Document:-
A/CN.4/SR.2819

Summary record of the 2819th meeting

Topic:
Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-
2004, vol. I

of certain criteria drawn from the definition of unilateral acts as it appeared in recommendation 1 made by the 2003 Working Group. The recommendation suggested that there were two avenues to be explored: on the one hand, acts which generated obligations and, on the other, treaty-based acts. The working group should therefore be given the task of re-examining the definition. A working group chaired by Mr. Pellet would undoubtedly be able to pick out the most appropriate examples.

50. He wondered whether the working group would have enough time for a thorough examination of those examples during the current session. Furthermore, recommendation 6 already spelled out the legal framework for international unilateral acts.

51. Mr. MATHESON said he agreed that the working group should choose only those examples which, generally speaking, matched the definition adopted at the previous session. Moreover, there was no question of asking the working group to determine whether each specific act really created legal obligations and what those obligations were, for that was more the responsibility of the Special Rapporteur.

52. Mr. CHEE said that the definition of unilateral acts had been under consideration ever since he had joined the Commission. The definition given in recommendation 1 did not pose any problems as far as he was concerned. The issue should be approached by referring to the judgments of ICJ and of tribunals, as well as to the opinions of distinguished writers. The working group should have some leeway and should strive to determine the method to be followed rather than the substance of the issue.

53. Mr. KEMICHA said that the plenary should endorse the proposal to set up a working group chaired by Mr. Pellet. In cooperation with the Special Rapporteur, it would be responsible for submitting proposals to the Commission on the course to be followed with regard to further consideration of the topic. He believed that it should build on the work which had been done at the previous session and which was partially reflected in the seventh report. He, too, thought that the working group should be allowed some leeway and should offer the Commission guidance in the very near future.

54. Mr. PELLET said that, having discussed the matter with the Special Rapporteur, he had agreed to assume the task of chairing the working group, although he was not really a candidate for it. In his view, the working group must be open in all senses of the term—both in its composition and in its attitude—and it must give itself guidelines. Moreover, it must not have any preconceptions; it must select examples to be studied according to the documentation available and the likelihood of finding information on the *ex ante* and *ex post* context. That meant that its task would consist of an in-depth analysis of those acts, since it was only thus that it could be decided whether they were of a political or a legal nature. In short, the working group must adopt an empirical approach and not start with preconceived ideas.

55. He considered that the working group must be open to all members, although he stressed that it should be a study group and not a discussion group. The members who decided to be part of it must therefore be ready to do some extra research based on the preceding year's report, rather than starting from scratch. With that in mind, the working group could deal first of all with acts intended to produce legal effects, without calling into question the conclusions reached at the preceding session. It should also meet as soon as possible in order to decide on its working methods. Like Mr. Daoudi, he considered that it would be unrealistic to hope for definitive results during the current session. The working group should therefore continue its work after the end of the session by electronic means so as to help the Special Rapporteur draft a report which, in his view, would give full effect to recommendation 4, something the seventh report did only partially.

56. The CHAIRPERSON suggested that a working group should be set up and chaired by Mr. Pellet; its task would be to select and analyse examples of unilateral acts on the basis of work done so far by the Commission, the Special Rapporteur's reports and ideas put forward in plenary. The working group, which should have the necessary scope to perform its task, should also be responsible for providing the Commission with information on how to continue the study of the topic. If he heard no objection, he would take it that the proposal was acceptable to the Commission.

It was so decided.

Organization of work of the session (*continued*)*

[Agenda item 1]

57. Ms. XUE (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda and Mr. Yamada. Members whose name had not been mentioned could, of course, take part in the work of the Planning Group.

The meeting rose at 1.10 p.m.

2819th MEETING

Tuesday, 20 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

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* Resumed from the 2815th meeting.

Cooperation with other bodies (*concluded*)*

[Agenda item 10]

Statement by the Observer for the Inter-American Juridical Committee

1. The CHAIRPERSON welcomed Mr. Felipe Paolillo, Observer for the Inter-American Juridical Committee, and invited him to take the floor.

