Summary record of the 2822nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/)
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 prejudice 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.

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. Dauudi, Mr. Dugard, Mr. Economides, Mr. Foniba, 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. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.

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/
1. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee), introducing the Drafting Committee's report on international liability in case of loss from transboundary harm arising out of hazardous activities (A/CN.4/L.662), thanked the Special Rapporteur, Mr. Sreenivasa Rao, for his cooperation, and the Working Group established to consider the proposed draft principles for its report, which had facilitated the Committee's deliberations. It had been decided, both in plenary and in the Working Group, that, for the purposes of the first reading, the Commission would work on the assumption that the definitive instrument would include a set of principles, on the understanding that the Commission would reserve the right to reconsider that decision in the light of comments by Governments. The title of the draft principles was “Allocation of loss in the case of transboundary harm arising out of hazardous activities” to make it clear that they were drafted in terms of State cooperation, with particular emphasis on the “polluter pays” principle. The structure of the draft principles was basically the same as that proposed by the Working Group.

2. With regard to the preamble, he recalled that although the texts submitted by the Commission to the General Assembly usually did not have a preamble, there had been several exceptions, such as those relating to the draft Convention on the Elimination of Future Statelessness and the draft Convention on the Reduction of Future Statelessness, the draft articles on nationality of natural persons in relation to the succession of States and the draft articles on prevention of transboundary harm from hazardous activities. Since the Commission was to submit draft principles, a draft preamble seemed to be appropriate.

3. The Drafting Committee had worked on the basis of a document proposed by one of its members. First of all, it had been considered that, in the light of certain recent events, it was necessary to stress the importance of developing liability regimes, while acknowledging the acquis of existing regimes covering hazardous activities. Secondly, it had been considered important to maintain the link that existed between the draft principles and the scope of application was the same, namely “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences”;

4. In view of the foregoing, the Drafting Committee had prepared a second draft, on which the text under consideration was based. In order to place the draft principles in context, it had been found useful to begin the preamble with a reference to principles 13 and 16 of the Rio Declaration on Environment and Development (Rio Declaration), which respectively referred to the need to develop national law regarding liability and compensation for the victims of pollution and other environmental damage and to internalize the costs of protecting the environment, taking into account the “polluter pays” principle. In that connection, opinion had been divided as to the advisability of an explicit reference to that principle in the text of the preamble. The Drafting Committee had finally settled for a simple reference to the Rio Declaration. The second preambular paragraph, which linked the draft principles to the draft articles on prevention of transboundary harm from hazardous activities, was self-explanatory. The third, fourth and fifth preambular paragraphs explained the rationale behind the draft principles. The original text had been retained, apart from some amendments to the third and fifth preambular paragraphs. In particular, the reference to the implementation of best practices concerning risk management had been deleted from the third preambular paragraph, the Committee having considered that the reference to the second preambular paragraph to the draft articles on prevention was sufficiently clear. The wording of the fifth preambular paragraph had also been streamlined, with the word “arrangements” being replaced by the word “measures” so as to avoid confusion with a similar formulation in the seventh preambular paragraph, which had subsequently been deleted. The sixth preambular paragraph stressed that the draft principles did not affect State responsibility as a result of failure to fulfill its preventive obligations under international law. The seventh preambular paragraph recognized the importance of international cooperation, the eighth preambular paragraph recalled the existence of international agreements for various categories of hazardous activities and the last preambular paragraph indicated the desire of the General Assembly to contribute further to the development of international law in that field.

5. Turning to the consideration of each draft principle, he said that draft principle 1, which related to the scope of application, was virtually the same as that proposed by the Working Group. An effort had been made to align the text with that of the draft articles on prevention, whose scope of application was the same, namely “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences”;

---

* See 2815th meeting.  
1 Reproduced in Yearbook ... 2004, vol. II (Part One).  
2 Ibid.  
4 See 2799th meeting, footnote 2.  
5 See 2797th meeting, footnote 3.
“transboundary” before the word “damage”. Discussions in the Drafting Committee had focused on the use in the English text of the terms “damage” and “harm” and on the possible redundancy resulting from the fact that the two words were generally synonymous.

