

Document:-  
**A/CN.4/SR.2780**

**Summary record of the 2780th meeting**

Topic:  
**Law and practice relating to reservations to treaties**

Extract from the Yearbook of the International Law Commission:-  
**2003 vol. I**

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law. The Study Group's aim should be to produce guidelines for States; it should not become embroiled in theoretical debates that would be of no practical use.

58. Mr. MANSFIELD said that the New Zealand branch of ILA and the Law School of Victoria University of Wellington would be assisting him with his part of the study.

59. The CHAIR suggested that the Commission should take note of the report of the Study Group on the Fragmentation of International Law.

*It was so decided.*

*The meeting rose at 1 p.m.*

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## 2780th MEETING

*Friday, 25 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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### Organization of work of the session (*continued*)<sup>\*</sup>

[Agenda item 2]

1. The CHAIR said that the Commission would proceed to the official closure of the International Law Seminar and that, to that end, the meeting would be suspended.

*The meeting was suspended at 10.05 a.m. and resumed at 10.30 a.m.*

**Reservations to treaties<sup>1</sup> (*continued*)<sup>\*\*</sup> (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

2. Mr. PELLET (Special Rapporteur), introducing his eighth report on reservations to treaties (A/CN.4/535 and Add.1), said that the report began by outlining reactions to his seventh report,<sup>3</sup> presented at the previous session, and describing new developments relating to reservations that had taken place over the past year. With regard to the first point, the Commission should be informed that, in addition to the information contained in the report, the draft guidelines appearing in the seventh report had been examined during the first part of the session by the Drafting Committee, which had improved them before their adoption by the Commission. He had drafted the corresponding commentaries, which the Commission would consider when it adopted its report on the current session, in accordance with the usual practice. Moreover, with the exception of draft guideline 2.1.8 [2.1.7 *bis*] on the procedure in case of manifestly [impermissible] reservations, the Sixth Committee had given a good reception to the draft guidelines adopted at the preceding session. Some of the comments made on that occasion had been interesting, but they could be taken into account only when the Commission had considered the draft Guide to Practice on second reading. It should be recalled, meanwhile, that draft guideline 2.5.X, on the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, had been withdrawn until the consequences of the impermissibility of a reservation had been considered. The reactions to the text and to its withdrawal were contained in paragraph 12 of the report, but it did not seem that any particularly enlightening conclusions could be drawn.

3. With regard to the second point, the most interesting new element was a document dated 13 March 2003, entitled "Preliminary opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights",<sup>4</sup> whose totally undogmatic approach contrasted strikingly with that of General Comment No. 24 of the Human Rights Committee.<sup>5</sup> Rather than adopting a combative attitude towards States and ordaining that a given reservation was impermissible, the Committee on the Elimination of Racial Discrimination endeavoured to set up a dialogue with them so as to encourage as complete an implementation of the International Convention on the Elimination of All Forms of Racial Discrimination as possible. That was also the position of the Committee on the Elimination of Discrimination against Women,<sup>6</sup> as was stated in paragraph 21 of the report. It was also the main lesson that he had drawn from the meeting between members of the Commission and members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights during the first part of the session. Similar meetings with members of the Human Rights Committee and the Sub-Commission on the Promotion and Protection of Human Rights were to take place during the second part. The introductory sec-

<sup>\*</sup> Resumed from the 2770th meeting.

<sup>\*\*</sup> Resumed from the 2760th meeting.

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

<sup>4</sup> CERD/C/62/Misc.20/Rev.3.

<sup>5</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

<sup>6</sup> See CEDAW/C/2001/II/4.

tion of the eighth report also contained a brief account of new developments as a result of the work of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and the Grand Chamber of the European Court of Human Rights. Finally, it reported that the legal service of the European Commission had finally replied to section I of the questionnaire on reservations.<sup>7</sup>

4. Turning to the structure of the report, he explained, first of all, that, after the introduction and the first chapter, which would conclude the chapter on the withdrawal and modification of reservations and interpretative declarations held over from the report of the preceding year, he had intended, as was indicated in paragraph 31 of the eighth report, to devote a second chapter to the procedure for formulating acceptances of reservations and a third to the formulation of objections. While drafting the chapter on acceptances, however, he had realized that it would be more logical to reverse the order of the two chapters, since an acceptance was ultimately most often simply an absence of objection. That was why addendum 1 to the eighth report contained the beginning of the new chapter II concerning the procedure for formulating objections, while the report itself contained the introduction and chapter I.

