. From the theoretical point of view, however, he wondered whether what the Special Rapporteur called true reservations relating to non-recognition really conformed to the idea of a reservation. That idea embraced the exclusion or modification of the effect of certain provisions, whereas in the case at hand, it was the entire treaty that was excluded for a given party. That created difficulties for the application of the regime of reservations. Objections, for example, were crafted in response to reservations that neutralized a given provision of a treaty, but they would henceforth have to be envisaged in terms of a State's own exclusion from the treaty in its entirety. Would it not be easier to classify such reservations as interpretative declarations? Since the unifying element in interpretative declarations was that they purported to clarify the meaning or scope of the treaty, reservations relating to non-recognition could be considered as interpretative declarations clarifying the extent of the commitment of the reserving State.

17. Mr. BROWNLIE pointed out that the declarations covered by draft guideline 1.1.7 diverged from the definition given for reservations in a number of ways. Aside from the fact that they did not exclude only "certain provisions" of the treaty, they denied the party concerned the capacity to conclude a treaty and established a precontract situation, whereas reservations were made when the parties were already bound by some type of contractual relationship. The phenomenon was one that arose often enough in practice but remained peripheral in relation to the topic.

18. Mr. LUKASHUK said he wondered whether it was wise to leave aside cases when a reservation relating to non-recognition did not exclude the application of the treaty to the non-recognized entity, such cases being in practice the most numerous. That type of declaration could be deemed to constitute a special type of recognition, confined to the scope of the treaty, failing which the treaty could not be implemented between the two parties concerned.

19. With regard to what the Special Rapporteur called "true reservations relating to non-recognition", what happened when they covered non-recognition, not of a State, but of a Government, or non-recognition of a multilateral organization that was a party to the treaty? Finally, might not the indication that such reservations could be made at any time open the door to serious complications by making it possible to halt the implementation of the treaty in the event of a change of government?

20. Mr. HAFNER said that some of the numerous declarations cited in the third report of the Special Rapporteur related to non-recognition of a State, and others to non-recognition of a Government. It seemed an exaggeration to say that they all purported to deny the party concerned the status of State and the capacity to conclude a treaty. Sometimes it was simply a matter of drawing certain conclusions from the non-recognition of the State or Government concerned. One had to determine whether the application of the treaty was necessarily linked to the question of non-recognition, whether it was a matter of non-recognition of a State or of a Government and whether such reservations were permissible. The Commission had always taken the view that non-recognition

was a strictly political act, devoid of legal effect. But if it was acknowledged that the right to exclude the application of a treaty to a State was linked to the question of non-recognition, then non-recognition was given legal effect.

21. Mr. GALICKI said that while the definition must certainly draw its inspiration from the provisions accepted by States in the Vienna Conventions, new developments in the field must also be taken into account, without going so far, however, as to assert that all new practices in relations among States could be categorized as reservations.

22. That was the risk inherent in draft guideline 1.1.7, too many elements of which contradicted the basic definition. As other speakers had pointed out, the exclusion of the whole set of treaty obligations contradicted the very essence of a reservation. In addition, the rules on objection in the Vienna Conventions could no longer be applied. Finally, the time-frames set up by the Conventions could not be applied to reservations that could be made "at any time". It would therefore be difficult to endorse draft guideline 1.1.7 as currently worded.

23. Mr. MELESCANU said he wished to inject a practical consideration into the debate by recalling that in the 1960s and 1970s, many States had been divided as a result either of the Second World War or of the cold war. One of the solutions to the problem of non-mutual-recognition of those parts of States had been to establish a system of multiple depositories, such as in the field of disarmament. That had enabled North Korea to deposit its instruments of ratification in Moscow, for example, and South Korea to do so in Washington, D.C. It was therefore clear that a declaration of non-recognition fell under the regime of unilateral declarations and not of reservations. A reservation, after all, was intended to modify not a treaty, but its effects, in other words the obligations it entailed.

24. Mr. DUGARD, replying first to the question of whether non-recognition of States or non-recognition of Governments should be envisaged, said it would be best to envisage the first: non-recognition of Governments would be too difficult to cover at the current time. Next, he pointed out that an act of recognition had meaning only in a bilateral context and had none in a multilateral context.

25. States made declarations relating to non-recognition to reaffirm their political positions. The problem was that the declarations nearly always lacked any legal precision. That was perfectly illustrated by the declarations made by Saudi Arabia and the Syrian Arab Republic on signing the Agreement establishing the International Fund for Agricultural Development (IFAD), cited by the Special Rapporteur in his third report (para. 168 et seq.).³ Like Mr. Brownlie, he thought the conclusion to be drawn was that non-recognition was a *sui generis* case.