6. Several proposals had been made for the wording of the draft principle. It had been proposed that the definition of scope should focus on the need to provide prompt and adequate compensation to the victim. It had also been proposed that, in the English text, the words “in relation to damage” should be deleted, since, in other languages, particularly French, the concept of “damage” was not distinguishable from that of “harm”; and that, in the English text, the words “transboundary harm” at the end of the paragraph should be replaced by the words “transboundary damage”. With regard to the first proposal, it had been observed that the scope of the draft principles transcended the provision of prompt and adequate compensation to victims. The draft principles also applied, for example, to response measures to be taken in the event of an incident in an effort to minimize damage. As for the second proposal, it had been preferred to retain the two terms “damage” and “harm”, since the first, more specific term was better suited to situations where the damage had actually occurred and a distinction had to be drawn between the draft principles on liability and the draft articles on prevention. The third proposal had not been adopted, as it had been deemed preferable to keep the same terms as those used in the draft articles on prevention, since the change would mean the loss of the concept of risk, which it was important to highlight. It had been understood that the text submitted by the Working Group contained four main elements that needed to be preserved: (a) the activities in question were not prohibited by international law; (b) such activities involved a risk of causing significant harm; (c) such harm must be transboundary; (d) and transboundary harm must be caused by the activities in question through their physical consequences. It had therefore been decided to retain that text.

7. With regard to draft principle 2 on the use of terms, paragraph (a) corresponded in full to the draft principle proposed by the Working Group. However, the Drafting Committee had discussed whether a subparagraph dealing exclusively with loss of income should be included. The Special Rapporteur’s second report (A/CN.4/540) contained a provision which read: “Loss of income from an economic interest directly deriving from an impairment of the use of property or natural resources or environment, taking into account savings and costs”. That provision had been the subject of discussion both in plenary and within the Working Group. The Drafting Committee had initially planned to include the following provision between subparagraphs (iii) and (iv): “Loss of income directly deriving from (ii) and (iii) above”. Such a provision was intended to cover purely economic loss, as had been done in the more recent liability regimes, such as the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context and some members of the Commission had been in favour of that. Following an exchange of views on the matter, it had been agreed that, in principle, aspects concerning purely economic loss should be covered under the heading “damage”, although there was doubt as to whether they constituted an element of damage as such or an element of compensation. It had also been noted that the notion of loss of income applied not only to subparagraphs (ii) and (iii) but also to subparagraph (i), but that it had been highlighted above all in some regimes relating to damage resulting from impairment of the environment. The Drafting Committee had eventually decided to retain the text proposed by the Working Group and to deal with the main aspects of the proposal in the commentary.

8. Paragraph (b) of draft principle 2 relating to the environment corresponded to the definition proposed by the Working Group. All the relevant elements contained in the definition would be elaborated on in the commentary. Paragraph (c), originally paragraph (e), contained a simplified definition of the term “transboundary damage”, which corresponded to the scope of application defined in draft principle 1. The phrase “outside the territory but” had been deleted and moved in order to highlight its close links with the definition of “damage”, including damage to the environment, as defined in paragraph (b). Paragraph (d), previously paragraph (c), defined “hazardous activity”. Apart from a drafting amendment in the English text, the Committee had decided to add the words “through its physical consequences” at the end of the sentence to reflect the wording of draft principle 1. Paragraph (e), originally paragraph (d), defined the operator and was the same as the text proposed by the Working Group. Its contents would be further elaborated on in the commentary.

9. Draft principle 3, entitled “Objective”, contained three elements. The first element related to the need to ensure prompt and adequate compensation to victims of transboundary damage; the compensation must be prompt, so that victims would not be left too long without support, and adequate, in other words, commensurate with the extent and gravity of the damage. It should be noted that, in certain circumstances, prompt and adequate compensation could also consist in reinstatement, as indicated in paragraph (a) (iv) of draft principle 2. The second element was that victims could be natural or legal persons. Although States were legal persons, States were explicitly referred to (“including States”) to highlight the fact that they could also be the victims of transboundary damage, where the damage had been caused to State-owned property or to the environment. The third element was that transboundary damage could include damage to the “environment”. The Drafting Committee had wished to emphasize that damage to the environment per se could be subject to prompt and adequate compensation, although damage to the environment was already covered by the definition of the term “damage” given in draft principle 2 (a).

