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Summary record of the 2738th meeting

Topic:

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ject and purpose of the treaty had an impact on the consequences of the impermissibility of the reservation.

49. Mr. KOSKENNIEMI, replying to Mr. Pambou-Tchivounda on the general consequences of a finding that a reservation was impermissible, said that the question could not be dealt with at present, as it was very complex and might, in some cases, relate to State responsibility. The Special Rapporteur could deal with the subject later. By proposing a new formulation for the draft guideline, he had intended to establish a link between the finding that a reservation was impermissible and a possible obligation for the reserving State or international organization to withdraw it. On the question of the three types of impermissible reservations identified by article 19 of the 1969 and 1986 Vienna Conventions and the consequences of that classification, he presumed that the consequences of impermissibility would not differ according to the type of reservation in question. However, that was perhaps not true for every possible type of consequence.

50. Mr. CANDIOTI suggested that all the proposed draft guidelines should be referred to the Drafting Committee, with the exception of the two guidelines on monitoring bodies, the study of which could be postponed until later, when the question of the impermissibility of reservations was examined. The withdrawal of a reservation was a possible consequence of a finding by a monitoring body that a reservation was impermissible, but it could also simply be the consequence of an objection by another State.

The meeting rose at 12.40 p.m.

2738th MEETING

Tuesday, 30 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MOMTAZ said that he endorsed the very pertinent remarks of Imbert, emphasized by the Special Rapporteur in paragraph 193 of his seventh report (A/CN.4/526 and Add.1–3), on the need to encourage partial withdrawals of reservations, which was a procedure that could enable States to gradually adapt their participation in a treaty to the evolution of their national law.³ However, it raised the question of whether the States parties to a treaty that had not objected to the initial reservation could object to a partial withdrawal. It seemed the Special Rapporteur had not answered that question and had merely dealt with the case of States that had made objections to the initial reservation. The reference in paragraph 201 of the report to “some of the other parties” was confusing: Did it refer to States that had made no objections to the initial reservation? In any event, he considered that, in order to favour the integrity of the treaty and encourage partial withdrawals, while awaiting complete withdrawal of the reservation, States should tolerate such partial withdrawals and waive the exercise of their right to object to them.

2. Guideline 2.5.11 (Partial withdrawal of a reservation) confirmed the merits of that option. At least, that was the logical conclusion to be drawn from the reference to the rules of form and procedure applicable to a total withdrawal in paragraph 1. It was inconceivable that a State party to a treaty should object to a total withdrawal of a reservation by another State party.

3. Paragraph 2 of the guideline defined what was understood by a partial withdrawal and appeared to consider that partial withdrawal of a reservation and modification of a reservation were synonymous. That assimilation could lend itself to misunderstandings. Indeed, as the Special Rapporteur pointed out in paragraph 207 of the report, the Secretary-General of the United Nations made a clear distinction between partial withdrawal of a reservation and modification of a reservation, reserving the latter expression for cases in which a withdrawal strengthened the scope of the reservation. That was evidently not the case envisaged in guideline 2.5.11.

4. It might therefore be advisable to eliminate any reference to the word “modification” in paragraph 2, for example, by eliminating the phrase *est la modification de cette réserve par l'État ou l'organisation internationale qui en est l'auteur*, *qui* in the French version and the correspond-

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

³ See P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), p. 293.

ing text in the other versions. That would not affect the definition, yet would avoid any risk of misunderstanding.

5. Regarding guideline 2.5.11 *bis* (Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), he favoured the solution preferred by the Special Rapporteur, on condition that any reference to the obligation of the State author of the impermissible or inadmissible reservation was eliminated from the text. However, he understood that guideline 2.5.4 would be reformulated taking into account the concerns expressed by members of the Commission.

6. Regarding withdrawal of reservations, he was concerned about implicit withdrawals, particularly since the Special Rapporteur went on to emphasize that a guide to practice “must, as far as possible, provide users with answers to any legitimate questions they might have” (para. 215 of the report). The examples provided in paragraphs 92 and the following of the report of the circumstances in which one could speak of implicit withdrawal did not include the case where a reserving State acted as if the reservation that it had formulated had become null and void—for example, when a State acted in accordance with the provisions of a treaty, although it had made reservations to it. He could envisage cases in which, contrary to the situations mentioned in paragraph 101 of the report, it was not the negligence of the competent authorities or insufficient consultation between the relevant services that was at the root of the withdrawal, but rather a voluntary act by the executive. It could happen that, to avoid opposition by the legislature, which was at the origin of the reservation, the executive preferred to comply at the international level with the provisions of the treaty that was the subject of the reservation and not do anything to withdraw it, for fear of raising an outcry on the domestic front.

7. The following question arose: Could the States that objected to the reservation when it was formulated use the subsequent practice of the reserving State to declare that the said reservation had fallen into abeyance and that, henceforth, it had no validity in their treaty relations with the reserving State? He believed that the question needed to be dealt with in the Guide to Practice.

8. Mr. PAMBOU-TCHIVOUNDA said that he had some difficulty in following the arguments of Mr. Momtaz in proposing the reformulation of paragraph 2 of guideline 2.5.11, eliminating the reference to modification. Admittedly, the guideline did not define the notion of modification, but how could the partial withdrawal of a reservation be anything other than a modification of the reservation? Withdrawal was a procedure that consisted in eliminating certain elements that had been stated within the framework of the reservation, and, accordingly, the purpose of a partial withdrawal was to modify the reservation. Therefore, he was unable to support Mr. Momtaz’s suggestion, unless he had misunderstood the meaning of modification.

