

Document:-  
**A/CN.4/SR.2821**

**Summary record of the 2821st meeting**

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

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

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objection to that reservation, but it could certainly not add to it articles 25, 26 and 27. According to the Convention, a State had only two options: either it confined itself to rejecting a reservation or it opposed the entry into force of the treaty as a whole. There was no third option. If a State chose to use the third option, then it would be making new reservations against the reserving State, something which was unlawful under the Convention.

30. The Special Rapporteur had stated that his definition did not prejudice the issue of the validity of that type of objection. In his own view, however, the Commission had to start with the question of validity before adding a definition which must be precise and correct in a quintessentially legal text.

31. Mr. PELLET (Special Rapporteur), referring to what he had said about modifying objections, said that he did not share Mr. Economides's view. While it was true that super-maximum objections went beyond the 1969 Vienna Convention, modifying objections did not. The option to which Mr. Economides had referred represented the two outside boundaries of the Vienna Convention, within which he himself wished to stay. Modificatory objections were within those boundaries and simply represented an intermediate situation. That was, however, not the point; in his view, it was to find a definition and then to understand how the institution operated.

*The meeting rose at 11.35 a.m.*

## 2821st MEETING

*Thursday, 22 July 2004, at 10.05 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. 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<sup>1</sup> (*continued*) (A/CN.4/537, sect. E, A/CN.4/544,<sup>2</sup> A/CN.4/L.649 and Corr.1)

[Agenda item 6]

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

1. Mr. KOLODKIN said that he wished to draw attention to the reactions of two States to Pakistan's statement concerning the International Convention for the

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

Suppression of Terrorist Bombings, which implied that the Convention did not apply to acts carried out as part of a national liberation struggle.<sup>3</sup> Many States regarded that statement as a reservation. On 6 October 2003, the Republic of Moldova had objected to Pakistan's statement on the grounds that it conflicted with the object and purpose of the Convention, that the reservation was therefore inadmissible and that the Convention "enters into force in its entirety between the two States, without Pakistan benefiting from its reservation".<sup>4</sup> On 22 September 2003, the Russian Federation had declared that the statement by Pakistan could "jeopardize the fulfilment of the provisions of the Convention in relations between the Islamic Republic of Pakistan and other States parties and thereby impede cooperation in combating acts of terrorist bombing".<sup>5</sup> The Russian Federation had called upon Pakistan to review its position and withdraw its statement.<sup>6</sup> Those two recent reactions revealed the growing range of possible responses to reservations and bore out the conclusions reached in the 1977 *English Channel* case.

2. Although the Republic of Moldova's statement had been made after the deadline prescribed by the 1969 Vienna Convention, it was clearly an objection, having been formulated in accordance with the model response to reservations contained in recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe.

3. The Russian Federation's statement had not been formulated as an objection, as the legal consequences of such action had been unclear to it and it had been unable to rule out the eventuality of an objection, placing it in the same situation as if it had tacitly accepted the reservation. The decision had therefore been taken to make a purely political statement which did not contain the verb "object". The Russian statement had not characterized Pakistan's statement as a reservation and it had deliberately been made more than 12 months after the date of notification of Pakistan's statement. Hence Russia's response belonged to the category of political reactions to a reservation analysed in paragraphs 85 to 89 of the eighth report on reservations to treaties.<sup>7</sup>

4. If the Commission wished to define objections to reservations (and he was not convinced that it should), any such definition would have to be flexible enough to include objections like those of the Republic of Moldova to Pakistan's reservation, and precise enough to exclude reactions like the Russian statement. Both the alternative wording put forward by the Special Rapporteur in 2003, reproduced in paragraph 15 of the ninth report (A/CN.4/544), and the new definition proposed in paragraph 22 of the report appeared to be steps in the right direction. In the light of the discussion, he would favour continuing work on the basis of the wording reproduced in paragraph 15 of the ninth report and adding the words "or to modify these effects" at the very end of the definition,

<sup>3</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. II (United Nations publication, Sales No. E.04.V.2), document ST/LEG/SER.E/22, p. 126.

<sup>4</sup> *Ibid.*, p. 136.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> See 2816th meeting, footnote 8.

so as to take account of comments on the most recent proposal. He wondered, however, if that or a similar definition would be rigorous enough to exclude reactions which did not constitute objections to reservations. It might also be better to defer consideration of the definition of objections until the question of their admissibility had been considered.

5. He endorsed the conclusions contained in paragraphs 23, 26, 27 and 28 and the wording of draft guideline 2.6.2 reproduced in paragraph 29 of the ninth report.