10. Draft principle 4, entitled “Prompt and adequate compensation”, reflected the important role of the State of origin in setting up a workable system for compliance with the requirement of such compensation. It contained four points: firstly, the State must establish a liability regime under its domestic law; secondly, any such regime should not require proof of fault; thirdly, any conditions or restrictions that might be placed on such liability should not weaken the requirement of prompt and
adequate compensation; and, fourthly, the regime should integrate various forms of securities, insurance and industry funding to provide sufficient financial guarantees for compensation.

11. Paragraph 1, which addressed the first point, required that the State of origin should take the necessary measures to ensure that prompt and adequate compensation was available for victims of transboundary damage caused by hazardous activities within its territory or under its jurisdiction. Since the paragraph related to the State of origin, the Committee had replaced the words “States” by the words “Each State”. In order to make it consistent with the text of the draft articles on prevention of transboundary harm from hazardous activities, the Committee had also slightly revised the latter part of the article to read: “its territory or otherwise under its jurisdiction or control”, which was the wording used in article 6, paragraph 1 (a), of the draft articles on prevention.

12. Paragraph 2 related to the second and third requirements. It provided that a liability regime should not require proof of fault and that any conditions or restrictions on such liability should be consistent with draft principle 3, with its requirement of prompt and adequate compensation. The first sentence, highlighting the “polluter pays” principle, provided that liability should be imposed on the operator or, where appropriate, another person or entity. The second contained the requirement that such liability should not entail proof of fault. The third recognized that it was customary for States and for international conventions to subject liability to certain conditions or limitations. However, to ensure that conditions or exceptions did not fundamentally alter the nature of the obligation to provide for prompt and adequate compensation, it had been emphasized that they should be consistent with the requirements of such compensation in draft principle 3. It was worth noting that the second sentence of the original draft principle as proposed by the Working Group had been divided into two. The Drafting Committee had considered that, although the issues were of equal importance, they were substantially different from each other and would therefore be more clearly expressed in two separate sentences. Moreover, the new wording did not encourage the imposition of conditions, limitations or exceptions to liability, as had been the impression given by the text originally proposed by the Working Group. In addition, the Committee had, in the interests of greater precision, replaced the words “draft principles”, at the end of the text as drawn up by the Working Group, by the words “draft principle 3”.

13. Paragraphs 3 to 5 dealt with the financial security arrangements that should be set up in order to provide prompt and adequate compensation. Paragraph 3 provided that the measures taken by the State of origin should include a requirement that the operator or, where appropriate, another person or entity should establish and maintain financial security, such as insurance, bonds or other financial guarantees, to cover claims for compensation. In order to make the paragraph consistent with paragraph 2, the Drafting Committee had added the phrase “or, where appropriate, other person and entity” after the word “operator”. Paragraph 4 provided that, in appropriate cases, the measures implemented should include a requirement that industry funds should be established at the national level. The Committee had retained the text proposed by the Working Group, except that it had replaced the words “the measures” by the words “these measures” to indicate clearly that the reference was to the various measures that a State would need to take.

14. Paragraph 5 imposed a further obligation on the State of origin by requiring that, in the event that the measures mentioned in the preceding paragraphs were insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources were allocated. The Drafting Committee had retained the text proposed by the Working Group, except that it had replaced the word “States” by the word “the State” in order to make it clear that the reference was to the State of origin and not to all other States. It was worth noting that the last three paragraphs gave the State of origin the freedom to determine what financial mechanisms were required for prompt and adequate compensation, the presumption being that it would continually review its domestic law to ensure that its regulations kept up with the development of technology and industry practices in its territory and elsewhere. Paragraph 5, while not directly requiring the State of origin to set up government funds to guarantee prompt and adequate compensation, did require it to ensure that additional financial resources were allocated.

15. Draft principle 5 dealt with response measures. Its initial title in English, “Response action”, had been replaced by “Response measures” to bring it into line with the term “reasonable response measures”, which was to be found in draft principle 2 on the use of terms. It was, however, understood that the response measures which might be taken could extend beyond those which were provided for in draft principle 2 and which, in theory and in practice, were usually associated with the costs in respect of damage, particularly damage to the environment.