9. Mr. PELLET (Special Rapporteur) said that one of the main justifications for paragraph 2 of guideline 2.5.11 was to state that partial withdrawal was the modification of an existing reservation, not the withdrawal of a reser-

vation followed by the formulation of a new reservation. However, as he had explained in the preceding paragraphs in the report, practice was highly inconsistent, and even the Secretary-General himself had said that he could not accept a partial withdrawal, on the pretext that it was a case of a total withdrawal, followed by the formulation of a new reservation. That was why the word “modification” was useful. It showed that the question was not one of formulating a new reservation, but rather one of modifying an existing one. While Mr. Momtaz had based his arguments on the position taken by the Secretary-General, it was precisely the position that, for his own part, he was contesting, because it led to inconsistencies.

10. He was not sure that he completely understood the first comment made by Mr. Momtaz, who had asked, in the case of a partial withdrawal, about the relations between a State that had not made an objection and the reserving State. The State that had not made an objection was considered to have accepted the reservation, and the matter fell under guideline 2.5.12 (Effect of a partial withdrawal of a reservation). Following a partial withdrawal, the reservation was diminished. Consequently, in principle, that State would not object to it. If Mr. Momtaz wanted that to be explicitly stated in the commentary, it could be included, but it seemed curious to observe that acceptances of reservations still remained.

11. Mr. MOMTAZ said that he had requested the inclusion of a clarification to the effect that a State which had not made an objection to a reservation could not make an objection in the case of a partial withdrawal, because there was a lack of clarity on that point.

12. Regarding his second point, which had been taken up by both the Special Rapporteur and Mr. Pambou-Tchivounda, since the Special Rapporteur had referred to the inconsistent practice of the Secretary-General as depositary, it would be useful to remove the reference to “modification” in paragraph 2 of guideline 2.5.11 and eliminate the phrase he had suggested during his initial statement.

13. Ms. XUE asked whether, in guideline 2.5.11, the Special Rapporteur had considered two possible scenarios for partial withdrawals. In the first, when State A became party to a convention, it might make reservations to two or more articles and subsequently withdraw its reservation to one of them: a straightforward partial withdrawal. In the second, when State A became party to a convention, it might make a reservation to one specific provision by declaring that implementation of the provision would be in accordance with its domestic legislation. Subsequently, the State might modify its reservation because there was an amendment to its domestic legislation that strengthened its obligations under the convention.

14. Under the first hypothesis, it was clear that the objections by other parties would disappear, since the reason for the objections had been eliminated. In the second, however, that was not the case because the other States parties could consider that, even with the new legislation, the reservation affected satisfactory implementation of

the convention. The draft guidelines did not appear to take both scenarios into consideration.

15. Mr. GAJA, referring to the first point raised by Mr. Momtaz, said that, in general, a State that had not made an objection to a reservation would not have any objection to make to a reservation which had been modified through a partial withdrawal. Nevertheless, it should not be said that a State could not make objections to a partial withdrawal if it had not made objections to the reservation: everything depended on the consequences of the withdrawal. For example, in the hypothetical case of a treaty protecting the rights of foreigners, if a provision of that treaty said that foreigners had the right to own real estate and a State made a reservation to that provision, other States might not raise objections. However, should the reserving State make a partial withdrawal, saying that it would withdraw the reservation, but not for nationals of country X, the State affected by the discriminatory partial withdrawal should have the opportunity to object. Therefore, the possibility of making objections in the case of partial withdrawals should not be categorically ruled out.

16. Mr. Sreenivasa RAO said that he agreed with Mr. Gaja. Partial withdrawal of a reservation could almost amount to a new reservation. It was not simply a matter of deleting part of a reservation that had been accepted by some and objected to by others; when an element was eliminated or added, a completely new reservation was established. Hence, at least technically, it could be argued that a modification should be treated as a new reservation.

17. Mr. PELLET (Special Rapporteur) said his report had covered the point extensively and he was still convinced that a modification to a reservation was not a new reservation. However, that did not mean he totally rejected Mr. Gaja's position and the example he had given. Indeed, he wondered whether there were other examples, similar to "discriminatory" withdrawals, and, although he did not believe it necessary to include a provision on them in the draft guidelines, he would be prepared to envisage such a course if a proposal was put forward. If it was only a question of discriminatory withdrawals, the situation was clear. However, it would be necessary to see if there were any other similar situations where a State that was a victim of a discriminatory partial withdrawal could wish to react.

18. Ms. Xue had mentioned two situations. In the first, the partial withdrawal could refer to one or several reservations. In that case, guideline 2.5.12 was very clear and would be even clearer with the addition, at the end, of the phrase proposed by Mr. Galicki: "to the extent that the objection does not relate exclusively to the part of the reservation that was withdrawn." In the second case, where the State aggravated its reservation as domestic legislation became more restrictive in the implementation of the convention, it made a new reservation to reflect that. The situation had not been envisaged in that part of the report which, as he had already pointed out, was incomplete because it dealt only with partial withdrawals that attenuated and did not aggravate reservations. An aggravation of a reservation did not come under draft guidelines 2.5.11

and 2.5.12. Hence there was another argument in favour of maintaining the word "modification" in the case of a partial withdrawal, which was a modification that reduced the scope of an existing reservation. Strengthening an existing reservation was a modification that expanded the reservation and was equivalent to the formulation of a new reservation, which led on to the issue of late formulation of reservations. Paragraph 185 of the report clarified that point. Members of the Commission could reproach him for not having provided the final part of his report which dealt with that matter, which might cause misunderstandings.

19. The CHAIR said that Mr. Gaja's statement had also brought to mind the case of amended reservations that affected some States adversely and others positively, something which raised another series of problems.