2. Mr. PAOLILLO (Observer for the Inter-American Juridical Committee) said that although the Committee was sometimes seen as the younger sibling of the International Law Commission, he would hesitate to describe the relationship in that way; for, while the functions and objectives of the two institutions were similar, they were not identical. The Commission's task was to promote the progressive development and codification of international law with a view to regulating the conduct of all States, irrespective of their region, whereas the Committee's mission was to achieve the same goal at the level of the region of the Americas and in the light of its particular problems, legal tradition and regional interests and priorities. In addition, the Committee served as a consultative body to OAS on legal matters and for the consideration of legal issues relating to the integration of the developing countries of the continent and ways of harmonizing their legislation. Furthermore, unlike the Commission, the Committee devoted a great deal of its time to matters of private international law: indeed, such matters had dominated its agenda in recent years. Lastly, the Committee had the option of including items on its agenda on its own initiative.

3. There were thus differences between the Commission and the Committee as to their competence and scope. Yet his hesitation to describe the Committee as a younger relative derived primarily from the fact that in two years' time it would celebrate its centennial. Although it could not claim to have functioned uninterruptedly throughout the whole of that period, its roots went back to 1906, when the Third International Conference of American States had decided to establish the Permanent Committee of the Inter-American Council of Jurists. In 1939, that body had become known as the Inter-American Neutrality Committee, and had taken its current name in 1948. Its present operational structure dated back to the adoption of the Protocol of amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires") in 1967. The Committee was thus older than the oldest institutions currently functioning within the United Nations or any of the existing regional bodies. It would celebrate its centennial in a fitting manner, with events including the publication of a volume detailing its contribution to the development of international law throughout its long history. That same topic would be the subject of the annual course on international law to be held in 2006, to coincide with the Committee's August session.

4. In 2002, the Permanent Council of OAS had instructed the Committee to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extracontractual civil liability, bearing in mind the guidelines formulated by the Sixth Inter-American Specialized Conference on Private International Law. The Council had likewise instructed the Committee to issue a report on the subject, drawing up recommendations and possible solutions, for the Council's consideration and the determination of future steps. In its guidelines, the Conference had indicated that the purpose of the study would be to identify specific areas revealing progressive development of regulation in that field through conflict-of-law solutions, as well as a comparative analysis of national norms currently in effect.

5. After having discussed the topic on the basis of reports submitted, the Committee had concluded that because of the complexity of the subject and the wide variety of diverging forms of responsibility encompassed within the category of "non-contractual civil liability", it did not seem feasible to attempt to draft a regional treaty to cover that topic as a whole, and that it would be more appropriate initially to recommend the adoption of inter-American instruments to regulate jurisdiction and choice of law with respect to specific subcategories such as non-contractual liability for damage caused by traffic accidents and by the manufacture and distribution of defective products (product liability). Those two areas were cited as being amenable to regulation through an inter-American instrument. On the other hand, the Committee had felt that the elaboration of such an instrument to regulate non-contractual liability arising from transboundary environmental harm would present major difficulties. Lastly, the Committee had concluded that the conditions were not yet ripe for the elaboration of an inter-American instrument dealing with extracontractual obligations arising from acts committed in cyberspace. The Permanent Council had not yet decided on the direction to be taken by the Committee's future work on that subject.

6. Another topic of private international law to which the Committee had devoted considerable attention in recent years was that of cartels in the scope of competition law in the Americas. Two members of the Committee had submitted a report analysing different types of cartels, which were defined as groups of firms that engaged in coordinated behaviour instead of competing. It had divided them into "hard core", export and import cartels and it had reviewed the legislation and regulations on competition in force in the countries of the hemisphere. Consideration of the topic was a first step towards promoting more effective control over anticompetitive practices in the Americas and enhancing understanding of the legislation and policies needed to regulate such cartels. The relevant resolution adopted by the Committee indicated that the reports on the topic were to be distributed to the competent authorities in member States and encouraged member States to give top priority to the adoption and application of competition laws and to reach agreements on extending inquiries, cooperation and exchange of information on matters relating to competition.

7. The Committee had recently begun considering the legal aspects of compliance within States with decisions of international courts or tribunals or other international organs with jurisdictional functions. The topic had been

* Resumed from the 2816th meeting.

suggested by the President of the Inter-American Court of Human Rights, who had cited cases of non-compliance by some States with the Court's decisions, particularly those involving the introduction of legal reforms. The Committee was in the initial stages of its work, which involved gathering information, for which purpose a questionnaire had been prepared covering domestic legislation in force governing conditions and procedures for complying with decisions of international tribunals as well as the practice of States in actually implementing such decisions. Most countries had regulations on compliance with decisions of foreign national courts but not on decisions of international courts. On the basis of information being provided by States, the Committee intended to evaluate the domestic legislation in force in the countries of the region, practice regarding the procedures and modalities for compliance with decisions, and cases of non-compliance and their causes, including the difficulties most often encountered by the countries concerned. It would then discuss what type of measures could be adopted or recommendations made to ensure faithful and rapid compliance by countries of the region. The purpose of the study was thus essentially to strengthen the international jurisdictional regime at the inter-American level.

