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Summary record of the 2632nd meeting

Topic:
Law and practice relating to reservations to treaties

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between those States. The parties to the bilateral agreement could introduce clarifications or amendments to the basic treaty applicable to relations between them. The subordination of the entry into force of the basic treaty to the conclusion of such an agreement was of no relevance to the study of reservations. On the other hand, the arrangement whereby two States could change the legal effect of a treaty bore a closer resemblance to the subject of the study. In reality, however, such bilateral agreements could not be viewed as reservations since they did not constitute unilateral declarations.

66. In view of its distinctive character, he felt that the bilateralization procedure should be mentioned in the Guide to Practice as falling outside the definition of a reservation. The broader wording of draft guideline 1.7.4 would cover not only the bilateralization phenomenon in the strict sense but also agreements among States that were not envisaged in the basic treaty and that had the same object as reservations. Obviously, as he had pointed out, such agreements did not qualify as reservations because they did not constitute unilateral declarations. The second version of the draft guideline would read:

“An agreement by which two or more States purport to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in their application to their relations *inter se* does not constitute a reservation within the meaning of the present Guide to Practice.”

67. As he had doubts about the desirability of addressing two different categories of procedure in a single guideline, he was inclined to opt for the narrower version of draft guideline 1.7.4 that focused on bilateralized reservations but would like to hear members' views in that regard.

The meeting rose at 1 p.m.

2632nd MEETING

Tuesday, 6 June 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Reservations to treaties¹ (*continued*) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,² A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KABATSI joined other members in commending the Special Rapporteur on his excellent fifth report (A/CN.4/508 and Add.1–4) and thanked him in particular for his update on work carried out in various quarters on the subject under consideration, which had been useful in putting the subject into perspective. All of that work had helped the Special Rapporteur in his research and had allowed the Commission to adopt important preliminary conclusions on a number of key issues: for example, there was no question at the current stage of undermining the integrity of the Vienna regime on reservations to treaties or of amending the relevant provisions of the 1969, the 1978 or the 1986 Vienna Conventions. Moreover, a guide to practice would be prepared for States and international organizations, containing guidelines with commentaries and, if necessary, model clauses. It also seemed virtually certain that the title of the topic would remain “Reservations to treaties”.

2. Nonetheless, as far as the format was concerned, like other members of the Commission, he had trouble following the numbering system used by the Special Rapporteur. The two explanations given in paragraph 28 of the report were unconvincing.

3. With regard to the views, positions and work of other bodies, especially those established pursuant to United Nations human rights instruments, he thought that the Commission should take due note of them before reaching a definite decision. Those bodies did have expertise in their respective areas of competence and were generally well equipped to tackle the issues involved. Moreover, they were usually well placed to analyse and determine State practice in the matter. It would therefore be useful for the Special Rapporteur to continue to cooperate with them.

4. Turning to the proposed guidelines on alternatives to reservations and interpretative declarations, he said that the Special Rapporteur had been right to draw attention to the procedures sometimes used by States to modify the application of the provisions of treaties to which they were parties without necessarily referring to them as “reservations” and also to provide the necessary details on such procedures in paragraph 80. Noting that the Special Rapporteur admitted in paragraph 93 that he had hesitated for a long time before proposing the inclusion of draft guidelines on alternatives to reservations in the Guide to Practice under consideration, he said he assumed that the hesitation was basically due to the fact that it was not always easy to distinguish those alternatives from reservations and so he wondered how potential users of the Guide to Practice could be expected to follow them. A

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

guide to practice should be as clear and precise as possible. The options introduced should not be buried under a mass of obscure alternatives. States had the sovereign right to enter into international obligations or not, with or without reservations. He did not share the view expressed by the Special Rapporteur in paragraphs 73 and 74 of his report that alternatives to reservations allowed parties to avoid the “voluntary traps” of treaties, or at least to mitigate their severity, the ideal being, without any doubt, the non-binding obligation. He personally thought that reservations procedures were flexible enough to protect States. Moreover, alternatives were merely reservations in disguise, and that was possibly the reason why it was not always easy to distinguish between the two. In any case, whether the procedure was “surgical” or “therapeutic”, it led to the same result: modifying the application of the provisions of treaties to which States or international organizations were parties.

5. Since alternatives to reservations were a fact of life, he would not mind if they were mentioned in the commentaries to the guidelines on the definition of reservations or somewhere else in the report, but they were out of place in the main text of the Guide to Practice, where they were liable to cause confusion.

6. Mr. MOMTAZ said that he was grateful to the Special Rapporteur for submitting a report that dealt with alternatives to reservations and interpretative declarations, thereby following the work plan which he had announced at the appropriate time to the Commission and which had raised no objection.

7. However, he wondered whether States using those alternatives would really be able to overcome, if need be, some of the problems to which reservations gave rise, as the Special Rapporteur believed. It was not certain that implementing and monitoring bodies would be able to accept those alternatives and that they would not be obliged to question their validity on the same grounds as the reservations they had rejected. He therefore had doubts about the exercise undertaken by the Special Rapporteur, insofar as those alternatives had the great advantage of helping politicians achieve their ultimate goal of accepting an obligation that was preferably non-binding. Nevertheless, he would be glad to see the alternatives included in the commentary.