5. Chapter I dealt with two points that he had not had time to include in his seventh report concerning the withdrawal and modification of reservations, namely, the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations. At the preceding session, the Commission had considered the question of modifications that sought to lessen the scope of reservations and concluded that they were, rather, partial withdrawals and, as such, ought to be encouraged; that had been the aim of draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12], adopted on first reading at the current session (see 2760th meeting, para. 76). The situation in which a State sought, in modifying its reservation, to enlarge its scope was quite different. In that case, it was no longer a partial withdrawal, but a kind of late formulation of a reservation; that situation was covered by draft guidelines 2.3.1 to 2.3.3, which had been adopted by the Commission at its fifty-third session, in 2001,<sup>8</sup> and certainly did not seek to encourage such action. By analogy, it would seem that the restrictions adopted in cases where the scope of a reservation was lessened should be transposed to the enlargement of such scope, without anything being added or removed. Without anything being added, because it was illogical that a State that had made a reservation to a provision of a treaty should be placed at a disadvantage in modifying that reservation in comparison with a State which had made no reservation, but which could nevertheless formulate a late reservation, provided that all the other parties were in agreement (draft guideline 2.3.1). With nothing removed, either, however, since such modifications should surely not be encouraged, for the same reasons for which the late formulation of reservations had been hedged about with extremely strict conditions. Moreover, that approach corresponded with the

practice, or at least with that of the “principal” depositary of multilateral agreements, the Secretary-General of the United Nations, as was described in paragraphs 41 to 45 of the report. He was therefore proposing a draft guideline 2.3.5 to deal with that point by simply referring to the rules applying to the late formulation of reservations, while leaving two aspects undecided. The first, less important and rather of an editorial nature, was whether those rules should be referred to explicitly or whether that was unnecessary. The second, which was mentioned in paragraph 48 of the report, was whether the “enlargement of the scope of a reservation” should be defined. He himself had not been in favour of that course of action, unless it was dealt with in the commentary, but the Drafting Committee, and then the Commission, had subsequently adopted draft guideline 2.5.10 [2.5.11], concerning the partial withdrawal of a reservation, the first paragraph of which defined what was meant by the term. If only for the sake of symmetry, it would seem sensible to proceed in the same way in dealing with the enlargement of the scope of a reservation and model draft guideline 2.3.5 directly on draft guideline 2.5.10 [2.5.11] by including in it a first paragraph that would define “enlargement”. The text of the definition would be that proposed in paragraph 48, which he had originally intended for the commentary, but could be simplified along the lines of paragraph 1 of draft guideline 2.5.10 [2.5.11], with the following text:

“Enlargement of the scope of a reservation has the purpose of excluding or modifying the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.”

The two situations were not entirely analogous in that, while the first case could be restricted to the effects (partial withdrawal lessened the legal effect of the reservation), in the second case there could be legal effects only if all the other parties were in agreement, and that was why it was necessary to include the phrase “has the purpose of” excluding or modifying the legal effect. The eighth report was fairly brief as far as the withdrawal of interpretative declarations was concerned, first because there was very little State practice in that regard (para. 51 of the report). States could nevertheless withdraw “simple” interpretative declarations whenever they wished, since the withdrawal was carried out by a competent authority. That was what draft guideline 2.5.12 said, and the only question to be asked was whether to refer explicitly to the rules which were applicable to the formulation of such declarations and which were the subject of draft guidelines 2.4.1 and 2.4.2. The modification of “simple” interpretative declarations did not pose a problem either. Since draft guidelines 2.4.3 and 2.4.6 provided that such declarations could be formulated at any time unless the treaty provided otherwise, those declarations could also be modified at any time in the same way. The very little practice he had been able to find (paras. 66 and 67) bore that out, as was stated in draft guideline 2.4.9, which raised the technical question whether mention should be made of the case where a treaty expressly prohibited the modification of an interpretative declaration. Since that was rather a moot point, perhaps it should be included in the commentary. Referring to paragraph 65 of the report, he noted that, as

<sup>7</sup> The questionnaires sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III.

<sup>8</sup> *Yearbook ... 2001*, vol. II (Part One), para. 157.

the rules relating to the modification of simple interpretative declaration were exactly the same as those relating to their formulation, it might be enough to make a very minor amendment to the text of draft guidelines 2.4.3 and 2.4.6 and the commentaries thereto in order to combine them into one single rule on the formulation and modification of interpretative declarations. He acknowledged that was a rather unorthodox proposal, since the draft guidelines in question had already been adopted, but it would provide a more elegant solution.