6. Mr. MOMTAZ said that the Special Rapporteur's interest in the question of objections to reservations was justified, given that the provisions of the 1969 Vienna Convention on that question were vague and required elucidation. Such clarification should not, however, weaken the principle of States parties' sovereignty and their equality before the law within the treaty regime in question. It was therefore unacceptable for the author of an objection to intend it to produce effects extending beyond those provided for in the 1969 and 1986 Vienna Conventions.

7. Fortunately, the Special Rapporteur was "particularly attached to the 'contractual' character of treaties and the voluntary nature of treaty commitments" (paragraph 20 of the report). Any will of the objecting State to make the treaty as a whole binding upon the author of a reservation was unquestionably at odds with those postulates. That said, if the reservation concerned a provision of the treaty which simply reproduced a peremptory norm of international law, the State making the reservation remained bound at the international level, but the reservation could not produce effects with respect to the treaty. Thus, the State raising an objection could not rely on the peremptory nature of the treaty rule that was the subject of the reservation in order to contend that the State making the reservation was bound by the treaty obligations related to that rule.

8. As for the new definition of objections to reservations contained in paragraph 22 of the ninth report, he agreed with Mr. Economides that the phrase "however phrased or named" was superfluous and should be deleted. Another argument in support of its deletion was that while it might sometimes be to the advantage of States to disguise the intentions behind their reservations, that was not true of their objections to reservations.

9. The new version of the definition of objections to reservations proposed by the Special Rapporteur stated that they purported to modify the effects of a reservation. Admittedly, in some cases, a State raising an objection to a reservation could be attempting to mitigate the effects of the reservation; normally, however, the aim of objections to reservations was to prevent the reservation having any effects. It would therefore be preferable to revert to the original wording and to speak of preventing the application of the provisions of the treaty to which the reservation related.

10. He likewise subscribed to the Chairperson's comments on the definition. In his view, the expression "effects expected" was too subjective; it would be sufficient to speak simply of the "effects of the reservation".

11. Turning to the categories of States or international organizations entitled to formulate objections to reservations, he echoed Mr. Pambou-Tchivounda's concerns about the inclusion of States which were entitled to become parties to the treaty. That category should comprise only States which had already signed the treaty in question. He saw no reason why such a right should be granted to States which might accede to the treaty, or which were entitled to do so. A distinction should be drawn between signatory States and States which had not yet taken that step. Under the 1969 and 1986 Vienna Conventions, signatory States had to adopt a positive attitude to a treaty; hence their entitlement to object to reservations was a kind of *quid pro quo* for the obligations that the Conventions imposed on them. The questions raised in connection with the categories of States entitled to formulate reservations should be addressed in a separate guideline, to which, however, the text of draft guideline 2.6.1 should make reference.

12. Mr. FOMBA said that the Special Rapporteur's ninth report clearly set out the issues and potential solutions to them. Multilateral treaties were an excellent means of enabling States to participate actively in the legal life of the international community. Reservations to treaties and objections to reservations encouraged the widest possible participation based on respect for the sovereignty and will of States. Just as the aim of reservations should not be to defeat the purpose of treaties, so the aim of objections should not be to vitiate reservations and thereby the effectiveness of treaties. On the contrary, the aim must be to preserve their relative or absolute effectiveness, and, to that end, it was necessary to retain a balance between the interests of the reserving and objecting States.

13. It could be inferred from the spirit of article 21, paragraphs 1 and 2, of the 1969 Vienna Convention that the purpose of a reservation was to modify the provisions of a treaty, that the scope *ratione materiae* of a reservation was limited to the provisions to which it related and that its scope *ratione personae* was restricted to States parties.

14. Neither article 2, paragraph 1 (*d*), nor article 20, paragraph 4 (*b*), of the 1969 Vienna Convention defined the term "objection", but article 21, paragraph 3, made it clear that when the objection did not purport to prevent the entry into force of a treaty, its only aim could be to prevent the application of the provisions to which it expressly related. The 1969 and 1986 Vienna Conventions, albeit important, suffered from lacunae and shortcomings, one of which was their failure to define objections and their legal scope. He personally considered that, from a logical and methodological standpoint, it was both possible and necessary to define objections before considering their legal effects. Moreover, that had been the procedure adopted in respect of reservations in the 1969 Vienna Convention. The new draft guideline proposed in paragraph 22 of the ninth report was designed to fill the lacunae that practice had revealed. The expression "effects expected" was not as obscure as might be supposed, for when a State expressed a reservation, it expected that reservation to have a specific legal effect, provided that it was formulated unambiguously. It therefore seemed logical to consider that the objection purported to modify the effects expected of the reservation, albeit in a carefully considered and balanced manner.