16. The draft principle differed in three respects from that submitted by the Working Group. Firstly, as already mentioned, the reference to “Response action” had been changed to “Response measures”. Secondly, the order of the words in the first sentence had been inverted in order to accentuate the rationale for taking response measures. The Drafting Committee had considered whether the obligation should be placed on “States” or “each State”, as had been done in draft principle 4, but it had preferred to retain the word “States”. It was axiomatic that it was important to ensure that States which had been or might be affected by transboundary damage could take response measures. Thirdly, in order to separate the various levels of interaction referred to in the second sentence of the text—namely, notification, consultation and cooperation—some members had considered that the word “prompt” was suitable for notification, but might not be entirely appropriate in an emergency situation with reference to “consultation” and “cooperation”, which were more consensual, guided by good faith and usually triggered by a request. Others had, however, felt that consultation and cooperation were necessary, since the focus of the draft principles was on transboundary damage. It had therefore been decided that the cases in which recourse could be had to consultation and cooperation should be limited by adding
the words “where appropriate”. The Drafting Committee had been of the opinion that, of all the expressions suggested, which had included “appropriate consultation and cooperation”, “appropriate consultation and cooperation, as mutually agreed” and “as necessary, consultation and cooperation”, the term chosen was sufficiently flexible to cover a wide range of interaction processes, depending on the circumstances of each case.

17. The Drafting Committee had also considered whether there should be a particular sequence between the various actors which were supposed to take the response measures recommended. While no such sequence was implied in the phrase “States, if necessary with the assistance of the operator, or, where appropriate, the operator”, the Committee had considered that it would be reasonable to assume that, in the context of transboundary damage, the State would have a more prominent role. It could not be overemphasized that States had a general obligation to ensure that activities carried out within their jurisdiction or control did not give rise to transboundary harm. Moreover, a State would have the option of being reimbursed for the cost of reasonable response measures. The proposed wording was also designed to take account of certain diplomatic nuances that might be involved. The possibility that an operator, including a transnational corporation, might be the first to react was not to be ruled out.

18. Draft principle 6 was entitled “International and domestic remedies”. Its initial title had been “Remedies”. It had been broken down into three paragraphs, instead of the two originally proposed by the Working Group. The second sentence of the original paragraph had become paragraph 2. The text was thus better balanced and drew attention to both international and domestic procedures.

19. The first sentence of paragraph 1 was unchanged. The obligation to provide appropriate procedures to ensure compensation applied to all States. That paragraph should be contrasted with paragraph 3, which specified the obligations of each State. Furthermore, in order to ensure the consistency of the terminology used in the draft principles, the words “transboundary harm” had been replaced by the words “transboundary damage”.

20. Paragraph 2 was based on what had initially been the second sentence of paragraph 1. Its purpose was to clarify the nature of the procedures involved. The words “international procedures or forms of settlement” had therefore been replaced by the words “international claims settlement procedures”, the focus being on “claims settlement”. Such procedures might include mixed claims commissions or negotiations for lump-sum payments. The international component did not rule out the possibility of a State of origin making a contribution to the affected State so that compensation could be disbursed through a national claims procedure established by that State. The Drafting Committee was aware of the heavy costs involved in pursuing claims at the international level and it also knew that it took a long time to settle some international claims. The reference to expeditious procedures involving minimal expenses reflected a desire not to overburden the victim with a lengthy procedure akin to a judicial trial or with procedures which might act as a disincentive. It had also been suggested that mention should be made of “prompt and effective” or just “effective” procedures. The Committee had opted for the current formulation to focus attention on the victim. The procedures were understood to be without prejudice to the right of the individual to pursue other remedies under domestic law.

21. Paragraph 3 focused on domestic procedures. It was an equal right of access provision based on the presumption that the right of access could be exercised only once there was an appropriate system in place for the exercise of individual rights. The first sentence of paragraph 3 therefore dealt with the competence of administrative and judicial mechanisms, which must be able to entertain claims relating to activities that came within the scope of the principles. The first sentence also dealt with the effectiveness of the remedies themselves. It stressed the importance of removing hurdles in order to ensure participation in administrative hearings and proceedings. As paragraph 1 had been split, it had been recast so that the purpose stated in new paragraph 1 was reiterated in full. The obligation now applied to “each State” and not just to “States”. The second sentence dealt with two aspects of the equal right of access. Firstly, it emphasized the importance of non-discriminatory standards for the settlement of claims concerning hazardous activities. In that connection, the broader concept of “remedies”, which had appeared in the original text, had been replaced by the concept of “mechanisms”. Secondly, the sentence dealt with equal access to information. The word “appropriate” had been used to indicate that, in certain circumstances, access to information or the disclosure of information might be denied. It was, however, essential that, even in such circumstances, information should be readily available on the applicable exceptions, grounds for refusal, review procedures and, possibly, the applicable charges. Where feasible, such information should be accessible free of charge or at minimal cost.