6. There remained the problem of the withdrawal and modification of conditional interpretative declarations, and he was aware that several members were sceptical about whether the Commission should continue to take a particular interest in that category of interpretative declarations, on the grounds that they were most probably subject to the same legal regime as reservations and it would be enough to say so once and for all. He recalled that, as he indicated in paragraph 55 of his report, he did not oppose such a solution in principle, provided that the intuition on which it was based turned out to be correct. The Commission would not find that out until 2004, when he would submit a report on the validity of reservations and interpretative declarations and, possibly, on their effects. Until then, however, the Commission had agreed to accept the *status quo* and he sincerely hoped that that compromise would not be called into question when considering draft guidelines 2.5.13 and 2.4.10 dealing with the withdrawal and the modification of conditional interpretative declarations, respectively. It seemed to him that it would be difficult to simply transfer the rules applicable to the modification of reservations to conditional interpretative declarations. While it was relatively simple to decide whether the modification of a reservation was tantamount to partial withdrawal or enlargement of scope, it was very difficult to do so with respect to modifications of conditional interpretative declarations, as specified in paragraphs 59 and 60 of the report. He had therefore decided not to propose that the Commission should transpose the distinction drawn in draft guidelines 2.3.5 and 2.3.10 to conditional interpretative declarations. It had seemed reasonable to consider that any modification of a conditional interpretative declaration, which must, by virtue of guidelines 1.2.1 [1.2.4] and 2.4.5 [2.4.4], be made at the time the party concerned expressed its consent to be bound, must always follow the regime applicable to the late formulation or enlargement of the scope of a reservation. In other words, any modification of a conditional interpretative declaration must be subject to the absence of objection by one of the other contracting parties. That was what was proposed in draft guideline 2.4.10, as contained in paragraph 61 of the report. A more elegant solution would be to take draft guideline 2.4.8, adopted in 2001, and combine in one single draft guideline the principles applicable to the late formulation and modification of conditional interpretative declarations. However, he would not insist on such a solution if it was pointed out that the Commission's practice was not to go back on rules it had already adopted, even if, in the circumstances, it would actually be making them more complete.

7. With regard to the withdrawal of conditional interpretative declarations, of which no clear example had been found, it seemed that there was no choice but to follow

the rules relating to the withdrawal of reservations as, like them, conditional interpretative declarations limited the scope of the commitment by their authors unilaterally, and it was therefore in their interest to withdraw them; guideline 2.5.13 was worded along those lines, namely, in such a way that States would not hesitate to withdraw those declarations.

8. Addendum 1 to the report, containing paragraphs 69 to 105, was the beginning of the study on the formulation of objections to reservations; chapter II, which was just the start of the study, also dealt with the “reservations dialogue”—the trend that had developed in recent years of establishing a dialogue, instead of raising formal objections to a reservation, with a view to convincing the author of the reservation either not to make the reservation or to formulate it differently. The rest of the chapter would be submitted in 2004 along with chapter III dealing with the procedure for the acceptance of reservations. Before taking up certain aspects of the issue of objections to reservations, he pointed out that objections were not defined anywhere, while reservations were defined in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions—a provision which was reproduced in guideline 1.1 of the Guide to Practice—and it therefore seemed essential to fill the gap. The Guide to Practice would indeed be incomplete if it did not provide a reasonably accurate definition of what was meant by an objection to a reservation. Paragraphs 75 to 105 of the report endeavoured to do that, on the understanding that the more specific question of “enlarged” objections, namely, those whereby a State made known not only that it objected to the reservation, but also that it understood that it was consequently no longer bound to the reserving State, would be examined at the next session in addendum 2 to the report.

9. With regard to “simple” objections, he saw no reason, as he had stated in paragraph 76, why the moment when such objections must be formulated should be specified in the definition. Article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions indirectly dealt with the question of the time at which an objection could be formulated, but it did not solve the problem under consideration, and that was why he treated it in some length in paragraph 2, which would come later, of section 1 of that chapter. However, there appeared to be no doubt that an objection, like a reservation, was a unilateral statement, and he had merely made that clear in paragraph 78. He had not considered it wise to belabour the point, but had left the possibility of a joint objection open for later consideration. It was just as obvious, as was indicated in paragraph 79, that, regardless of the phrasing or designation of that unilateral statement, it was the underlying intention that counted, just as it did in the definition of the term “treaty”. The question of what a State's intention must be in order for its unilateral statement to be termed an objection called for a much more complex answer, which he had tried to provide in paragraphs 82 to 105 of his report.