15. There was no point in including in the definition any mention of the categories of States or international organizations entitled to formulate an objection. The analogy with reservations should be applied, although there was nothing to prevent that question from being settled elsewhere in the Guide to Practice. Terminological considerations apart, he did not think that the word “made”, which was discussed in paragraph 24, prejudiced the issue of the validity of the objection. Lastly, it might be wise to include draft guideline 2.6.2 in the Guide to Practice, given that it covered opposition to the very right to the late formulation or widening of the scope of a reservation, rather than an objection to a reservation *stricto sensu*.

16. Mr. YAMADA said that he had no problem with the Special Rapporteur’s proposed new definitions of objections as set out in draft guidelines 2.6.1 and 2.6.2, contained in paragraphs 22 and 29 of his ninth report. With reference to the question debated at the previous meeting by Mr. Economides and the Special Rapporteur, he thought that the answer depended essentially on the interpretation of the 1969 Vienna Convention, the deciding factor being the development of State practice after the adoption of that Convention. The Guide to Practice must reflect those developments.

17. He agreed with the Special Rapporteur that the Commission should first define what an objection was; he therefore had no intention of discussing the legal consequences of objections at the present juncture. However, the reservation and objection regime in the 1969 Vienna Convention was based on the assumption that obligations under multilateral treaties could be broken down into reciprocal bilateral obligations between the parties. That was true in the case of some multilateral treaties such as those on diplomatic relations, consular relations and extradition. Many, however, were normative treaties in the field of human rights, disarmament or environment, and the obligations that they entailed could not be reduced to bilateral obligations between specific parties. For example, when ratifying the International Covenant on Economic, Social and Cultural Rights, the Government of Japan had entered a reservation to article 13, paragraph 2 (c), which called for the progressive introduction of free higher education.<sup>8</sup> The Government of Japan had regarded that measure as unrealistic, and it had accordingly reserved the right not to introduce free higher education. He wondered what would have happened if some State—for example, New Zealand—had objected to the reservation. Clearly, it would not have been able to enter into a treaty obligation to introduce free higher education *vis-à-vis* other States but not *vis-à-vis* Japan: only one system could apply. The objection would thus be meaningless unless New Zealand refused to enter into a treaty relationship with Japan. He had no answer to the question of what an objection entailed in the case of normative treaties. Perhaps the question should be revisited when the Commission came to consider the legal consequences of objections.

18. Mr. CHEE said that he was not convinced by the Special Rapporteur’s conclusion in paragraph 3 of his

report that objections to reservations should be defined according to the intention of the formulating State or international organization. While it was true that States sometimes made objections to reservations in veiled terms, without disclosing their true intentions, it was equally likely that they might do so in a clear and unambiguous way. When a State made a reservation to a treaty, it was attempting to restrict the scope of application of the treaty *vis-à-vis* the other contracting party. Such an attempt should not be made lightly, through the use of veiled words or ambiguous expressions. Likewise, it was important that a State affected by the reservation should make a clear and unmistakable attempt to express its objection thereto.

19. How the objecting State should conduct itself in that regard had been laid down by ICJ in the 1951 *Reservations to the Convention on Genocide* case in the following manner:

... each State which is a party to the Convention is entitled to appraise the validity of the reservation ... from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State. (p. 26)

With that wording, the Court had commented on the legal effect of a reservation *vis-à-vis* the State that objected to the reservation, but had not defined what constituted an objection.

20. Similarly, in its 1961 judgment in the Case concerning the *Temple of Preah Vihear* (preliminary objections), the Court had held that it “must apply its normal canons of interpretation, the first of which ... is that words are to be interpreted according to their natural and ordinary meaning in the context in which they occur” (p. 32). Applying that reasoning, it seemed that the phrase “objection to” carried the meaning of either “opposition to” or “disapproval of”. Reverting to the Special Rapporteur’s statements in paragraph 3 of his report, he wondered how the intention of the objection’s author was to be discerned if it was not communicated in a clear and unmistakable manner to the reserving State. In paragraph 13 of his report, the Special Rapporteur referred to “the need to take into consideration the intention of the objecting State or international organization, whose unilateral statement in reaction to a reservation must purport ‘to oppose’ ... the reservation’s having the full effects sought by its author”. He endorsed that statement wholeheartedly.