20. Mr. FOMBA said that although, in paragraphs 185 to 210 of his report, the Special Rapporteur pointed out that doctrine and practice revealed some elements of uncertainty with regard to the question of modification of reservations, he nonetheless concluded that "the modification of a reservation whose effect is to reduce its scope must be subject to the same juridical regime as a total withdrawal" (para. 209); and that a single draft guideline should be able to take account of that alignment of regimes. Given that the difference between a partial and a total withdrawal of a reservation was one not of nature but of degree, he endorsed that conclusion.

21. In the light of the methodological principles established by the Commission, it was reassuring to note that the definition of a partial withdrawal contained in paragraph 2 of guideline 2.5.11 was modelled as closely as possible on the definition of reservations in the 1969 and 1986 Vienna Conventions. Nonetheless, he had two concerns in that regard. On the substance, he noted that the current definition had three components, namely, modification, limitation of the legal effect, and fuller application of the treaty's provisions. Since the modification did not eliminate the reservation and the latter's legal effect was merely limited, how could it contribute to re-establishing the juridical regime of the treaty more completely, or as a whole? There seemed to him, as one not well versed in practice in the field of the law of reservations, to be a contradiction between the text of paragraph 2 of the guideline and the content of paragraph 217 of the report. As to the form, the two phrases "ensuring more completely the application of the provisions of the treaty" and "or of the treaty as a whole" seemed to express the same idea. Consequently, one or the other should be deleted.

22. With reference to the transposability of guidelines 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), 2.5.7 (Effect of withdrawal of a reservation) and 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization) to the case of partial withdrawals, the Special Rapporteur stated that the thorniest case was probably the one where a treaty-monitoring body had found that the reservation initially formulated was not valid. In that

regard, without begging the question of the monitoring body's powers, he endorsed the Special Rapporteur's reasoning as set out in paragraphs 213 and 214 of his report.

23. On the question whether it was useful to specify in the Guide to Practice, and if so in what form, that partial withdrawal was one of the means by which the State or international organization might fulfil its obligations if one of its reservations was found to be impermissible, he shared the Special Rapporteur's doubts about the wisdom of simply mentioning it in the commentaries to guidelines 2.5.4 and/or 2.5.11. The Special Rapporteur did not state his position with regard to the second possibility, namely, inclusion of draft guideline 2.5.11 *bis*. Personally, leaving aside the matter of impermissibility and competence to determine it, he had no objection to including such a guideline, provided the State's freedom of action was not impaired. In regard to the third course of action, namely, mentioning the possibility of a partial withdrawal in paragraph 2 of guideline 2.5.4—the Special Rapporteur's preferred solution, involving the insertion of a new guideline 2.5.X (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) at the end of section 2.5 of the Guide to Practice—he would welcome clarification of the need for individualization of guideline 2.5.11. With that proviso, he could support the proposal to merge guidelines 2.5.4 and 2.5.11 *bis*, since paragraph 2 of guideline 2.5.4, by referring simply to withdrawal of the reservation (in line with the terminology of the Vienna Conventions), left the distinction between total and partial reservations wide open for interpretation, a grey area that would be eliminated by the inclusion of guideline 2.5.X. In that case, however, guideline 2.5.11 should nonetheless be retained.

24. He agreed with the Special Rapporteur's conclusion, expressed in paragraphs 218 and 219 of the report, about the fate of objections in the event of a partial withdrawal. That line of reasoning appeared to be supported by logic and practice, as was guideline 2.5.12, which also had the merit of reproducing the terminology of article 21 of the 1969 and 1986 Vienna Conventions. Subject to any further clarifications that might be provided, he proposed referring guidelines 2.5.11 and 2.5.12 to the Drafting Committee.

25. Mr. DAOUDI said that the "long version" of guideline 2.5.6 (Communication of withdrawal of reservations) was to be preferred as facilitating use of the Guide to Practice, but the Commission should revert to that question once the full text of the Guide was available. In paragraph 2 of guideline 2.5.6 *bis* (Procedure for communication of withdrawal of reservations), it should be mentioned that the date of the electronic mail or facsimile was the date of the withdrawal of the reservation, not the date of the confirmation, so as to harmonize the provision with the Drafting Committee's proposal on the matter, approved by the Commission at its 2734th meeting.

26. With regard to the effective date of withdrawal of a reservation, he endorsed the Special Rapporteur's position concerning the principle posed in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions. That provision was reproduced in its entirety in guideline 2.5.9

(Effective date of withdrawal of a reservation). He also supported the three model clauses proposed with a view to reflecting State practice and attenuating application of the effective date requirement in certain situations. Those clauses, and other model clauses, should be incorporated in an annex to the Guide to Practice.

27. However, in paragraph 173 of the report, the Special Rapporteur considered that the principle of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions departed from ordinary law, according to which, in the Special Rapporteur's opinion, an action under a treaty took effect from the date of its notification to the depositary. In substantiation of that reading, the Special Rapporteur referred to article 78, subparagraph (b), of the 1969 Vienna Convention and the judgment of ICJ, in the *Right of Passage over Indian Territory* case, concerning optional declarations of acceptance of its compulsory jurisdiction under Article 36 of the Court's Statute. In that regard, he wished to point out that ordinary law as established in article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention provided that a notification or communication produced effects with regard to the State for which it was intended only when that State had received it from the reserving State or been informed of it by the depositary. The Court's jurisprudence confirmed that principle. The relevant articles of the Vienna Conventions began with a phrase that permitted States to waive the application of ordinary law, namely, "Except as the treaty or present Convention otherwise provide...". Consequently, Article 36 of the Statute of the Court, which provided that an optional declaration took effect upon its receipt by the Secretary-General in his capacity as depositary, thus constituted an exception to the application of ordinary law.

28. As for guideline 2.5.7, it should perhaps begin with some such phrase as "Unless other reservations continue in force...", so as to reflect the idea referred to by the Special Rapporteur in paragraph 183 of his report.