10. An objection to a reservation was obviously a negative reaction to that reservation, but the intention behind it was crucial, as was illustrated by the decision handed down on 30 June 1977 by the court of arbitration responsible for settling the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Continental Shelf between the United*

*Kingdom and France* case, which was cited in paragraph 83 of the report. Several of the examples quoted in paragraphs 84 to 88 of the report showed that, in a reservations dialogue, it could and increasingly frequently did happen that States or international organizations, the European Union being one example, reacted negatively to a reservation without formally objecting to it. He was not sure that it was in the interests of either the author of the reservation or the objector to perpetuate such uncertainty. It would be wiser for States to say clearly that they objected to the reservation. He would come back to that point when he submitted his study of the reservations dialogue. Given the lack of clarity, it had to be emphasized that, if a State or international organization deliberately placed itself in that grey zone, it ran the risk that its reaction would not be deemed an objection and would not therefore produce the effects attaching to such a unilateral declaration.

11. The position was quite different if the objector, no matter what terminology it used, clearly indicated that it rejected or was opposed to the reservation or that it considered it to be invalid for some reason. Nevertheless, as was stated in paragraph 94, no reasons had to be given for an objection, and States did not necessarily have to specify the intended effects of their objection unless those effects departed from ordinary law. He was personally highly sceptical about the effects that certain States, modelling themselves on the bodies monitoring certain human rights treaties, intended their objections to have, and in paragraph 95 he provided some examples of cases where they expected too much. He did not, however, intend to adopt a final stance on that matter at present and would say only that, when a State formulated an objection, it could indicate what effects it intended the objection to have, and that it was even required to do so under article 20, paragraph 4 (b), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, if its intention was to prevent the treaty from entering into force in its relations with the author of the reservation. That hypothesis and a study of practice had led him to propose, in paragraph 98 of his report, draft guideline 2.6.1 containing a definition of objections to reservations.

12. That rather unwieldy definition left out a number of points and was silent on the question whether the State or international organization formulating the objection must be a contracting party, since the definition of reservations itself did not shed light on the matter and, in his opinion, the nature of the objection, on which much had already been written, should form the subject of a separate study and draft guideline. Dealing with that question in the proposed definition would have made the definition incomprehensible. Intention had been mentioned, as it had been in the definition of reservations itself, but without adopting a stance on the validity of that intention. In paragraph 103 of his report he drew attention to the fact that, just as there could be impermissible reservations, there could be impermissible objections, which would not therefore produce their intended effect. That was a problem not of definition but of the validity of objections. In paragraph 101 of his report, he again referred to a problem which was dear to his heart, that of objections not to a reservation but to the late formulation of a reservation. He deeply regretted the fact that the Commission had used the term "objection" to refer to two operations which were in fact

totally different in intellectual terms. He did not suggest that a debate on that very questionable syncretism should be reopened, for that would call into question the wording of draft guidelines 2.3.1 to 2.3.3, which had already been adopted, but, for the sake of consistency, the Commission should specify somewhere that the same word was being used to refer to two separate legal operations. That could be done in draft guideline 2.6.1 *bis*, which he proposed at the end of paragraph 101, or at least in the commentary to draft guideline 2.6.1. He did not have any set ideas on the matter, although he did think that a separate draft guideline would be the best solution because the problem should be clearly flagged. He would like to know the Commission's preferences in that regard.

13. The proposed definition echoed the definition of reservations contained in draft guideline 1.1 in that it did no more than state the usual purpose of an objection, which was to prevent the application of the provisions of the treaty to which the reservation related in relations between the author of the reservation and the author of the objection. That definition was, however, incomplete and did not take account of draft guideline 1.1, which had already been adopted and which embodied the practice of across-the-board reservations, which purported to exclude or modify the legal effect of the treaty as a whole with respect to certain specific aspects. That point could be made clear either by means of an addition to draft guideline 2.6.1 or in a separate draft guideline, 2.6.1 *ter*, which he proposed in paragraph 104 of his report. The advantage of the second solution was that it followed the procedure used in draft guidelines 1.1 and 1.1.1 [1.1.4] on the definition of reservations themselves. The disadvantage was that it was less economical than the first solution, which would provide that explanation in the definition of objections given in draft guideline 2.6.1. Either solution was possible, but, one way or another, the Commission had to deal with the problem when it debated the draft guidelines. In conclusion, he suggested that the draft guidelines he proposed in his report should be referred to the Drafting Committee.