22. Draft principle 7 (Development of specific international regimes) reflected recognition of the significant role of States and the importance of their cooperation in setting up and implementing any regime that could prevent and minimize significant transboundary damage from hazardous activities and compensate the victims. That idea was also reflected in the draft articles on prevention. In addition, draft principle 7 laid down the same set of obligations as draft principle 4, but at the international level.

23. Paragraph 1 encouraged States to cooperate in the development of international agreements on a global, regional or bilateral basis in order to make arrangements in three areas: prevention; response measures in order to minimize transboundary damage in the event of an accident involving specific categories of hazardous activities; and compensation and financial mechanisms to secure prompt and adequate compensation. The Drafting Committee had retained the text which had been proposed by the Working Group and to which it had added some drafting amendments for linguistic reasons and for the sake of consistency with the text of the preceding draft principles.

24. In paragraph 2, States were encouraged to set up various international financial security measures funded by industry or by the State in order to provide victims
of transboundary damage with sufficient, prompt and adequate compensation. In addition, the paragraph highlighted the idea that, no matter what domestic measures States might have to take to fulfill their response and compensation obligations, a more secure and consistent pattern of practice in that area required the adoption of international arrangements.

25. Draft principle 8, entitled “Implementation”, reaffirmed what had been implied in the other draft principles, that each State must adopt the legislative, regulatory and administrative measures necessary for the implementation of the draft principles. It also emphasized that these principles and any implementing provisions should be applied without any discrimination on any grounds. One point to be noted was that the Drafting Committee had slightly amended the last part of paragraph 2 of the text prepared by the Working Group in order to make it clear that any discrimination was prohibited. The references to nationality, domicile or residence were only examples, albeit common and relevant examples of bases for discrimination in the context of the settlement of claims arising out of transboundary damage. Paragraph 3 was a general clause laying down that States should cooperate with each other in order to implement the draft principles in accordance with their obligations under international law.

26. The CHAIRPERSON suggested that the Commission should adopt the preamble and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities as contained in document A/CN.4/L.662. If he heard no objection, he would take it that the Commission accepted that proposal.

It was so decided.

Organization of work of the session (continued) *

[Agenda item 1]

27. The CHAIRPERSON announced that the Commission would suspend the meeting in order to officially close the International Law Seminar.

The meeting was suspended at 10.55 a.m. and resumed at 11.45 a.m.


[Agenda item 6]

Ninth report of the Special Rapporteur (concluded)

28. MR. PELLET (Special Rapporteur) said that he had three preliminary comments to make on the preceding meetings. The first was that he had been sincerely pleased that he had been able to participate in the discussions. Admittedly, some had commented that his report (A/CN.4/544) was short, but no one had attacked him in an area where it would have been easy to do so. The document that he had, under pressure from the Secretariat, pompously termed the “ninth report” was not a report properly speaking, but rather, as stated in the footnote on the cover page, a corrigendum to part of his eighth report, which had given rise to criticisms that had seemed to him to have some merit. He had not written a report for the current session, since, in the light of the discussions at the preceding session, it had seemed crucial to undertake a comprehensive examination of the formulation of objections and acceptances; that was a substantial task, which he had not yet completed. He solemnly undertook to do so before the next session, however, and at the same time he would consider the validity of reservations and objections. In that context, he proposed to include a question to States in chapter III of the report of the Commission to the General Assembly on the work of its session concerning the word “validity”, which he had earlier abandoned owing to the controversy that it had caused, but which he intended to re-examine in future reports.

29. His second comment related to the pace at which the consideration of the topic was proceeding. The Commission had taken its time, but if it went too quickly, simply for the satisfaction of wrapping up the draft articles within a timescale that it had arbitrarily fixed for itself, it would undoubtedly neglect some essential points. The question of reservations was, of course, of great interest to States, but they had managed for 35 years with the deficiencies and ambiguities of the Vienna Conventions and they could doubtless wait a few more if they could be assured of a complete, useful and well-thought-out guide to practice.