29. Mr. MANSFIELD asked the Special Rapporteur for clarification of his intentions with respect to guidelines 2.5.4 and 2.5.11 *bis*. He reiterated his opinion that guideline 2.5.4 was too compressed and, as such, not ripe for referral to the Drafting Committee. At the previous meeting, Mr. Koskeniemi had pointed out that a very wide range of bodies might wish to comment on reservations and that, while some of those bodies had a self-executing power to declare a reservation null and void, and others created an obligation on the reserving State, yet others produced findings which amounted to no more than a recommendation. In his view, that analysis was correct. Other members, however, considered that the implications of guideline 2.5.4 went beyond those cases: Mr. Yamada, for instance, had referred to the recent action of the International Whaling Commission in relation to the reservation by Iceland (2737th meeting, para. 5). While the International Whaling Commission was clearly not a monitoring body within the meaning of guideline 2.5.4, the contentious issue in that case, namely, whether the reservation in question and the action of a majority fell within the terms of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, illustrated the complexity of the is-

sue, confirming his opinion that the text as it stood was too general to be helpful. Mr. Koskenniemi had also made the important point that the issues perhaps fitted better under the general rubric of impermissibility, rather than in the section on withdrawal. Did the Special Rapporteur intend to provide the Commission with a reformulation of guideline 2.5.4 in the context of impermissibility, or did he regard that as a task for the Drafting Committee?

30. Mr. BROWNLIE said he was not convinced that the problem could be dealt with simply by reclassifying it as an issue of admissibility, even though it clearly overlapped with that question. The role of the monitoring bodies needed separate treatment. His own suggestion, which had attracted absolutely no comment, favourable or otherwise, had been that the Special Rapporteur should consider the possibility of what, in a more formal context, would be described as a proviso. Although a proviso as such would be anomalous in the context of guidelines, its equivalent, *mutatis mutandis*, seemed a feasible option.

31. Mr. PELLET (Special Rapporteur) said that, as a result of a misunderstanding, he had prepared preliminary conclusions only for the first two groups of guidelines introduced, namely, guidelines 2.5.1 to 2.5.6 *ter*, with the exception of guideline 2.5.4, to which he would return only at the very end of the debate, presumably at the next meeting.

32. As he had had occasion to remark the previous week, the topic of formulation of reservations *largo sensu* was, if not thankless, undoubtedly somewhat austere and technical. Nonetheless, the Commission rendered the international community a greater service by attempting to codify technical rules of that type, which responded to a real need, than by squabbling over doctrine and theory. In any case—with the exception of guidelines 2.5.4 and 2.5.11 *bis*, to which he would return at the next meeting—none of the 17 guidelines he had proposed was likely to lead to a slippage of that kind.

33. By and large, the debate had focused on very specific points and had not posed insuperable problems of principle. The dominant sentiment appeared to have been very clearly in favour of referring the entire set of draft guidelines—again with the exclusion of guidelines 2.5.4 and 2.5.11 *bis*, on both of which he would take a firm decision at the next meeting—to the Drafting Committee for consideration at the next session.

34. Before reviewing the guidelines one by one, he would try to respond to a few general concerns voiced by members. It bore repeating that the Guide to Practice was intended to comprise, not a compilation of binding rules, but a “code of recommended practices” with no binding force—a point that might perhaps eventually be reflected in a change of title. However, there was no reason not to draft them as carefully and rigorously as possible, since they were intended as a guide to State practice. In that regard, he entirely supported Mr. Brownlie’s most recent remarks. Furthermore, it was clear that the rules contained in some of the guidelines were indeed binding—not because they were to figure in the Guide to Practice, but

because they were customary rules, or because they were transposed from the 1969 and 1986 Vienna Conventions and thus binding. That illustrated the difference between the legal value of a norm and of a source.

35. Mr. Pambou-Tchivounda had raised the question whether there was any value in incorporating provisions of the Vienna Conventions word for word in the Guide to Practice. The Special Rapporteur’s reply to that question was categorically in the affirmative. That practice had been adopted for a large number of guidelines, including guideline 1.1, on the definition of reservations, for good reasons to which Mr. Momtaz and Mr. Comissário Afonso had alluded: the value of the Guide to Practice would be seriously compromised if users were unable to find answers to all their general questions in the Guide itself. Albeit incomplete and sometimes ambiguous, the Vienna Conventions were the inevitable starting point for any practice in the matter of reservations, and to compile a Guide to Practice that made no reference to it would indeed be odd. Mere reference to the Vienna Conventions would oblige users to constantly skip back and forth between the three instruments, and would also pose technical problems for States and organizations not parties to those Conventions. Accordingly, it was simpler, more logical, and more convenient, practical and useful to transpose the relevant provisions in their entirety.

36. Some speakers had reverted to decisions already taken by the Commission. For instance, Ms. Escameia, Ms. Xue and Mr. Kateka had expressed doubts about the soundness of the solution proposed in guideline 2.5.6 *bis* concerning communication of a reservation by electronic mail and its effects. While he was fond of the *Odyssey*, he had no wish to play the role of Penelope: as Mr. Daoudi had recalled earlier in the meeting, the Commission had, for better or worse, taken a position in that regard in guideline 2.1.6 (Procedure for communication of reservations), and it would be totally inconsistent not to adopt the same solution in guideline 2.5.6 *bis*. In that regard, he appealed to members not to call into question solutions already adopted – unless, of course, some material error came to light. If the Commission continually unravelled the fabric already woven, its work would never be done.