14. Mr. GAJA said that he endorsed the definition of the enlargement of the scope of reservations proposed by the Special Rapporteur, as well as his argument that a "simple" interpretative declaration could be withdrawn or modified at any time, unless the treaty provided otherwise. However, he believed that it would be better not to follow the suggestion in paragraph 65 of the report that two of the draft guidelines already adopted should be revised, since the only advantage was that it might be possible to do without one draft guideline.

15. The main problem was with draft guideline 2.6.1 in paragraph 98 of the report, concerning the definition of objections to reservations, which was not entirely satisfactory. It adapted to objections the definition of reservations contained in the 1969 and 1986 Vienna Conventions, indicating that objections were statements which purported "to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection". Objections were thus aimed at one or another of the effects attributed to them by the 1969 and

1986 Vienna Conventions. It was true that, according to article 21, paragraph 3, of the Conventions, the normal effect of an objection was that the provisions to which the reservation related did not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation. The ambiguity of that wording had given rise to discussions at the 1969 United Nations Conference on the Law of Treaties. It was nevertheless clear that, according to the Vienna Conventions, if a reservation was intended to exclude the application of one of the provisions of a treaty, that had to be the result, regardless of whether the reservation had been accepted or whether an objection to the reservation had been formulated. In both cases, the provision that was the subject of the reservation did not apply.

16. With regard to a reservation aimed at excluding a provision, the 1969 and 1986 Vienna Conventions assimilated the legal effect of an objection to the legal effect of acceptance. It did not necessarily follow that the objecting State was pursuing the same goal as the State that accepted the reservation. The objecting State probably did not intend to accept the reservation; at the very least, that State intended to encourage the reserving State to withdraw it.

17. The definition of objections should therefore reflect the normal attitude of the objecting State and not link it to the effects that were attributed to objections under the 1969 and 1986 Vienna Conventions. State practice also showed that States that made objections often intended different effects from those provided for in articles 20 and 21 of the Conventions. Paragraph 95 indicated that the Special Rapporteur viewed as an objection the attitude of a State which, in objecting to a reservation, intended to exclude not only the provision to which the reservation applied but also a whole portion of a treaty. That type of objection should, regardless of its legal effects, also be included in the definition of objections.

18. The same should be true of objections which stated that a reservation was incompatible with the object and purpose of a treaty, but which, in a somewhat contradictory manner, indicated that treaty relations were nevertheless established between the reserving State and the objecting State. He gave the example of the declaration by the Government of the Federal Republic of Germany on some reservations made by Sudan to the Vienna Convention on Diplomatic Relations. The German Government had considered those reservations to be incompatible with the object and purpose of the treaty, yet had declared that that would not have prevented the treaty from entering into force between Sudan and the Federal Republic of Germany.<sup>9</sup>

19. The alternative version of draft guideline 2.6.1 contained in paragraph 105 of the report and draft guideline 2.6.1 *ter* contained in paragraph 104 dealt with cases when legal effects not provided for in the 1969 and 1986 Vienna Conventions were produced. Those guidelines covered the fairly rare case of an across-the-board reser-

vation whose purpose was to prevent the application of a treaty as a whole with respect to certain specific aspects “to the extent of the reservation”. An objection to such a reservation should be included in the definition; however, the aim pursued by the author of the objection and the legal effects attributed by the Convention to objections did not have to be identical.

20. The definition of an objection contained in draft guideline 2.6.1 should be broadened. That task could be given to the Drafting Committee, which could also decide whether or not the future definition obviated the need for draft guideline 2.6.1 *bis* on objections to late formulation of reservations.

21. With regard to the definition of the objecting State, the Special Rapporteur was correct to say that article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions must not be taken to mean that the objecting State must be a contracting State or a contracting international organization. In his view, the definition should be based on article 23, paragraph 1, of the Conventions: a State entitled to become a party to the treaty must be mentioned in addition to the contracting State or contracting international organization.

22. Mr. PELLET (Special Rapporteur) said that the definition of an objection raised a problem of principle. The definition he had proposed was faithful to the 1969 and 1986 Vienna Conventions, whereas Mr. Gaja’s position was different, more intuitive. In his view, a case could be made for both positions.