26. The question that then arose was what was to be done with non-recognition. Since it was a very common practice, it could not be passed over in silence in the

³ See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), p. 403 and United Nations, *Treaty Series*, vol. 1059, p. 317 and vol. 1119, p. 387.

Guide to Practice currently being elaborated. At the least, the attention of States should be drawn to the fact that their participation in a multilateral treaty did not necessarily entail recognition from all other States parties to the treaty. The question of where to put such a provision within the Guide would also have to be resolved.

27. Mr. PAMBOU-TCHIVOUNDA pointed out that declarations relating to non-recognition introduced into the topic the question of motive which, in the current instance, was political. If the Commission started reasoning along those lines, it would have to do so in a consistent manner and would have to somewhat revise the Vienna Conventions to include the concept. The question of motive had so far remained implicit, because the framers of the Vienna Conventions had held that the answer was self-evident. If, in its draft guidelines, the Commission emphasized the fact that there was a special kind of reservation involving, on the one hand, a State that did not recognize an entity, and on the other, that very entity, then it would be forced to elucidate all the situations in which such relations might arise. It would be impossible to endorse a draft guideline that would necessitate a review of the text of the Vienna Conventions.

28. Referring to the phrase “regardless of the date on which it is made”, which Mr. Galicki had already criticized, he said that the Vienna system set up a very clear time-frame, from signature of the instrument to accession of States to the treaty, and including approval and ratification. He wondered whether the phrase in question referred to all those different stages; in other words, if it was consistent with the Vienna Conventions, or if it referred to a time preceding or following the operations mentioned and thus departed from the provisions of the Conventions. To avert any ambiguity, the phrase should be deleted.

29. Mr. ECONOMIDES said that draft guideline 1.1.7 had nothing to do with reservations *stricto sensu*, as most of the other speakers had already pointed out, for essentially three reasons. First, a reservation was always directed at a treaty provision, and not, as in the current case, at the capacity of a given entity to sign a treaty. Secondly, a reservation excluded or limited the effects of certain treaty provisions, whereas in the text before the Commission, a treaty was excluded in its entirety. Thirdly, the substantive law of reservations, including procedural law, could not be applied to the cases mentioned in draft guideline 1.1.7, as was perfectly illustrated by the phrase “regardless of the date on which it is made”.

30. The draft guideline envisaged only one instance among the multitude of possible declarations which could be much less definite and express far more nuanced positions. Conversely, a declaration of non-recognition was sometimes extremely concise, the State simply indicating that “I do not recognize this or that State”. It thereby signalled that it would not apply the agreement in question in any manner that would lead it to recognize, *de jure* or *de facto*, the State that it cited.

31. If the Commission wished to settle the fate of declarations relating to non-recognition, it should engage in a much more in-depth study that would lead it to the border-

line between the topic of reservations and that of “acts that can be classified as reservations”.

32. Mr. SIMMA said he, too, thought that draft guideline 1.1.7 dealt with only one of the situations that the Special Rapporteur had covered in the body of his report. For example, it would be recalled that even when States had declared, in the context of a multilateral treaty, that they did not recognize the existence of other States parties to the same treaty, that had not prevented extremely fruitful inter-State relations from being developed throughout the duration of the cold war. The Federal Republic of Germany had not recognized the German Democratic Republic, yet it had been a party, with that country, to various multilateral treaties and had even concluded bilateral treaties with it, all without recognizing it.

33. From the logical standpoint, one could easily say that the legal device envisaged in draft guideline 1.1.7 certainly did fall under the regime of reservations: a State that refused to recognize the existence of another State signatory to the same treaty was indeed modifying the effects of the treaty on itself. But if one considered a declaration relating to non-recognition as a reservation, one became aware that in fact, very few of the provisions in the Vienna system could be applied. The Commission had therefore to decide what it should do with non-recognition which, as most other speakers had indicated, had a number of elements that did not correspond to the strict definition of a reservation.

34. Mr. YAMADA said he wished to make two comments. First, the Special Rapporteur had enumerated three categories of unilateral declarations relating to non-recognition: those in which a State excluded all contractual relations with a State that it did not recognize; those in which a State agreed to have contractual relations with a State that it did not recognize; and those in which a State indicated that it did not recognize another State, without specifying whether or not it would agree to have contractual relations with it. The second and third types of declaration did not under any circumstances constitute reservations. The first type was not merely a political declaration, and the legal effects had to be examined. The Special Rapporteur had rightly concluded that such declarations were in fact reservations.

35. Secondly, one had to determine whether a State, by making a reservation, could refuse all contractual relations with another State. According to the 1969 Vienna Convention, a State could exclude all contractual relations with another State when it formulated an objection. Could a State do the same thing in other situations? As the Special Rapporteur had indicated, a State could formulate such reservations *vis-à-vis* another State that it did not recognize. Conversely, one could ask whether a State could exclude all contractual relations with another State that it recognized.