37. As to the individual guidelines, guideline 2.5.1 (Withdrawal of reservations) seemed to pose no real problems other than the question raised by Mr. Pambou-Tchivounda. The only suggestion he had noted came from Mr. Galicki, who had proposed deleting the words “Unless the treaty otherwise provides...”. In principle he agreed that such an amendment would be useful, and he had himself pointed out as much in paragraph 86 of his report and in his oral presentation. However, that expression occurred in article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, which was reproduced in its entirety in guideline 2.5.1; and it was both unnecessary and potentially dangerous to rewrite that provision. The guiding principle must be to retain the Vienna provisions unless there was a compelling reason to depart from them.

38. On guideline 2.5.2 (Form of withdrawal), Mr. Galicki had pointed out that the withdrawal of reservations should be facilitated as much as possible—an opinion with

which he concurred in principle. How, though, was that to be achieved? Just as, in the words of Alfred de Musset, “a door must be open or closed”, likewise, a reservation or its withdrawal must be written or unwritten. Guidelines 2.1.1 (Written form) and 2.5.2 required the written form; there was no intermediate solution, and the security of legal relations—and, to a lesser extent, the principle of parallelism of forms—required the written form, particularly as such withdrawal was the means of completing a State’s consent to be bound by the treaty, which must be a formal act.

39. Ms. Xue, however, had suggested including in guideline 2.5.2—or, more controversially, in guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation)—the words “When a reserving State has submitted a written notification of withdrawal of its reservation, it should act in line with that withdrawal even before such notification is received by the other States parties.” That proposal seemed more acceptable than her previous formulation. At first sight, it might seem that there was no drawback to a State’s becoming bound by its withdrawal of a reservation from the moment of notification. Upon reflection, however, he saw a serious problem with Ms. Xue’s proposal. A treaty was an agreement, presupposing the meeting of two or more minds at a given point in time on a *single* text. It did not seem at all satisfactory that, on the date of its withdrawal of a reservation, State A became bound by the entire treaty, whereas State B became bound by the entire treaty in its relations with State A only two or any other given number of days later. States could be bound only as a group and by a single text, but Ms. Xue’s proposal would have the two sets of obligations diverge. Even when written in the conditional, as she had drafted it, the proposal seemed likely to create unnecessary complications and he could therefore not go along with it.

40. Another question about draft guideline 2.5.2 raised by Mr. Momtaz echoed one brought up earlier by Mr. Pambou-Tchivounda: What happened if in practice a State applied a provision on which a reservation had been made? In his view, the problem transcended the sphere of reservations and approached the Commission’s new field of inquiry, the fragmentation of international law. The problem was to determine which would prevail among contradictory obligations, namely those assumed under the treaty and those assumed in practice by the State, presumably through some form of unilateral act. He was not convinced that the problem should be addressed in the Guide to Practice, although there might be a need to enlarge on what he had said about implicit reservations. If, however, the Commission felt strongly that a draft guideline along the lines suggested by Mr. Momtaz should be included, he would have no objection.

41. Finally, Mr. Chee had accused him of inconsistency—of having first suggested that a reservation must always be withdrawn in writing, and then invited discussion about implicit reservations. He pleaded not guilty: he had raised the question of implicit reservations only theoretically and had clearly come out as saying the proposition was inconceivable.

42. As for draft guideline 2.5.3 (Periodic review of the usefulness of reservations), he said he was very pleased with the Commission’s reaction to what was a fairly unusual proposal. His apprehensions, engendered by past instances of the Commission’s conservatism, had in fact been unfounded. The guideline appeared to have gained unanimous and even warm approval, and the specific proposals made could be studied by the Drafting Committee. Mr. Pambou-Tchivounda had questioned the placement of the provision in the part of the Guide to Practice on procedure, and in logical terms he was right to do so, but he himself thought there was an advantage to combining in section 2.5 everything relating to the withdrawal of reservations. Ms. Escameia had wished to see a reference to appeals by treaty-monitoring bodies, but in that case why not mention also the appeals of the General Assembly and regional bodies? Since most members of the Commission were quite reticent about treaty-monitoring bodies, it was unlikely that the proposal would gain wide acceptance.

43. Mr. Tomka, supported by Mr. Yamada, had endorsed guideline 2.5.3 but wanted to make the recommendatory aspect stronger by starting it with the phrase “It is recommended that States...”. It would be for the Drafting Committee to decide on that proposal, but he himself was not convinced of its usefulness. It seemed somewhat awkward and in fact redundant, as the Guide to Practice itself was a set of recommendations addressed to States.

44. Mr. Tomka again, but supported by Mr. Momtaz and Mr. Mansfield, had suggested that the last phrase in paragraph 2 should be deleted because of the reference to developments in internal legislation. It was precisely such developments that made a periodic review of reservations so essential, however, and he still thought it would be useful to refer to them because they were the primary situations in which, objectively speaking, reservations could be considered to have become obsolete, not merely politically inconvenient. There again, however, it would be for the Drafting Committee to decide.

45. As he had indicated, he would pass over in silence draft guideline 2.5.4. As to draft guidelines 2.5.5 (Competence to withdraw a reservation at the international level) and 2.5.6 and their variants, some sympathy had been expressed for his preference for applying a double standard. The longer version of draft guideline 2.5.5 was indeed the better of the two, since one could hardly transpose the rules on formulation of reservations lock, stock and barrel: it could only be done *mutatis mutandis*. In the case of draft guideline 2.5.6, however, that distinction did not apply. Nearly all of the speakers on that point had seemed to prefer the longer version of both draft guidelines, the sole exception being Mr. Galicki, who had advocated the short versions and, in addition, a single draft guideline for the formulation and withdrawal of reservations, and undoubtedly objections to them as well. As Mr. Kemicha had said, that would be necessary if the Commission was drafting a convention, but it was not. In the interests of facilitating the task of future readers of the Guide to Practice, the subject matter should be treated separately, even at the expense of repetition. In any event it would be better to wait until the draft was considered on second reading before taking a position on the approach outlined by Mr. Galicki.