8. In any event, it was important not to lose sight of the fact that the Special Rapporteur’s highly relevant comments on alternatives to reservations were in line with the goal set in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993,³ which stressed the need to limit the number and scope of reservations to human rights treaties. That was what had led the Sub-Commission on Prevention of Discrimination and Protection of Minorities to request one of its members, Ms. Hampson, to prepare a working paper on the question of reservations to human rights treaties.⁴ That extremely stimulating document⁵ showed clearly that the author’s work, which she intended to pursue if the Commission on Human Rights gave her

the mandate, did not duplicate the mandate given by the General Assembly to the International Law Commission. In fact, Ms. Hampson had paid particular attention to the shortcomings of the 1969 Vienna Convention, including article 20, which set a deadline of 12 months after notification of the reservation for objections to be made. She also intended to contest that article and to challenge the deadline, which was not applicable to all treaties. As a result, cooperation between the Commission and the Commission on Human Rights could be fruitful, especially with regard to the study of the effects of decisions by monitoring bodies on the non-validity of reservations, which was a subject Ms. Hampson intended to study in depth. Such cooperation would also allow the two bodies to avoid coming to diametrically opposed conclusions, the risk of which was all the greater, since, in paragraph 13 of her report, Ms. Hampson described human rights norms as essential elements of an international legal order. For all those reasons, he was in favour of cooperation, on as permanent a footing as possible, between the two Special Rapporteurs.

9. Mr. PAMBOU-TCHIVOUNDA said that he had mixed feelings about chapter II of the fifth report, in that, while he did not underestimate the considerable work carried out by the Special Rapporteur, he did wonder about its usefulness in practice.

10. The significance of the Special Rapporteur’s fifth report lay primarily in the “hard core” of alternatives to reservations and interpretative declarations. That was the heart of the report and he found it quite interesting, especially from the point of view of legal theory: the Special Rapporteur had produced a work of erudition which was rich in detail and back-up information and a major contribution to the legal, especially French-language, literature. The report would inspire new studies that went beyond international treaties to deal with the general theory of the sources of general international law, as it referred to what had long been the essence of international law from the point of view of its sources, namely, the role of the will of States. Alternatives to reservations were the result of what the parties to the treaty would have liked and not what only one of the parties would have liked. They were “treaties within a treaty” or, in other words, a means to avoid one constraint or another. The question that arose in the circumstances was whether for all that they left the most important part intact.

11. He wondered how useful the alternatives to reservations would actually be in the preparation of a guide to practice. He noted that the study being carried out would be of no interest unless it resulted in the drafting of a minimum regime. Of course, it could be used to delimit the definition of reservations, but that was not enough. It was the scope of the procedures mentioned that needed to be determined. The Special Rapporteur spoke of procedures for modifying the effects of a treaty, whereas in fact they were procedures for limiting those effects, as was clear from the draft guidelines contained in the annex to the fifth report. He found it very difficult to imagine that modification involved only the flexibility of a legal act in a restrictive sense and not also in an expansive sense, but, if modification meant flexibility in the latter sense, was a “reservation” really involved?

³ A/CONF.157/24 (Part I), chap. III.

⁴ See 2630th meeting, footnote 18.

⁵ *Ibid.*, footnote 19.

12. He thought that the Special Rapporteur could have confined himself to draft guidelines 1.7.3 and 1.7.4 and to explaining to the Commission what he understood by “alternatives to reservations” with the help of illustrations. Draft guidelines 1.7.1 and 1.7.2 took up a disproportionate amount of space in relation to the function of alternatives to reservations, which was to help circumscribe the concept of a “reservation”. It would therefore be better to move the contents to either the commentary or to notes because, otherwise, people would be confused.

13. Mr. PELLET (Special Rapporteur), continuing his introduction to draft guideline 1.1.8, said that it referred to unilateral declarations that had the same objective as reservations, since they were intended to exclude or modify the legal effect of certain provisions of a treaty in their application to the State or international organization making the declaration, and that perfectly matched the definition of reservations given in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and draft guideline 1.1. In that connection, he pointed out for Mr. Pambou-Tchivounda’s benefit that the Commission had never defined reservations—to the regret, moreover, of some members, including Mr. Economides—as being exclusively aimed at limiting the effects of a treaty. That possibility was envisaged in draft guideline 1.1.5, but the word “limit” had carefully been avoided in the actual definition of reservations in the Vienna Conventions. The unilateral declarations addressed in draft guideline 1.1.8 were indeed reservations, and that justified including the draft in chapter I of the part of the Guide to Practice on definitions. They were nonetheless rather special reservations in that they were made pursuant to an express provision in the treaty authorizing the parties, or some of them, to exclude or modify the legal effect of some of its provisions. Such clauses authorizing the parties not to apply certain provisions of the treaty were called “reservation clauses” when the word “reservation” was used in them. When the word “reservation” was not used, they tended to be referred to as “opting-out” or “contracting-out” clauses. When he had begun writing that part of his report, he had not had very fixed ideas on the nature of those clauses or on that of the unilateral declarations made pursuant to them. He had been certain of only one thing: opting-out clauses were sufficiently similar to reservation clauses and declarations made pursuant to opting-out clauses were sufficiently similar to reservations themselves to require a closer look at their nature. That was basically why, in accordance with the promises he had made to the Commission in his first⁶ and second⁷ reports (as Mr. Momtaz had reminded him), he had come to the conclusion that it was essential that the Commission should concern itself with what he had called “alternatives to reservations”. The starting point for his argument, which seemed to have disconcerted some members, was therefore that opting-out clauses were very similar to reservation clauses, but were not generally presented as such. While studying that phenomenon, he had finally realized what now appeared to be self-evident: those exclusionary clauses were quite simply reservation clauses and the unilateral declarations they permitted were quite simply reservations authorized by treaty. That was

what he was trying to explain in paragraphs 148 to 178 of his fifth report.