23. He called on the members of the Commission to comment on the two positions and to indicate whether it was better to adopt a definition which remained as faithful as possible to the 1969 and 1986 Vienna Conventions or a broader definition which was less faithful to the Vienna spirit, but undoubtedly clearer.

24. Mr. ECONOMIDES said that he was quite surprised by draft guideline 2.3.5 on the enlargement of the scope of reservations. According to the Special Rapporteur, a modification of a reservation that aimed at enlarging its scope should be viewed as a late formulation of a reservation. In his own view, that was only ostensibly true, and in fact there was a fundamental difference between the two. A reservation formulated late was one which a State had in good faith forgotten to attach to its instrument of ratification. That had happened twice in Greece. The late formulation of a reservation thus aimed to remedy an oversight. On the other hand, draft guideline 2.3.5 was outside the realm of good faith and opened up very dangerous prospects for treaties and international law in general. To enlarge the scope of a reservation was to enlarge the opposition to a treaty. In his view, the sort of provision which authorized the State to modify its reservations in order to enlarge their scope could not be equated with a late reservation; it was a new reservation which undermined the treaty. The provision should not be included in the draft guideline, since it represented a threat to international legal security. He favoured prohibiting such types of reservation and proposed the following wording: “The modification of an existing reservation in such a way as to enlarge its scope shall be prohibited.”

<sup>9</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002*, vol. I (United Nations publication, Sales No. E.03.V.3), pp. 89 (reservation by Sudan) and 91 (objection by the Government of Germany).

25. In paragraph 39 of his report, the Special Rapporteur pointed out that the Head of the Legal Advice Department and the Treaty Office of the Council of Europe had noted that, in some instances, States had requested the Secretariat of the Council of Europe to provide information on whether and how reservations could be modified. The Secretariat's response to such questions had always been the same: modifications which would result in an extension of the scope of existing reservations were not acceptable. He believed that the practice of the Council of Europe should be followed, even though the United Nations had used the opposite practice, which, in his view, was very dangerous.

26. During the second reading of the draft guideline, the possibility of formulating a late reservation should be restricted. The State must prove that it had already formulated the reservation prior to depositing its instrument of ratification in order for such a reservation to be accepted.

*The meeting rose at 11.45 a.m.*

## 2781st MEETING

*Tuesday, 29 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN said that the eighth report (A/CN.4/535 and Add.1) was rich and useful. The conclusions drawn by the Special Rapporteur in Chapter I, on

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

the withdrawal and modification of reservations and interpretative declarations, were quite correct, and the draft guidelines contained there could therefore be referred to the Drafting Committee. The logic underlying them was sound, and he endorsed the view, expressed in paragraph 36 of the report, that the rules applying to a late formulation of a reservation also held good for “enlargement” of the scope of a reservation, a term that could be interpreted in the commentary.

2. He could also subscribe to the Special Rapporteur's opinion that an interpretative declaration could be withdrawn at any time since, according to the general rule, it could be formulated at any time, although it was not clear why partial withdrawal was impossible. Draft guideline 2.4.9 was acceptable, and the new variants of guidelines 2.4.3 and 2.4.6 were, as the Special Rapporteur had said, more elegant. Personally he, like several other members of the Commission, would prefer to extend the provisions on reservations to conditional interpretative declarations as well.

3. The definition of objections to reservations, dealt with in paragraphs 98 and 105, was of central importance. The principal element of the definition was the intention of the objecting State “to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection” (para. 98). That element was consonant with article 21, paragraph 3, and with article 20, paragraph 4 (b), of the 1969 Vienna Convention, the latter provision being the only one in the Convention that referred to the intention of the objecting State. Nevertheless, there was nothing in the Convention or in State practice to indicate that that was the sole possible intention of States objecting to reservations. It was possible to discern the intention of the objecting State above all by analysing the text of the objection.

4. While the Special Rapporteur had done much research into State practice, he had held that only reactions to reservations that evidenced their authors' intentions could be termed objections. Accordingly, he had doubted whether Sweden's reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>3</sup> qualified as an objection to that reservation. In fact, the text of the objections of Sweden and Norway<sup>4</sup> to that reservation did show that their aims had been quite different, as the quotation in paragraph 96 of the report made plain, namely, to secure the application of the treaty to the objecting State and to persuade that State to withdraw its objection.

5. Recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe to member States on responses to inadmissible reservations to international treaties was pertinent to an analysis of the intentions of

<sup>3</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 316 (reservation by Qatar) and 318 (objection by Sweden).

<sup>4</sup> *Ibid.*, p. 317.