Once the full draft was available, it might become clearer how to help the reader find his way around the text.

46. In regard to substance, the two draft guidelines had drawn very little criticism and few specific proposals. He drew attention to an omission in the French text of the chapeau to draft guideline 2.5.6 *bis*: the words *est transmise* should be added after the last word, *réserve*.

47. He would conclude his summing up of the debate at the next meeting, focusing on draft guidelines 2.5.7 to 2.5.12 and 2.5.4 and 2.5.11 *bis*.

Cooperation with other bodies (*continued*)^{*}

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

48. The CHAIR welcomed Mr. Wafik Kamil, Secretary-General of the Asian-African Legal Consultative Organization (AALCO), and invited him to address the Commission.

49. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) congratulated all of the members that had been elected to the Commission since 2001 and said he was confident their contributions would enhance the Commission's work. AALCO attached great significance to its long-standing ties with the Commission. One of its primary objectives was to examine questions under consideration by the Commission and to place before it the views of its member States. Over the years, that practice had helped to forge closer bonds between the two bodies, and it had become customary for each to be represented at the other's annual sessions. He thanked Mr. Yamada for having represented the Commission at AALCO's forty-first session, held in Abuja from 15 to 20 July 2002, and Mr. Momtaz and Mr. Simma for having made valuable contributions to the deliberations. AALCO, for its part, appreciated the presence of representatives of the Commission at its annual sessions.

50. At the forty-first session, no fewer than 15 substantive items had been considered, one of which had been the work of the Commission at its fifty-third session. At a general level, delegates had welcomed the completion and adoption of the draft articles on State responsibility for internationally wrongful acts.⁴ Most delegates had acknowledged that they were balanced and a fair reflection of customary international law. One delegate had been of the view that they emphasized codification rather than introducing progressive elements of international law. While codification admittedly had the advantage of rendering the draft articles more acceptable to States, elements of progressive development, such as the notion of serious breach of obligations under peremptory norms of international law and the invocation of responsibility on the part of a State other than the injured State, had the potential to invite further debate. Overall, delegates had

felt that the draft articles were the best that could be obtained after almost 50 years of hard work. They had unanimously endorsed the decision of the General Assembly to take note of the draft articles and to include the topic on the agenda for its fifty-ninth session.⁵ The interim period would offer time for States to reflect on the provisions and allow for State practice to develop.

51. Some delegates had been concerned that the notion of serious breaches of obligations arising under peremptory norms of general international law would prove to be controversial, since the articles did not clarify who should judge whether an internationally wrongful act constituted a serious breach. The decision to delete any reference to "international crimes" had been welcomed and, it had been felt, would not weaken the articles. The view had been expressed that the examples of peremptory norms given in the commentary were only indicative: the precise content and conditions under which they could be treated as peremptory norms were open to debate. Accordingly, the concept required careful study on the basis of further development of State practice.

52. With regard to the consequences of a serious breach, the obligation placed on States to cooperate to bring a breach to an end through lawful means and not to recognize the situation resulting from the breach as lawful or to render aid or assistance in maintaining it had been welcomed. The omission of any reference to "punitive damage" and the simplified structure of the provisions relating to the consequences of serious breaches had been noted with appreciation.

53. One delegate had welcomed the limits within which a State other than the injured State could invoke responsibility. Others, however, had acknowledged that any State other than an injured State could express its concern in some appropriate form or demand that the responsible State cease the wrongful act. Doubts had nonetheless been expressed about the appropriateness of elevating such actions to the level of the legal responsibility of the State.

54. In the opinion of many delegates, the uncertainty of the concepts of an obligation owed to the international community as a whole and an obligation for the protection of collective interests contained potential for abuse. More particularly, the phrase "the beneficiaries of the obligation breached" in article 48, paragraph 2 (*b*), conferred on third States a broad and excessive right and was therefore likely to lead to disputes.

55. By and large, delegates had welcomed the checks and balances incorporated in the draft articles in order to prevent abuse of countermeasures. At the same time, they had cautioned against expanding the scope of States entitled to take countermeasures and against introducing the notion of "collective countermeasures". Since unilateral determination of the legitimacy of countermeasures operated in favour of powerful States, however, some delegates had been disappointed that the draft articles had left it to the State taking countermeasures to determine whether an act was unlawful. In that connection, the need to establish linkages between countermeasures and compulsory settlement of disputes had been emphasized.

^{*} Resumed from the 2730th meeting.

⁴ See 2712th meeting, footnote 13.

⁵ See General Assembly resolution 56/83 of 12 December 2001.

56. Countermeasures should be reversible and should not inflict serious or irreparable damage on the responsible State. For that reason, one delegate had felt that the list of prohibited countermeasures should have been more exhaustive, including two additional obligations: first, prohibition of any measures of economic or political constraint affecting self-determination, territorial integrity or political independence; and, second, prohibition of countermeasures that banned access to markets by responsible States for which exports were the principal source of income.

57. He wished to convey AALCO's appreciation to the Commission for the successful completion of work on the topic and its deep appreciation for the contribution of all the special rapporteurs to the shaping of the draft articles.

58. AALCO wished to compliment the Commission, the Special Rapporteur and his predecessors on the successful completion of work on the draft articles on prevention of transboundary harm from hazardous activities.⁶ Many delegates considered the draft articles a significant step forward in the field of international environmental law. It had been felt that they could provide a solid basis for a framework convention for international cooperation and regulation and could serve as a practical guide for the development of international legal instruments dealing with specific aspects of environmental protection. The principles relating to public participation, non-discrimination and settlement of disputes were in the nature of progressive development of international law. As State practice on such matters varied from region to region, it might take time before universal standards could be developed. Finally, given the interrelations between prevention and liability, delegates had urged the Commission to expedite its consideration of the liability aspects of the topic.