14. The procedure of the opting-out clause was extremely common and, as shown in paragraphs 152 to 154, such clauses were found in all kinds of treaties. The strongest argument for not considering those provisions as reservation clauses probably stemmed from the position resolutely maintained by ILO since its inception, consisting of, on the one hand, including a generous supply of such opting-out clauses in its conventions and, on the other, flying in the face of all legal theory by maintaining that they were not reservation clauses, so that the declarations made pursuant to those provisions were also not reservations. He did not find that a tenable position. It had, moreover, been contested by every expert on reservations, for reasons that seemed to him difficult to refute. In particular, contrary to what ILO lawyers appeared to believe (at least officially), it was certainly not in conformity with the definition of reservations to see them as unilateral declarations necessarily and exclusively formulated under general international law. They might well take that form, and very often did, by virtue of an express provision in a treaty authorizing only certain specified reservations. That did not mean that, when a treaty authorized reservations, the unilateral declarations made pursuant to that authorization were not reservations. However, that appeared to be the view of ILO and was the only explanation given by its lawyers for the bizarre position they had held for so long despite everything. Besides, article 19, subparagraph (*b*), or article 20 of the 1969 Vienna Convention left no doubt that reservations could be expressly authorized by the treaty and that the result might be—although it did not necessarily have to be—that other reservations were prohibited. The only conclusion that could be drawn from ILO practice was that reservations which were not expressly authorized were prohibited. That did not mean that the unilateral declarations made under the opting-out clauses in ILO conventions were not reservations. For example, when article 17, paragraph 1, of ILO Convention (No. 119) concerning the guarding of machinery provided that “The provisions of this Convention apply to all branches of economic activity unless the Member ratifying the Convention specifies a more limited application by a declaration appended to its ratification”, it was difficult to see what distinguished the declaration concerned from a reservation and what distinguished such a provision from a reservation clause. It was true that, under ILO rules, which were no doubt of a customary nature, as ILO practice was considered as law, no reservations to the conventions adopted under the auspices of that organization were permitted unless they had been expressly authorized, but that was another question entirely.

15. Mr. Simma (2631st meeting) had brought up another more general argument against classifying the declarations made under an opting-out clause as reservations. He had asked whether the classification of declarations made under an opting-out clause as reservations was compatible with article 19, subparagraph (*b*), of the 1969 and 1986 Vienna Conventions, according to which a reservation could be formulated unless the treaty provided that “only specified reservations, which do not include the reservation in question, may be made”. He did not see that as a nullifying objection. Article 19, subparagraph (*b*), did

⁶ *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/470.

⁷ *Yearbook* . . . 1996, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

not say that all other reservations were prohibited if some were expressly provided for. It said something quite different—that other reservations were prohibited if the treaty stipulated that only specified reservations could be made, and that was obvious. Consequently, Mr. Simma's reasoning was not an argument for denying that declarations made under an opting-out clause were reservations. In fact, his objection applied only if the treaty specified that only those declarations were permitted. That was not so in the majority of cases.

16. Mr. Rosenstock had also expressed doubts on the subject, pointing out that a State party could not object to a declaration made under a contracting-out clause. That was no doubt true, but, in his view, it did not necessarily exclude that kind of declaration from the general category of reservations. For one thing, it was not a problem of definition, but one of legal regime. For another, and perhaps especially, it was no doubt true of every reservation formulated under a reservation clause and in any case of what was called a "negotiated reservation". Once a reservation was expressly provided for in a treaty, the contracting States knew what to expect: they had accepted in advance the reservation or reservations concerned in the treaty itself. A priori it thus appeared that the rules in article 20 of the 1969 and 1986 Vienna Conventions on both the acceptance of reservations and objections to them did not apply to reservations that were expressly provided for, including opting-out clauses or exclusionary provisions. Therefore, while he agreed with the substance of Mr. Rosenstock's comments, there was nothing in the latter to suggest there was anything wrong in considering opting-out declarations as reservations. Those declarations would generally be subject to the legal regime applicable to the reservations formulated under a reservation clause. That was why there appeared to be no serious argument against considering opting-out clauses as reservation clauses and declarations made in application of those clauses as reservations as long as they were made at the time of expression of consent to be bound.

17. However, it seemed more debatable whether those declarations could be considered as reservations when they were made, as authorized by some treaties, at any other time. He gave some examples of that in paragraph 173 of the fifth report. The problem was not so much with the timing as such, since the provisions of the 1969 and 1986 Vienna Conventions and, with all the more reason, the Guide to Practice were of a residual nature, but, rather, with the fact that declarations not made at the same time as the expression of consent to be bound were no longer linked in any way with the entry into force of the treaty for the State or international organization making them, whereas a reservation was closely linked to the process of the entry into force of a treaty, as provided for by article 19 et seq. of the Conventions dealing with reservations. Thus, although he had considered including a draft guideline to make all that clear, he did not think it was necessary specifically to say it in the Guide to Practice, as it was just the converse of what was said in draft guideline 1.1.8. Nevertheless, if the members of the Commission were of a different opinion, he would see no harm in including that draft guideline, which was outlined in paragraph 177 of the fifth report, in the Guide to Practice.