21. Mr. MANSFIELD said that as one who had expressed concerns about the Special Rapporteur’s original formulation of the definition of objections, he appreciated the steps taken to meet those concerns. He was inclined to agree with those who considered that the first of the new formulations, contained in paragraph 15 of the report, was the better of the two; that relatively esoteric matter could perhaps best be explored in the Drafting Committee. He continued to believe, however, that any formulation arrived at, and indeed the question of whether a definition was needed at all, would have to be reviewed in the light of the work subsequently undertaken on the

<sup>8</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (see footnote 3 above), p. 159.

legal effects of reservations. That said, he had no objection to draft guidelines 2.6.1 and 2.6.2 being referred to the Drafting Committee.

22. Mr. CANDIOTI said that he agreed in general with the approach taken to the definition of objections and could accept the more succinct formulation of draft guideline 2.6.1 given in paragraph 22 of the report. He nevertheless preferred the earlier formulation, “prevent the reservation having any or some of its effects”, set out in paragraph 15 of the report. That was a clearer and more direct way of describing the possible intentions being pursued through the formulation of an objection, provided that subsequent draft guidelines would specify which States or international organizations that were bound by the treaty in question would be entitled to formulate objections, and at what time they could do so.

23. The definition should also include the element of relativity, as had the original proposal. An objection established a particular relationship between the reserving State and the objecting State, but it did not have any general ramifications, having no effect, in principle, on the relations between the other parties to the treaty and the reserving State.

24. The Drafting Committee should look at the words “*dicho Estado u organización*” and “*cet État ou cette organisation*” in the Spanish and French versions of draft guideline 2.6.1 (“the State or organization” in English), which created some confusion since the State or organization mentioned immediately previously was the reserving State or organization, not the objecting State or organization.

25. Turning to draft guideline 2.6.2, which proposed a new understanding of the word “objection” as covering a reaction to the late formulation or widening of the scope of a reservation, he said that while that meaning had been accepted by most members of the Commission, he shared the Special Rapporteur’s view that a reaction of that type did not constitute a true objection to a reservation within the meaning of the 1969 and 1986 Vienna Conventions, being different in terms of its function and its effects. If the Guide to Practice was intended to shed light on the practice of reservations and dispel confusion, then it did not seem useful to give one term two different meanings, corresponding to two different legal acts.

26. Mr. GALICKI, responding to the comments by Mr. Mansfield and Mr. Candiotti, said that the definition of objections to reservations proposed in 2003 had been too elaborate and overambitious; the idea of simplifying it so as to reflect State practice more closely was thus worthy of support. However, the outcome of the exercise was not fully acceptable. He would prefer, as Mr. Candiotti had suggested, not to go so far in limiting the purpose of objections. The latest proposal was concise to a fault: the purpose was simply “to modify the effects expected of the reservation”.

27. As the Special Rapporteur indicated in his report, the Commission should not follow the pattern used for the definition of the reservation itself. However, the legal language used regarding reservations in article 2, paragraph 1

(d), of the 1969 Vienna Convention, which differentiated between exclusion and modification of the legal effects of a treaty, should also be applied to the effects of an objection. To speak only of modifying effects, as did draft guideline 2.6.1, would be to narrow the frame of reference unduly. The version of the guideline in paragraph 15 of the report was slightly preferable to that in paragraph 22; his main concern, however, was not to lose sight of the distinction between modifying legal effects and excluding legal effects.

28. Mr. MATHESON said that he had the same doubts as Mr. Kolodkin as to whether a definition of objections was needed at the present stage. However, if one was to be developed, then it must not prejudge the issue of the scope and validity of objections. The new, shorter formulations in paragraphs 15 and 22 of the report were thus welcome improvements.

29. He also had doubts about the words “any or some” in draft guideline 2.6.1 as set out in paragraph 15, which might invite the possibility of some kind of partial objection, something that was not contemplated under the 1969 Vienna Convention. On the other hand, in the version contained in paragraph 22, the words “modify” and “expected” might create problems. The Drafting Committee might therefore be asked to look at both formulations and try to reconcile them; or, if only the version in paragraph 22 was to be referred to the Drafting Committee, it could be asked to bear in mind the somewhat different language of paragraph 15 in attempting to arrive at a suitable solution.

*The meeting rose at 11.10 a.m.*

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## 2822nd MEETING

*Friday, 23 July 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, 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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**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded)\* (A/CN.4/537, sect. C, A/**