59. Regarding the topic of reservations to treaties, delegates had generally been opposed to acceptance of late reservations, in the interests of the stability and integrity of treaties. In exceptional cases, where late reservations were permitted, the Guide to Practice should regulate the matter and clarify the conditions for the practice as well as the procedure to be followed in accepting or refusing the late formulation of a reservation.

60. Opinion had been divided on conditional interpretative declarations. One view held them to be reservations in another form, and hence not to be treated as a separate category from reservations. Another view had been that conditional interpretative declarations, as distinct from simple interpretative declarations, limited or modified the effect of treaty articles on a particular State party and thus functioned as reservations to treaties. A distinction should therefore be made between conditional and simple interpretative declarations, without setting separate norms for the first category, and they should both be made subject to the same legal regime with regard to reservations.

61. It had been thought that the role of the depositary should not go beyond the scope of the 1969 Vienna Convention. In accordance with article 77, paragraphs 1 (d) and 1 (e), of the Convention, the depositary could exam-

ine the appropriateness of the form of a reservation to see whether it was in conformity with the relevant rules, but a depositary was neither an interpreter of the text of the treaty nor a judge of compliance by a State with the treaty. Hence, the depositary should not be endowed with the right to review the permissibility of reservations and to refuse to communicate such reservations to the States concerned.

62. With regard to the topic of diplomatic protection, support had been expressed for the view that the continuous nationality rule should be maintained as the basic standard of diplomatic protection, although exceptions could be allowed in cases where individuals had changed nationality involuntarily and ended up with no diplomatic protection from any State. As to the rule on the exhaustion of local remedies, one delegate had pointed out that draft article 10 as presented by the Special Rapporteur in his second report⁷ had not specified the criteria for determining whether such remedies had been exhausted. Moreover, it would be too great a burden for victims of generalized human rights violations to require that all available local remedies should be exhausted. Another delegate had said that an international claim brought on the basis of a direct injury to a State rather than to one of its nationals was beyond the scope of diplomatic protection and the rule on the exhaustion of local remedies had no relevance. The rule contained in draft article 11⁸ was therefore unnecessary.

63. Several delegates had commented on the need to make a distinction between diplomatic protection for companies and for shareholders. It was agreed that only the State whose nationality a company had acquired through incorporating or registering in that State had the right to provide diplomatic protection for the company. Nor was it appropriate for a State whose nationals were shareholders to exercise diplomatic protection *vis-à-vis* the State in which the company was incorporated. On the other hand, if an individual shareholder was injured by a wrongful act of the State in which the company was incorporated, the shareholder's State of nationality had a right to provide diplomatic protection. That, however, lay within the scope of diplomatic protection for individuals rather than for the company.

64. Regarding the topic of unilateral acts, delegates had considered that, notwithstanding its theoretical usefulness, the Special Rapporteur's classification of unilateral acts based on the criterion of legal effects might not be viable in practice. The suggestion was made that the draft articles should be divided into three parts: a general section; a section on rules relating to acts under which the State undertook an obligation; and a section on rules relating to acts under which the State reaffirmed its right. It was thought that the Commission should focus, for the time being, on formulating general rules applicable to all unilateral acts. While the importance of interpreting unilateral acts was generally acknowledged, delegates had felt that it was not the right time to consider the issue; interpretation could be discussed after the scope and definition of unilateral acts had been delineated. It was agreed,

⁶ See 2724th meeting, footnote 2.

⁷ See 2712th meeting, footnote 15.

⁸ *Ibid.*

however, that, when it came to formulating rules on interpretation, the relevant provisions of the 1969 Vienna Convention could be used as a point of reference. When interpreting those provisions, specific circumstances should be taken into account in considering the true intention of a State, as should the special characteristics of the unilateral act itself. The session had adopted a resolution urging AALCO member States to respond to the Commission's questions on the topics of reservations to treaties and diplomatic protection.

65. The other items considered at the Abuja session had included international terrorism; status and treatment of refugees; deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in all occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949; extraterritorial application of national legislation, with reference to sanctions imposed against third parties; follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; the United Nations Conference on Environment and Development; legislative activities of United Nations agencies and other international organizations concerned with international trade law; WTO as a framework agreement and code of conduct for world trade; and establishing cooperation against trafficking in women and children. In cooperation with the Office of the United Nations High Commissioner for Human Rights, AALCO had also organized a one-day special meeting on human rights and combating terrorism.

66. Since the introduction of an agenda item on the legal protection of migrant workers at the thirty-fifth session, AALCO had continued to study the topic. At its fortieth session, a one-day special meeting on migration challenges had been held in cooperation with IOM. At the end of that meeting, a resolution had been adopted giving the Secretary-General a mandate to prepare a model regional agreement between States of origin and States of destination, in collaboration with IOM. The AALCO secretariat had prepared the agreement and submitted it for consideration by member States. Two new items had been included on the agenda of the forty-first session: the development of an effective international legal instrument against corruption, and human rights in Islam. A comprehensive report on the forty-first session would be sent to the Commission at the earliest possible opportunity.

67. AALCO, as an intergovernmental body with 45 member States from Asia and Africa, was uniquely placed to serve the States of the region in examining and formulating their responses to newly emerging challenges of international law. The expanding scope of its work programme was indicative of its willingness to respond to those challenges. As one of the intergovernmental organizations having a cooperative relationship with the Commission, AALCO believed that the relationship should be further intensified. Given, therefore, that in-depth consideration of important legal issues was often impossible on formal occasions, he reiterated the proposal he had made the previous year that the two bodies should jointly organize a seminar or workshop. Despite the tight financial constraints on both of them, the benefits of such

an exercise would outweigh the difficulties. The seminar could either focus on one of the topics currently at a formative stage within the Commission or discuss the topics proposed under the Commission's long-term programme. As to other future cooperation, the AALCO secretariat would continue to prepare notes and comments on substantive items considered by the Commission with a view to assisting the representatives of member States of AALCO to the Sixth Committee in their deliberations on the Commission's report to the General Assembly on its fifty-fourth session. He extended to all members of the Commission an invitation to participate in AALCO's forty-second session, in 2003, which would probably be held in the Republic of Korea.