18. Similarly, as he had tried to explain in paragraphs 168 and 169, he did not think it was essential to devote a specific draft guideline to "negotiated reservations", which were basically only reservation clauses—not reservations—indicating in a precise and restrictive fashion the reservations that could be made to a treaty. That very misleading terminology was common in the legal writings in which negotiated reservations were discussed, but it was clear that they were not reservations within the meaning of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention. He had nevertheless attempted to draft a text to show what might be included in a guideline defining negotiated reservations. The text was contained in paragraph 169 of the report and could also be included in the Guide to Practice, although he did not think that was necessary. On the other hand, it would certainly be necessary to define, perhaps in the final clauses of the Guide to Practice, what was more generally understood by "reservation clauses".

19. He introduced draft guidelines 1.4.6, 1.4.7 and 1.4.8, which were included in chapter I, section 4, of the Guide to Practice on unilateral statements other than reservations and interpretative declarations. Although they were unilateral statements, they were not reservations. They were not made under opting-out clauses but under contracting-in or opting-in clauses, or similar clauses offering a choice among treaty provisions.

20. A priori, there might appear to be little reason to treat the declarations made under those two kinds of clause (opting-in and opting-out clauses) differently, as they were very similar provisions. Nevertheless, the distinction between unilateral statements made under a contracting-in clause, on the one hand, and a contracting-out clause, on the other, appeared to be imposed by the very definition of reservations adopted in draft guideline 1.1, which followed the definition in the 1969 and 1986 Vienna Conventions. Opting-in clauses were very common. The first to come to mind was the famous Article 36, paragraph 2, of the Statute of ICJ. However, that procedure was certainly not limited to treaties dealing with arbitration or jurisdiction. He gave several examples of that in paragraph 183 and in footnotes to that paragraph of his report. Contrary to what was said, contracting-in clauses did not function at all in the same way as reservation clauses. First and foremost, declarations made under opting-in clauses did not aim to exclude or modify the legal effect of certain provisions of the treaty; they aimed to increase the obligations arising from the ratification of the treaty. Moreover, that did not affect in any way the entry into force of the treaty for the State or international organization making the declaration; in contrast, the opting-in declaration became effective only once the treaty was in force. Lastly, as a consequence of what he had just explained, those declarations could be formulated at any time.

21. Declarations made under contracting-in clauses were therefore not reservations, even though they were unilateral statements having the aim and effect of modifying the effects of the treaty. It seemed difficult to omit the draft guideline concerning them, if only to maintain the symmetry with the declarations made under opting-out clauses, which were indeed reservations. That was why he was proposing draft guideline 1.4.6.

22. Opting-in declarations could themselves be accompanied by what were commonly called reservations. Once again, the most well-known example (though far from the only one) took the form of the often numerous “reservations” accompanying voluntary declarations of acceptance of the compulsory jurisdiction of ICJ, which were opting-in declarations. In that case, too, it was only out of linguistic carelessness that those restrictions were called reservations. It was the purpose of draft guideline 1.4.7 to make that clear.

23. It was true that those conditions and restrictions were aimed, like reservations, at limiting the application of a treaty provision or, in other words, of the optional clause under which they were made. It was also true that those restrictions appeared in a unilateral statement. However, they were not the actual subject of it and it was not the effects of the treaty as such that they limited, but those of the optional declaration itself. They could be seen as clauses or provisions of a unilateral statement, but they were not unilateral statements. Therefore, they were certainly not reservations in the sense understood in both the 1969 and 1986 Vienna Conventions and the Guide to Practice.

24. The same was true of declarations formulated under complex clauses, which were not, strictly speaking, opting-in clauses and not really opting-out clauses, but which could no doubt be considered as being halfway between the two. They were “choice clauses”, which obliged a State or an international organization to make a choice between the provisions of a treaty. Those provisions operated as opting-in clauses with regard to what the State chose and as opting-out clauses with regard to what it excluded. It could be concluded, a priori, that the declarations by which the State excluded certain provisions were reservations, as he had proposed to say in draft guideline 1.1.8, whereas those by which the State expressed its consent to be bound by certain provisions were not reservations, in accordance with draft guideline 1.4.6. Unfortunately, that solution was not viable, since the dual action of inclusion and exclusion was expressed in a single declaration. A choice must therefore be made.

25. Three observations could be made. The first was that those clauses were more numerous than had been suspected and more numerous than stated by the Commission in its commentary to what had become article 17, paragraph 2, of the 1969 Vienna Convention, which dealt precisely with the situation where a treaty offered contracting parties a choice between its various provisions. He provided many examples of that in paragraphs 200, 201 and 206 of the fifth report. The second observation was that choice clauses were themselves subdivided into two categories. Some, following the system of the European Social Charter, for instance, led States to accept freely a number of basic provisions from among the provisions in the treaty. Those in the second category, which were less common, could be classified as alternative clauses in that they forced States to choose between one provision (or group of provisions) and another provision (or another group of provisions). The famous article XIV, section 1, of the Articles of Agreement of the International Monetary Fund, which was cited in the report, was a good example. The third observation, however, was that unilateral statements making a choice under either of those categories

could apparently not be classified as reservations even though they resembled them in certain respects, including the fact that they were declarations made as a general rule at the time of expression of consent to be bound. The similarities ended there and a major difference emerged: on the one hand, those choices were the condition for the State’s participation in the treaty and, on the other, that condition was set not by the State, but by the treaty. In the final analysis, they did not resemble reservations at all in that respect, and that explained the wording he was proposing for draft guideline 1.4.8.