8. The Committee had concerned itself with the topic of inter-American security for many years, although its focus had changed in line with changes in the international arena. In the Americas, regional instruments supplemented the rules set out in the Charter of the United Nations and other universal instruments. Perhaps the most important of those regional instruments was the Inter-American Treaty of Reciprocal Assistance. However, in addition to the fact that only 15 of the 34 members of the inter-American system were parties to it, the Treaty appeared not to offer an adequate and effective response to contemporary threats to international peace and security. Some believed that the Treaty should be replaced by a more up-to-date instrument.

9. At various meetings, the States of the region had acknowledged that the sources and nature of threats to peace and security had diversified in recent years and that traditional approaches to dealing effectively with such threats should consequently be adjusted in the light not only of the political and military dimensions of the problem, but also of its economic, social and environmental dimensions. Accordingly, OAS had convened a Special Conference on Security, that had been held in Mexico City in October 2003 and had resulted in the adoption of a Declaration on Security in the Americas. The Committee was currently considering how to approach the problem in order to contribute to the work of updating the inter-American security system on the basis of that Declaration. An effort was being made to systematize the regulations in force on the American continent, whether universal, regional or subregional, in order to see whether they were in line with the principles set out in the Declaration and to identify areas amenable to progressive development. During the initial discussions on the subject it had been pointed out that whatever direction the study might eventually take, the multidimensional nature of hemispheric security emphasized in the Declaration must be taken into account, which, in turn, would lead to the consideration of issues such as the eradication of poverty, human security and humanitarian intervention.

10. Some OAS member States had pointed to the need to adopt a new inter-American convention against racism and all forms of discrimination and intolerance. The Committee had submitted a preliminary report to the General Assembly of the Permanent Council in which, having reviewed the relevant regional and international instruments, it had identified areas that could be the subject of regional regulation without leading to duplication, redundancy or conflicts with existing international rules. The report pointed out specific areas that could be the subject of a treaty or other instrument, such as strengthening oversight and compliance mechanisms for the obligations under human rights treaties; protection of the rights of specific, particularly vulnerable groups, such as indigenous populations; and contemporary forms of racism and racial discrimination, including the use of electronic communication and information media to promote racism. The topic remained on the Committee's agenda pending a decision by the Permanent Council or the General Assembly on the matter.

11. Other topics on the Committee's agenda included "Right to information: access and protection of information and personal data"; and "Improving the system of administration of justice in the Americas: access to justice". Under a resolution adopted by the General Assembly of OAS in June 2004, in the context of joint efforts to combat corruption and impunity, the Committee was to prepare a report on the legal effects of giving safe haven to public officials and persons accused of crimes of corruption after having exercised political power, and on cases in which appealing to the principle of dual nationality could be considered fraudulent or an abuse of the law. The General Assembly of OAS had also requested the Committee to contribute to the preparatory work for the Seventh Inter-American Specialized Conference on Private International Law. It had also decided that, in the context of its agenda item "Application of the Inter-American Democratic Charter", the Committee would analyse legal aspects of the interdependence between democracy and economic and social development.

12. Lastly, he noted that the course on international law that the Committee had been organizing annually for over 30 years had again been held in 2003, on the theme of "International law and the maintenance of international peace and security". The course had been attended by 49 students from across the continent and 24 professors from American and European countries.

13. Mr. MOMTAZ said that the new item on the Committee's agenda, "Legal aspects of compliance with decisions of international courts or tribunals", was of great importance, particularly in view of the growing number of international courts. Had any mechanisms been envisaged to ensure such compliance? Specifically, were any countermeasures by members of OAS against recalcitrant States being contemplated?