68. The CHAIR said that the statement by the Observer for AALCO demonstrated that organization's breadth of interests. He noted that, although AALCO had not always reached the same conclusions as the Commission, it had raised the same questions and, for lawyers, questions were almost as important as answers.

69. Mr. MOMTAZ said that the statement by the Observer for AALCO was doubtless based on the very full report of the AALCO session produced by the team of lawyers working under the Secretary-General. The report, which he had seen, was detailed and full of insight—sometimes critical—into the work of international organizations. It was a pity that such a wealth of material could not be circulated to a wider audience. He therefore wondered whether the Secretary-General could make the report available to members of the Commission, particularly when it related to topics under consideration by the Commission, such as unilateral acts of States, reservations to treaties or diplomatic protection. He had also been impressed by the AALCO report containing an extremely useful summary of the jurisprudence of ITLOS.

70. Mr. YAMADA said that he had attended the AALCO session together with Mr. Momtaz and Mr. Simma. The Commission would undoubtedly benefit greatly from increased cooperation with AALCO in its work of codification. The Observer for AALCO had omitted one item discussed at the session, namely jurisdictional immunities of States and their properties, on which a number of AALCO member States had expressed interest in the Sixth Committee, on the basis of the draft articles adopted by the Commission at its forty-third session, in 1991.⁹ As for the proposal by the Observer for AALCO regarding a joint seminar, as a first step the regular meeting of the legal advisers of AALCO member States during the General Assembly should be extended in order to advance dialogue between AALCO and the Commission. Both sides would benefit. He would be happy to assist in preparing such a meeting.

71. Ms. XUE said that the success of the forty-first session of AALCO, the only interregional legal body for Asia and Africa, highlighted the importance of developments in those regions and its more active participation in the development of international law. AALCO and the Commission had much in common, and cooperation between the

⁹ For the text of the draft articles adopted by the Commission, see *Yearbook ... 1991*, vol. II (Part Two), chap. II, p. 13, para. 28.

two would be most useful. She endorsed Mr. Momtaz's request that the AALCO report should be circulated to members of the Commission. As for the question of joint seminars, while she saw merit in Mr. Yamada's suggestion, she also wondered whether AALCO might consider inviting members of the Commission to the seminars that it already held on its own account. A joint seminar could have difficult financial implications. She herself would be glad to help in any way.

72. Mr. SIMMA pointed out that AALCO was the only intergovernmental organization in the world solely concerned with the development of international law; all other bodies existing for that purpose were subsidiaries of larger bodies. Cooperation between it and the Commission should therefore be pursued. He had observed, at the forty-first session of AALCO, that a number of French-speaking African States had experienced difficulty in participating, and he wondered whether there was any possibility of their being helped by the International Organization of La Francophonie. As for the suggestion regarding joint seminars, he endorsed the proposals by Mr. Yamada and Ms. Xue. Many members of the Commission attended the Sixth Committee, and any meeting between them and the AALCO representatives need not be excessively formal. Finally, he echoed the request for the report of the AALCO session to be distributed to members of the Commission, at least insofar as it concerned topics being dealt with by the Commission.

73. Mr. DUGARD expressed his appreciation of the fact that AALCO had commented on future possibilities for the topic of diplomatic protection, which, for him as Special Rapporteur, was more useful than the criticism of draft articles already adopted. He was, however, glad to have received support on the need to retain the broad principles of the *Barcelona Traction* case.

74. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said that he would gladly grant the request by Mr. Momtaz and others that the report of the AALCO session, at least insofar as it concerned the Commission's work, be made available. On the question of joint seminars, he was inclined to suggest combining both possibilities: the legal advisers' meeting could be used to discuss topics of concern to both the Commission and AALCO; and AALCO would make every effort to invite members of the Commission to seminars held during intersessional periods.

75. Mr. PELLET said that, although he regretted injecting a negative note into the discussion, he was slightly uneasy at the thought of the independent members of the Commission working jointly with the States which made up AALCO. It could be a volatile mixture.

76. Mr. Sreenivasa RAO said that, if debate was engaged in all honesty, the results would be worthwhile. He thanked AALCO for its support for the Commission and urged it to find new approaches and techniques for coordination in the interests of the ultimate aim of the codification of international law.

77. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said that the contribution of

members of the Commission would be that of experts, whose knowledge of certain topics could only enrich AALCO's proceedings.

The meeting rose at 1 p.m.

2739th MEETING

Wednesday, 31 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (*continued*)

[Agenda item 11]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIR welcomed Mr. Gilbert Guillaume, President of the International Court of Justice, with whom the Commission was pleased to be able to hold its traditional exchange of views.

2. Mr. GUILLAUME (President of the International Court of Justice) said he welcomed the fact that, in the past few years, it had become the custom for the President of ICJ to come to the Commission to speak to its members about the Court's current situation and activities. Referring to the Court's composition, he said that when Mr. Bedjaoui had resigned, Mr. Elaraby had been elected on 12 October 2001 to replace him, and that the next triennial elections would be held in autumn 2002. Owing to the growing number of cases submitted to the Court, the number of judges *ad hoc* had risen to 19, creating certain administrative problems. In terms of recognition of the Court's jurisdiction, 63 States now accepted the optional provision on compulsory jurisdiction contained in Article 36, paragraph 2, of its Statute.