26. He then introduced draft guideline 1.7.5, the only one in chapter II of the fifth report that related to interpretative declarations. The exclusionary, optional, alternative and other clauses he had just dealt with did not really pose any problems with regard to interpretative declarations. They only really gave rise to problems (of distinction or comparison) in relation to reservations. It did not seem superfluous to specify in the Guide to Practice—because the exercise was a practical one—that interpretative declarations as such existed side by side with other procedures that allowed States and international organizations that were parties to a treaty to specify or clarify the meaning or scope of the treaty or of some of its provisions. There were very few such procedures. He had unearthed only two, which were briefly described in paragraphs 96 to 100 of his report. On the one hand, there were the interpretative clauses included in the treaty itself and, on the other, the interpretative agreements concluded between the parties or between some of them, and in particular, what could be called “bilateralized interpretations”, which were to interpretative declarations what “bilateralized reservations” were to reservations. He was aware that those procedures were off the subject from an academic or intellectual viewpoint, but the Commission was not writing a university textbook. From a practical point of view, he thought, as Mr. Elaraby had put it so well, that it was not superfluous to remind States, or rather legal advisers in ministries of foreign affairs and diplomats, of the opportunities open to them.

27. He proposed that all the draft guidelines should be referred to the Drafting Committee, which he hoped would not have too much difficulty finalizing the proposed draft guidelines, which could undoubtedly be improved.

28. Mr. GAJA said that two specific examples had come to mind when he was studying the draft guidelines in section 1.7 as proposed by the Special Rapporteur. The first was the European Convention on the Adoption of Children, article 6 of which provided that a child could be adopted “by two persons married to each other . . . or by one person” wishing to adopt. A European State that became a party to that Convention was not forced to accept the two possibilities in its domestic legislation. It was free to do so. It was therefore the example of a clause which limited the object of an international obligation and for that reason came under draft guideline 1.7.2.

29. The second example was the Convention on the Law Applicable to Trusts and on Their Recognition, adopted by The Hague Conference on Private International Law. Article 13 of that Convention provided that: “No State shall be bound to recognize a trust the

significant elements of which . . . are more closely connected with States which do not have the institution of the trust or the category of trust involved". Once again, a State that did not have the institution was not bound to recognize the trust, but was free to do so. If it did, it could not thereby extend the scope of its obligations on the basis of the Convention, but limited itself to reproduce in its domestic law what was written in the treaty, the effects of which were in no way modified in scope for that State, unlike in the case of a reservation. Because the "restricted clause" was part of the Convention itself, that example came under either guideline 1.7.2 or guideline 1.7.3. That prompted him to ask whether it was really useful to include a guideline specifically on restrictive clauses in section 1.7. In his opinion, all "alternatives to reservations" could have been brought together in a single guideline. A restrictive clause affected the scope of the obligation and was in any case an alternative to reservations. If the Special Rapporteur wished to retain the distinction, he should at the very least have drafted guideline 1.7.3 along the same lines as guideline 1.7.2 and he should not have specified that the restrictive clause did not "constitute a reservation within the meaning of the present Guide to Practice" when that expression did not appear in guideline 1.7.2.

30. Mr. ROSENSTOCK said that, if he had rightly understood the Special Rapporteur's answer to his question, an opting-out clause and a reservation had identical effects, but was that really true in the case of effects vis-à-vis third parties? When a State formulated an opting-out clause, a third State had no power to express objections. The case of a reservation was different. If a third State had objections to a reservation by a signatory State, it could refuse to be bound by the treaty alongside a State which was trying to evade certain obligations. Mr. Pellet's answer would therefore not cover all aspects of the question.

31. Mr. HAFNER thanked the Special Rapporteur for having given the Commission a very rich report on a topic with which those who had not directly taken part in the drafting of international treaties were still not very familiar. He hoped that it would also draw the attention of doctrine to the issue of how States could shape their treaty relations without resorting to the instrument of reservations. Of course, those "alternatives to reservations", which enabled States to assume "made-to-measure" commitments, were not very conducive to the homogeneous application of treaties, but they were often needed in order to ensure a larger number of signatories.

32. Commenting generally on the report, he said that he shared the regrets expressed by the Special Rapporteur in paragraph 5 about the absence of any comment by the European Communities. Not only could they provide many examples which would be of great help in scrutinizing existing practice, but the fact that it frequently needed a particular legal status in order to become a party to international treaty showed that it had a direct interest in the question. Secondly, he very much supported the Special Rapporteur's comments on the need for more coordination with the work of United Nations human rights bodies such as the Human Rights Committee and the Sub-Commission on the Promotion and Protection of Human Rights. The lack of cooperation with those bodies might lead not only to costly duplication of work in the consideration of some

topics, but also to the fragmentation of international law as a result of the adoption of diverging solutions. He therefore suggested that the Commission should play the role of coordinator assigned to it in article 17, paragraph 1, of its statute. The Codification Division might draw the attention of the bodies in question to the issues being discussed by the Commission. The Commission might also take a closer look at the work being done at the European level and he wondered whether the Council of Europe document entitled "Practical issues regarding reservations to international treaties",⁸ referred to by the Special Rapporteur in a footnote to paragraph 56 of his report, could be made available to all members of the Commission.