14. Mr. RODRÍGUEZ CEDEÑO said that it was always a pleasure to welcome members of regional legal institutions for the purpose of cooperation and exchange of

information. The Committee's agenda was rich in truly interesting subjects, such as extracontractual civil liability with specific reference to traffic accidents and dangerous products, and the possibility of elaborating a new treaty to replace the Inter-American Treaty of Reciprocal Assistance. The study of the legal effects of giving safe haven to persons who had exercised political power was also important. He would like to hear more about how that work related to the Inter-American Convention against Corruption: for example, whether it was to take the form of a protocol to that Convention, the background of the topic and how it was being addressed.

15. Mr. BAENA SOARES said that there was a need to draft a new instrument on security in the Americas, in view of the fact that the Declaration on Security in the Americas adopted on 28 October 2003 at the Special Conference on Security held in Mexico was not confined to narrow considerations of military security. He would also like to know more about measures to be taken to combat corruption, especially the use of safe havens by public officials, a matter that affected not only inter-American relations and the situation in the countries of the Americas, but was also bound up with the scourge of international organized crime.

16. Mr. GAJA asked whether the Committee had considered the question of possible extraterritorial effects of national or regional anti-trust instruments

17. Mr. AL-MARRI wished to know whether any practical steps had been taken in the field of judicial reform in the Americas and whether the Observer for the Inter-American Juridical Committee could provide examples of reforms designed to increase the impartiality and independence of the judiciary, which might serve as useful examples for other parts of the world.

18. Mr. NIEHAUS concurred with the Observer for the Inter-American Juridical Committee that the Inter-American Treaty of Reciprocal Assistance had become obsolete, since it was not designed to counter the types of aggression and insecurity which the continent and indeed the whole world faced in the twenty-first century. As the drafting of a new treaty would be complicated, he wondered if any thought had been given to amending the old treaty in such a way as to permit collective action in the Americas to fight terrorism and drug trafficking, or to protect the environment.

19. Mr. PAOLILLO (Observer for the Inter-American Juridical Committee), replying first to the question put by Mr. Momtaz, said that no country in the Americas currently had any legislation guaranteeing the implementation of judgements by international courts or tribunals, although almost all States had legislation governing the implementation of foreign courts' decisions. The matter was, however, being reviewed and the Committee had received numerous responses to a questionnaire that it had circulated to States. In fact, the cases of non-compliance which had prompted the study had mostly concerned judgements relating to human rights violations and, in that context, the establishment of countermeasures to induce States to abide by courts' decisions should naturally be contemplated. It was too early to say whether the Committee's work on that topic would culminate in recommendations on the introduction of countermeasures. It would be several years before any conclusions could be reached. The subject had been taken up by the Committee only the previous year and it was therefore just embarking on its examination of the issue.

20. He was unable to provide any detailed information on the Committee's mandate to look into measures to combat corruption. The relevant resolution had been adopted just one month previously and the Committee had not had time to discuss it. The General Assembly of OAS obviously wished to curb corruption, but the Committee's mandate was complex and required some elucidation.

21. Turning to Mr. Gaja's question regarding the extraterritorial scope of a possible regional instrument on cartels, he explained that the extensive study to which he had referred had been descriptive in nature and had led to a recommendation to OAS member States that they should formulate or strengthen national legislation on the subject with a view to controlling and punishing anticompetitive practices. It had not, however, been felt that it would be wise at that juncture to suggest the adoption of an inter-American convention or treaty on the subject.

22. As for the Inter-American Treaty of Reciprocal Assistance, he agreed that the time had come to seek a fresh approach to security in the hemisphere. Amending the old Treaty would be as difficult as drafting a new one. Existing regional norms were being examined in order to see where lacunae existed and how to deal with the new threats to inter-American security, which stemmed from environmental problems, corruption, organized crime and drug trafficking, and efforts were being made to ascertain what links existed between those issues. His impression was that opinion among OAS member States was moving in favour of drawing up a completely new instrument.

23. In response to the question from Mr. Al-Marri about judicial reform, he said that the Committee took the view that work at the inter-American level to improve the judicial system was of secondary importance. It gave higher priority to the organization of conferences of judicial authorities. It had issued some general recommendations which were mainly concerned with guaranteeing individuals' access to justice through the wider dissemination of information and the provision of education and financial assistance to ensure that justice was available to all. Numerous studies on judicial reform which might be of interest to other regions of the world had, however, been carried out by other bodies in the Americas.