36. Mr. CRAWFORD said that he, too, believed that the type of declaration covered in draft guideline 1.1.7 related exclusively to non-recognition, and had nothing to do with reservations. It would be preferable not to depart from the topic. Declarations made at the time of ratification or accession did not signify that their author would

never recognize the State in question. It was necessary to determine whether a State could refuse to have contractual relations in future with another State. It would be better, however, not to raise that question in the Guide to Practice; the best solution would be to delete draft guideline 1.1.7.

37. Mr. GOCO said he was of the view that draft guideline 1.1.7 was of practical interest, but only if considered independently of the law of treaties. Article 20 of the 1969 Vienna Convention (Acceptance of and objection to reservations) stated that when it appeared from the limited number of the negotiating States that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty, a reservation required acceptance by all parties. That provision clearly had to be taken into account. Draft guideline 1.1.7 was thus suitable for inclusion in the Guide to Practice, but only if it was aligned with the 1969 Vienna Convention.

38. Mr. ELARABY pointed out that in State practice, ratification did not necessarily mean recognition. If draft guideline 1.1.7 was retained in the interests of progressive development of international law, international relations might be complicated and the universality of treaties compromised. Most multilateral treaties were applied, irrespective of whether there was recognition, and sometimes even in the absence of diplomatic relations between the States concerned. Draft guideline 1.1.7 was not suitable for inclusion in the Guide to Practice.

39. Mr. ADDO said that he was also not in favour of the adoption of draft guideline 1.1.7. The type of unilateral declaration it covered was not in fact a reservation, which was intended to modify the legal effect of certain provisions of a treaty and not to exclude the application of a treaty as a whole.

40. Mr. MIKULKA said he thought draft guideline 1.1.7 raised an important issue but was outside the scope of reservations. The type of declaration relating to non-recognition it envisaged did not meet the criteria set out in the definition of reservations. According to the Vienna Conventions, a reservation was a declaration by which a State purported to modify or to exclude the legal effect of certain provisions of a treaty. Draft guideline 1.1.7 would exclude the application of the treaty in its entirety. In addition, the hypothesis it advanced was contrary to the doctrine of the law of reservations, according to which the reserving State accepted the legal ties that bound it to other States.

41. If the draft guideline was retained, that would mean that the regime of reservations would have to be applied to the unilateral declarations concerned, which would entail a number of problems. For example, one could imagine a situation when all the other parties to a treaty were States not recognized by the reserving State. Nothing would prevent that State from excluding the legal effect of the treaty vis-à-vis all the other States parties: an absurd situation. To take another example, some treaties prohibited reservations unless they were expressly provided for in the treaty itself. Could a State make a unilateral declaration in which it excluded any legal ties

between itself and another State party that it did not recognize? It would certainly be useful to consider the matter at a later stage, but not in the context of the regime of reservations.

42. Mr. RODRÍGUEZ CEDEÑO said that he, too, had doubts about the advisability of including draft guideline 1.1.7 in the Guide to Practice. It dealt with a very special type of declaration which was not an interpretative declaration in the sense used by the Special Rapporteur in his third report. The Special Rapporteur gave two specific examples, the declarations made by Saudi Arabia and the Syrian Arab Republic at the signing of the constituent instrument of IFAD. One related to non-recognition in general, the other to contractual relations with another State party. But the constituent instrument of IFAD contained an article prohibiting the formulation of reservations. The declarations should not have been accepted as reservations.

43. Mr. HE pointed out that the problem of non-recognition was an extremely complex one, in both political and legal terms. One could choose between two alternatives: to consider that matters relating to non-recognition should not be included in the Guide to Practice, or to extract the aspect of non-recognition that related to reservations and to include it in the Guide. A more detailed explanation should nevertheless be given in the commentaries to indicate that non-recognition was a political problem that often arose but had nothing to do with reservations.

44. Mr. AL-BAHARNA said the Special Rapporteur was well aware that the matter under consideration related to non-recognition and not to reservations. He indicated as much himself, in draft guideline 1.1.7, with the probable intention of attracting the attention of States. The type of declaration envisaged was common in the context of multilateral treaties and had never given rise to objections.

45. To resolve the matter, a compromise solution could be found by retaining the text of draft guideline 1.1.7 but either putting it elsewhere in the Guide to Practice or making it into an addendum or an annex. The wording should perhaps also be amended to read:

“A unilateral statement by which a State purports to exclude the application of a treaty between itself and other States which it does not recognize constitutes a special case of reservation which does not strictly fall within the meaning of guideline 1.1 but nevertheless could be considered as a declaration affecting the relation of the State making such a declaration vis-à-vis the State or the States which it does not recognize in so far as the rights and obligations arising from the treaty are concerned.”

The meeting rose at 1.05 p.m.