33. Thirdly, the theory put forward by the Special Rapporteur in paragraph 30 of the report that reservations could be defined separately from their admissibility seemed to have an impact on how article 20 of the 1969 Vienna Convention should be interpreted. In that article, the word "reservations" was used without any further qualification. Must it be concluded that the very broad definition of reservations contained in draft guideline 1.1, which did not rule out inadmissible or impermissible reservations, would be automatically applicable? In his view, such a conclusion constituted a real danger. Perhaps the Special Rapporteur could come back to that question in his next report.

34. Referring to the draft guidelines, he said that he fully agreed with the Special Rapporteur that reservations were not the only means of modifying the effects of a treaty, but questioned whether there really had to be a whole set of guidelines on alternatives to reservations. It seemed to him that the Special Rapporteur had been carried away by his subject, and that might delay the Commission's work. The text of draft guideline 1.7.1 was, moreover, not very clear. In the phrase "in order to modify the effects of the provision of a treaty", did the word "treaty" include bilateral treaties as well? If so, what was the meaning of "treaties" in the remaining guidelines? That should be explained. In addition, the use of the words "may have recourse to procedures" gave the impression that recourse to other procedures was a possibility or a right derived from general international law, whereas, in some cases, that possibility existed only if it was specially provided for in the treaty itself. The problem lay in the use of the word "may", which could be interpreted in different ways.

35. He understood that the list of procedures permitting modification of the effects of the provisions of a treaty contained in draft guideline 1.7.2 was given only by way of example and was not exhaustive. However, he questioned whether there had been any need for the draft guidelines to include a list of acts which were obviously not reservations corresponding to the definition given in draft guideline 1.1. In his opinion, the list belonged in the commentary. Moreover, the examples given were not always very clear. For instance, he had difficulty in understanding what was meant by "Restrictive clauses that limit the object of the obligations imposed by the treaty". The Special Rapporteur was probably referring to clauses

⁸ See Council of Europe, CAHDI (2000) 12 rev., appendix V.

such as articles 296 and 297 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam), article 4 of the International Covenant on Civil and Political Rights or article 15 of the European Convention on Human Rights, which had sometimes been called “sovereignty reservations”, but that concept was not very technical in nature and should not be used as a justification for that guideline.

36. Draft guideline 1.7.3 on restrictive clauses could also be done without. Even if States could use such clauses to agree to alter the effects of a treaty, they could certainly not be confused with reservations as defined in guideline 1.1, at least not since the adoption of the 1969 Vienna Convention.

37. In terms of drafting, the words “more general rules contained in the treaty” were confusing. It would have been clearer to refer to “a different rule contained in the treaty”, unless the Special Rapporteur’s intention had really been to limit the scope of the guideline to provisions of a general nature.

38. In that context, he noted that the inclusion of the word “any” between the word “exclusion” and the word “clauses” in the penultimate phrase of paragraph 110 of the report made the sentence incomprehensible.

39. Referring to draft guideline 1.7.4, he agreed that there were some similarities between agreements *inter se* and reservations insofar as they must not interfere with the object and purpose of the treaty, but the major difference between them lay in the fact that a reservation was unilateral in nature. Consequently, that guideline was not necessary. The issue that might be discussed in that context was whether, in the case where a treaty provided for the possibility of reservations, a State would be entitled to exclude the legal effect of a particular provision of a treaty in its application to one or some other States parties and whether such a declaration would have to be characterized as a reservation even if the treaty did not explicitly provide for such a right. Since the Special Rapporteur excluded declarations ruling out the application of an obligation for a certain period of time from the scope of reservations, it might be thought that such declarations, which excluded obligations under a treaty in respect of certain States only, would also be outside the scope of reservations, but he was not entirely convinced of that conclusion.

40. Exclusionary clauses, as dealt with in draft guideline 1.1.8, were very frequently used in practice and gave rise to many problems. There seemed to be almost no difference between such clauses and clauses authorizing reservations. For example, if an article of a treaty such as the Convention on Early Notification of a Nuclear Accident entitled States parties to declare that they would not apply a certain article on liability, what was the difference between such a provision and an article which authorized States to make reservations concerning one particular provision of a treaty? In both cases, negotiations had taken place in order to define precisely which provision could be the subject of such a declaration, so that both amounted to “negotiated reservations”. The Special Rapporteur’s conclusion, in paragraph 168, that that term was “misleading” was thus correct and it should not be included in the guidelines. The question of those clauses must nevertheless be

considered because they were frequent and raised problems relating to the admissibility of other reservations. In that connection, he did not agree with the interpretation of article 19 of the 1969 Vienna Convention which the Special Rapporteur had given in reply to a question by Mr. Simma: States were hardly likely to agree on a list of articles to which reservations were allowed and to add the word “only” in order to exclude any other reservation.