24. The CHAIRPERSON thanked the Observer for the Inter-American Juridical Committee for his highly informative statement and his replies to the questions put by members of the Commission.

Diplomatic protection[1] (*concluded*) (A/CN.4/537, sect. B, A/CN.4/538,[2] A/CN.4/L.647 and Add.1)**

[Agenda item 3]

25. Mr. DUGARD (Special Rapporteur) said that, since the conference room paper that he had prepared on the subject of "clean hands" and diplomatic protection had only just become available in all language versions, it might be best to defer discussion of the topic to the following session, provided that to do so would not delay the adoption of the draft articles on first reading.

26. Mr. BROWNLIE said that it would be useful to hold a preliminary discussion to determine whether the issue of "clean hands" should be included in the topic of diplomatic protection. Mr. Pellet had been quite right in implying that it would be strange if the Commission produced a report which made no reference to the "clean hands" doctrine. It would also be helpful to obtain States' views on the matter.

27. Mr. KATEKA wondered if it would be possible to hold a preliminary discussion on the subject, perhaps in a working group, so that the matter could be reflected in the report of the Commission to the General Assembly on the work of its session.

28. Mr. PELLET endorsed the Special Rapporteur's suggestion. The Commission needed more time to reflect on the Special Rapporteur's paper, which raised complex questions of substance to which a brief discussion in a working group would not do justice. He suggested that the chapter of the Commission's report concerning specific issues on which comments by States would be of particular interest should include a reference to the topic of "clean hands". That method of proceeding would not delay the adoption of the draft articles on first reading and the articles could subsequently be amended if necessary, in order to include the issue of "clean hands".

29. Mr. BROWNLIE said that while it would be wise to obtain the views of States on the "clean hands" doctrine, it should be borne in mind that the concept was very vague. There were very few instances in the case law of ICJ and other tribunals where the claimant State, or the individual in respect of whom diplomatic protection was to be exercised, had engaged in illegal conduct. One example which sprang to mind was the *Nottebohm* case, where the main issue had been fraudulent naturalization. The illegal conduct of the claimant State was not a simple subject, as it could arise as a matter of admissibility, propriety or merits. Admittedly, States might be puzzled by the omission of any reference to the doctrine of "clean hands" in the report; for that reason it might be wise to include an expository note in which the Special Rapporteur explained why the doctrine of "clean hands", as such, did not fit into his subject. The doctrine should not, however, simply be ignored.

30. Mr. PELLET said that while he broadly concurred with Mr. Brownlie, there was no reason why States should not simply be asked to what extent they considered that "clean hands" were a condition for the exercise of diplomatic protection.

31. Mr. CANDIOTI, supported by Mr. CHEE, said that, while he endorsed the suggestion that chapter III of the report should contain a question addressed to States, the terms of any such question should be dependent on the outcome of at least a preliminary discussion within the Commission.

32. The CHAIRPERSON said that the Commission appeared to have two options: to postpone the debate to the next session, meanwhile asking States for their opinions; or to set up a working group to discuss the issue at the current session and then report back to the Commission.

33. Mr. BROWNLIE said that there was no need to for a working group. It would surely be possible to frame a simple, general question along the lines: "What do Governments consider to be the relevance of the doctrine of 'clean hands' to the subject of diplomatic protection?" That would surely be the most satisfactory way of finding out what States thought.

34. Mr. DUGARD (Special Rapporteur) said that a very general question of the kind proposed by Mr. Brownlie was unlikely to achieve the required purpose. One solution would be for him to draft a short statement on the issue, to be read in conjunction with a question in chapter III of the report, to provide the Sixth Committee with some indication of the problems associated with a topic that was a good deal more complicated than it appeared. It was important to consult States as soon as possible, so that the second reading of the draft articles could be completed before the end of the quinquennium.

35. Mr. DAOUDI said that he was in favour of devoting half a day to discussing the working paper. The Sixth Committee would thus have the benefit not only of the Special Rapporteur's views, but also of those of the members of the Commission.

36. Mr. ECONOMIDES said that an important question of principle was involved: the Commission should not address a question to States before it had itself taken a position on the matter, either in plenary or in a working group. He himself favoured the latter course.

37. Mr. MOMTAZ said that he was strongly in favour of an in-depth consideration of the issue. The conference room paper submitted by the Special Rapporteur had concluded that there was no need for a provision on "clean hands" in the draft articles. Opinions were divided on that conclusion and a decision must be reached by the Commission before the views of States were sought.