41. During the drafting of the Rome Statute of the International Criminal Court, there had been lengthy discussions on reservations. The article 120 that had finally been adopted prohibited any reservation. Although the Statute did not explicitly define the provisions to which reservations could be made, it could be argued that some of those provisions authorized States to make declarations having an effect comparable to that of reservations. The first example which came to mind was the transitional provision of article 124, which entitled States parties to declare that they did not accept certain legal effects of article 8 relating to the jurisdiction of the Court. A declaration made by a State under article 124 was probably a declaration which purported to exclude or modify the legal effect of certain provisions of the treaty in their application to that State. If article 124 was understood in that sense and a declaration under that article was taken to be a reservation, no other reservations were admissible by virtue of article 19, subparagraph (b), of the 1969 Vienna Convention, even in the absence of a clause excluding reservations. In the light of those considerations, article 120 might be regarded as redundant. Of course, it could also be argued that a declaration under article 124 did not amount to a reservation in view of its restriction in time (seven years). If it was regarded as a reservation, however, article 120 and article 124 would be incompatible. It might also be considered that that was an example of the “terminological vagueness” to which the Special Rapporteur referred in paragraph 162 of his report.

42. In his final assessment, the Special Rapporteur concluded that declarations under such exclusionary clauses and reservations were identical. In his own view, however, a distinction was possible. Several years previously, when he had dealt with that problem in the context of the Convention on Early Notification of a Nuclear Accident, he had had the impression that there was a difference between the two in the sense that, according to article 21 of the 1969 Vienna Convention, a reservation would have a reciprocal effect, whereas, in the case of a clause excluding liability, the effect was only unilateral. He did not know whether that particularity was the result only of the object of that Convention, but it would be interesting to find out whether a similar distinction existed in other conventions. Of course, that question would lead to a further difficulty, since reservations to human rights treaties in general gave rise to the problem of reciprocal effect. That particular problem must undoubtedly be dealt with in the guidelines and he was still hesitant to agree that it could be explained by some “terminological vagueness”.

43. With regard to procedures for choosing between the provisions of a treaty by means of a unilateral declaration, he agreed with the view expressed in paragraph 177 of the report, namely, that unilateral declarations formulated under an exclusionary clause after the entry into force of the treaty did not fall within the ambit of reservations.

That conclusion followed from the definition contained in draft guideline 1.1 and could therefore only form part of the commentary.

44. With draft guideline 1.4.6, the Commission was again dealing with optional clauses. In that connection, it could be asked why the guidelines drew a distinction between declarations by which the State explicitly accepted obligations provided for in a treaty and declarations formulated under exclusionary clauses. In the drafting of the dispute settlement provisions contained in universal conventions, there was a kind of transition from inclusion to exclusion, i.e. from the clauses dealt with in draft guideline 1.4.6 to those referred to in draft guideline 1.1.8: whereas, formerly, States had been able to accept a compulsory judicial procedure by a declaration, there was now a tendency to provide for such a procedure and to allow States to exclude it by a unilateral declaration. Although the two types of clauses were politically very close, the distinction made in the guidelines nevertheless seemed correct, since they could be treated differently in domestic legislation. A guideline such as guideline 1.4.6 was thus undoubtedly necessary, since the declarations in question were unilateral in nature and did not come under guideline 1.4.1.

45. Referring to draft guideline 1.4.7, he shared the views expressed by the Special Rapporteur on the basis of the judgment in the *Fisheries Jurisdiction* case. It could nevertheless again be argued that the definition of reservations already excluded such declarations, since they did not relate directly to a treaty, but to a declaration under a treaty. That could be referred to in the commentary, although, in that particular case, he would accept a special guideline.

46. He doubted whether the clauses dealt with in draft guideline 1.4.8 needed a separate guideline; they might be associated with declarations under an optional clause, as dealt with in draft guideline 1.4.6, without, however, being merged with them. Those clauses were very similar, so much so that article 20 of the European Social Charter combined them in one provision. The example of the European Charter for Regional or Minority Languages was a little more complex than the report indicated, as shown by the voluminous declarations made by States under the clause in question. Thus, article 2, paragraph 2, and article 3, which had to be read in conjunction with article 2, contained different kinds of declarations: those discussed in paragraph 202 of the report and those covered by article 3 of the Charter, since, before making a declaration, States had to declare, under article 3, which he read out, to which language the Charter would apply. A declaration under article 3, paragraph 1, certainly did not come within the ambit of draft guideline 1.4.8, since that article did not offer the States parties a choice; it might be included under the clauses covered by draft guideline 1.4.6, but that too was open to question, since the article did not authorize States to accept an obligation, but obliged them to indicate the scope of application of the Charter. Hence, if all other clauses were dealt with in separate guidelines, it might be asked whether it would not also be necessary to refer to "unilateral declarations made in accordance with a clause obliging a State to define the scope of application of a treaty".

47. Draft guideline 1.7.5 was acceptable, but the second sentence was not necessary. He did not, however, share the view the Special Rapporteur had expressed in paragraph 99 of his report on article 31 of the 1969 and 1986 Vienna Conventions. The words "the parties" had always been interpreted as referring to all the parties to a treaty and, accordingly, if only some parties wanted to conclude an agreement on a particular interpretation of a treaty, it would then be an agreement *inter se* which did not come under article 31.

48. In conclusion, he recommended that draft guidelines 1.1.8, 1.4.6, 1.4.7, 1.4.8 (the latter being joined to, but not merged with, draft guideline 1.4.6), 1.7.1 and 1.7.5 should be referred to the Drafting Committee.

49. The CHAIRMAN suggested that, in order to make the best possible use of the Drafting Committee's time, draft guidelines 1.7.1, 1.7.2, 1.7.3 and 1.7.4, which were closely linked, should be referred to it provisionally, on the understanding that the members could still comment on them, and that the Drafting Committee should take due account of the observations made in the plenary. That solution would enable the Drafting Committee to begin its work. If he heard no objection, he would take it that the Commission agreed with his suggestion.

It was so agreed.

50. Mr. GAJA (Chairman of the Drafting Committee) announced that the Drafting Committee on reservations to treaties was composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Economides, Mr. Elaraby, Mr. Kamto, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Tomka and Mr. Rodríguez Cedeño as ex officio member.

51. Mr. BROWNLIE, referring to draft guideline 1.1.8, said he agreed with Mr. Hafner that reservations formulated under exclusionary clauses were very close to negotiated reservations.

52. Mr. HE said it was clear from the debate in the plenary that draft guidelines 1.7.1 and 1.7.2 belonged in the Guide to Practice. They and the commentaries which accompanied them in the body of the report would make a large number of complex issues clearer for practitioners, including diplomats and non-specialist lawyers.

53. With regard to draft guideline 1.7.2 on alternatives to reservations and paragraph 83 of the report, the first category of restrictive clauses corresponded to what Mrs. Higgins had called "clawback clauses".⁹ In his opinion, such derogations could also be included in the second category proposed by the Special Rapporteur, "escape clauses", if reference was made to the definition contained in draft guideline 1.7.2 and in paragraphs 83 and 140 of the report. In view, however, of the importance of derogation clauses, which were widely used in treaties, they should be made a separate category in procedures for modifying the effects of provisions of a treaty. Otherwise, in order to draw attention to their importance, the words "or to derogate from such obligations" might be added

⁹ R. Higgins, "Derogations under human rights treaties", *The British Year Book of International Law, 1976-1977*, p. 281.

after the words “general obligations” in the definition of escape clauses in draft guideline 1.7.2.

54. Noting that the Special Rapporteur proposed two alternatives for the title of guideline 1.7.4, he expressed the view that the second, “Agreements between States having the same object as reservations”, should be retained because it was more general, as it covered all agreements, including bilateralized reservations and amendments and protocols which might be concluded by certain parties to the treaty.

55. He agreed with the Special Rapporteur that the new guideline proposed in paragraph 143 of the report was not essential, but that, for the sake of exhaustiveness, the points it contained might be discussed in greater detail in the commentary.

56. Noting that draft guidelines 1.1.8, 1.4.6 and 1.4.7 were proposed in order to supplement the draft guidelines already provisionally adopted, he suggested that they should be referred to the Drafting Committee so that it might improve their wording and determine where they should be inserted in the Guide to Practice.

57. Mr. SIMMA, referring to declarations made under an opting-out clause, said that the reference to article 17 of the 1969 Vienna Convention in paragraph 148 of the report was misleading because that article related to accession to some parts of a treaty only and it was clear from the text of the article and from the Commission’s commentary that there was a difference under the Convention between a State which acceded only to a part of a treaty under article 17 and a State which in principle acceded to the treaty as a whole, but subject to certain reservations governed by articles 19 et seq.

58. Referring to his interpretation of article 19, subparagraph (b), of the 1969 Vienna Convention and the comment the Special Rapporteur had made in that regard, Mr. Hafner had given the interesting example of a multilateral convention which did not allow reservations, but did allow some declarations. If it was wrongly considered that such declarations were reservations, there would then be a contradiction between the various provisions of the treaty. In more general terms, he asked the Special Rapporteur what purpose it served to call a declaration a reservation if practically none of the provisions of the Convention on reservations applied to it. If the Special Rapporteur maintained his position, perhaps he could distinguish between declarations which excluded the application of some substantive provisions of a treaty and those which excluded the application of some procedures and would therefore be different from reservations.

59. Mr. PAMBOU-TCHIVOUNDA said that, unlike the Special Rapporteur, he was not sure that the fact that a treaty authorized only certain reservations meant that it prohibited all others.

The meeting rose at 1 p.m.

2633rd MEETING

Wednesday, 7 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Reservations to treaties¹ (continued) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,² A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ECONOMIDES said that chapter II of the Special Rapporteur’s fifth report (A/CN.4/508 and Add.1–4) dealing with alternatives to reservations and interpretative declarations deserved special praise. It was, to his knowledge, the first time that such a brilliant and comprehensive study of a difficult and unfamiliar subject had been undertaken and it would doubtless serve as an invaluable reference tool.

2. Referring to the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties which the Commission had adopted at its forty-ninth session,³ he said he had always viewed the Commission’s initiative in that regard as premature, not to say hasty. But he agreed with the Special Rapporteur’s proposal in paragraph 18 of his report to re-examine the preliminary conclusions as soon as the Commission had completed consideration of all the substantive questions concerning the regime for reservations.

3. With regard to the objective of the draft guidelines, it was generally agreed that the reservations regime established by the 1969 and 1986 Vienna Conventions should not be modified. Nevertheless, any errors, ambiguities or omissions in that regime detected by the Commission should, in his view, be rectified by means of the draft guidelines, which should not only simply clarify and refine the subject matter, which was rapidly evolving, but also provide practical solutions to existing problems and make good any omissions.

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ See 2630th meeting, footnote 17.