38. Mr. PELLET said that the time constraints were such that it would not be feasible for the Commission to discuss the question in depth before the end of the session.

** Resumed from the 2806th meeting.

[1] For the text of articles 1 to 10 of the draft articles on diplomatic protection provisionally adopted by the Commission at its fifty-fourth and fifty-fifth sessions, see *Yearbook ... 2003*, vol. II (Part Two), pp. 34–35, para. 152.

[2] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

To set up a working group—which was in any case quite unnecessary, since the working paper contained all the information required—would protract the proceedings still further. It would, on the other hand, be perfectly practicable for the Special Rapporteur to draft a brief summary of the issues involved, to be discussed in the context of the adoption of the Commission's report.

39. Mr. KABATSI concurred. The Special Rapporteur was best placed to formulate an appropriate note, which could then be considered when the Commission came to adopt its report.

40. Mr. KATEKA said that what was most important was to keep the Sixth Committee informed of the Commission's deliberations.

41. Mr. ECONOMIDES suggested that the Commission's report should contain a paragraph explaining the precise course of events, namely that the Special Rapporteur had not covered the issue of "clean hands" in the draft articles; that the Commission had questioned that omission; that the Special Rapporteur had prepared a conference room paper on the issue in which he concluded that such a provision was unnecessary; and that the Commission had not taken up the issue for lack of time.

42. The CHAIRPERSON, summarizing the discussion, suggested that the report of the Commission should contain an account of the proceedings, as proposed by Mr. Economides; a request for the views of States; and an explanatory note to be prepared by the Special Rapporteur. At the close of its fifty-seventh session, the Commission would report to the Sixth Committee on the final outcome of its deliberations on the issue of "clean hands".

It was so decided.

The meeting rose at 11.35 a.m.

2820th MEETING

Wednesday, 21 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties[1] (*continued*)* (A/CN.4/537, sect. E, A/CN.4/544,[2] A/CN.4/L.649 and Corr.1)

[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. PELLET (Special Rapporteur), introducing his ninth report on reservations to treaties (A/CN.4/544), recalled that, at the preceding session, he had put forward proposals for the definition of objections to reservations that had taken the form of three draft guidelines, 2.6.1, 2.6.1 *bis* and 2.6.1 *ter*. Those provisions had met with a certain amount of criticism from members of the Commission, some of which appeared to him to be well founded. His original premise had been that the meaning to be given to "objections", which were not defined in the 1969 and 1986 Vienna Conventions, had to be specified in the Guide to Practice. The case was thus one of the progressive development of the law and it had seemed to him that the definition should be based on the definition of reservations themselves. Draft guideline 2.6.1 therefore focused on the intention of the State or international organization that had formulated the objection, just like reservations, which were defined in draft guideline 1.1 and article 2, paragraph 2, of the Vienna Convention on the basis of the author's objective. During the discussion that had taken place within the Commission at the previous session, a number of members had indicated that that premise was artificial and debatable. They had considered that the effects of objections on article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the Vienna Conventions were vague and ambiguous and that, in a great many instances, States wanted their objections to have effects other than those provided for by those texts. Such was the case with what was known as the "super-maximum" effect, objections by which States claimed to have a binding relationship with the author of the reservation under the treaty as a whole, including the provisions to which the reservation related. He personally continued to believe that the validity of the effects that such objections were intended to have reservations and objections produce was open to question, since he was convinced that the entire law of reservations was dominated by the consensus principle and the idea that States could not be bound against their will: in formulating an objection, a State could not oblige another State to be bound against its will.

2. Nonetheless, some States intended their objections to produce such effects. Moreover, States sometimes wanted their objections to produce effects which gave rise to less criticism than those of "super-maximum" objections, but which were not provided for by the 1969 and 1986 Vienna Conventions. For example, a State might indicate that it did not intend to be bound *vis-à-vis* the reserving State, not only by the provisions to which the reservation related, but also by a set of provisions which were not expressly covered by the reservation.

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* Resumed from the 2810th meeting.

[1] For the text of the draft guidelines provisionally adopted by the Commission to date, see *Yearbook ... 2003*, vol. II (Part Two), pp. 65–70, para. 367.

[2] Reproduced in *Yearbook ... 2004*, vol. II (Part One).