30. His third preliminary comment was that he had been extremely surprised to hear his colleagues attribute to him the qualities of adaptability and flexibility, with which he was not usually credited. People tended to remember their failures rather than the occasions on which they had changed their minds, but he had found himself convinced by a number of serious and logical arguments. That having been said, there were limits to his flexibility. He thus disagreed with his colleagues on three important points of principle. Firstly, doubt had been expressed as to the usefulness of a definition of objections to reservations. Such a definition would undoubtedly be useful: the 1969 and 1986 Vienna Conventions did not contain one and it was essential to have one, since the institution constituted by objections to reservations produced legal effects. Moreover, the problem had arisen in practice; for example, the arbitral tribunal that had settled the dispute between France and the United Kingdom concerning the English Channel case had devoted much time to the issue. In addition, States had, in 2003, almost unanimously welcomed the fact that the Commission had decided to adopt an actual definition of objections. The time was ripe to do so. If the question was delayed until it had been examined from every angle, it would be necessary first to produce not a report, but a hefty tome running to 800 or 1,000 pages, since the whole of the law of reservations would have to be reviewed before it would be possible to embark on a definition.

* Resumed from the 2818th meeting.

† 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.

‡ See footnote 1 above.
31. There was another point on which he had not been convinced by the arguments of some members of the Commission during the current session. The successive definitions of objections proposed by him, which appeared in paragraphs 2, 15 and 22 of the “ninth report”, had a common element: they defined objections to reservations in terms of the effects intended by their authors. Some members had expressed doubt as to the validity of that approach, although it had been widely approved at the preceding session of the Commission and in the Sixth Committee. It could surely not be asserted that States did not have intentions or that they did not expect their objections to have any effect, on the grounds that the effect of objections would be identical to that of acceptances. It was quite possible that an objection might have scarcely any practical effect, as was surely the case where normative treaties were concerned, but, in such cases, the objections related more to the “reservations dialogue” (one State seeking to convince another State to withdraw its reservation) than to the law of reservations as such, which was based on reciprocity. That did not mean, however, that the State did not intend to produce certain effects by its objection. He had three comments to make in response to members who said that his approach was too subjective or that States did not always indicate their purpose when formulating an objection. Firstly, to take the effect intended by an objection as the starting point was no more or less subjective than the position taken by the 1969 and 1986 Vienna Conventions themselves in defining reservations. The concept of the purpose was at the very heart of the definition of reservations in those Conventions, as reflected in the Guide to Practice. Secondly, it was true that States did not always say precisely what they intended by their objections, but they did so more and more frequently and, under article 20, paragraph 4 (b), and article 21, paragraph 3, of the Conventions, they were obliged to do so if they intended a given treaty not to enter into force in their relations with the author of the reservation. States should also be encouraged to provide explanations of that kind, as indicated in paragraph 106 of the eighth report on reservations to treaties. Lastly, the same applied to reservations themselves. States seldom indicated the reasons for their reservations, yet that was no obstacle either to defining reservations in relation to their intended effects or to determining what those effects were on the basis of the actual text of the reservations.

32. There was a third point on which the criticism had not been convincing. He agreed with the idea that the Guide to Practice should determine when an objection would or must be made and which categories of States and international organizations could formulate an objection, particularly as he himself had emphasized that idea in paragraph 100 of his eighth report and in paragraph 23 of his ninth report, which referred to the potential authors of an objection, and in paragraph 76 of his eighth report on the moment when an objection must be formulated. Contrary to what some members of the Commission believed, however, those were questions which were not at all self-evident, to which further consideration should be given on the basis of examples and which were sensitive enough to be dealt with in separate draft guidelines that he intended to submit, as he had indicated at the preceding session and at the current session.

33. He would “stick to his guns” on those three points, but he had exaggerated somewhat in replying to criticism that had often been expressed in very measured tones. That was as far as his well-known “flexibility” went.

34. Some of the other criticism had given him food for thought, however, and it should be discussed by the Drafting Committee. It related, for example, to the elements of the definition contained in paragraph 22 of the report. All members had agreed with the words “‘Object’ means a unilateral statement”. Two members had objected to the words “however phrased or named”, but it was difficult to understand why. Just as States saddled their reservations with the most unlikely names, so they gave their objections any old names and often mixed them up with “remarks” or “commentaries”, as stated by the arbitral tribunal in the 1977 award in the English Channel case. Those words were therefore necessary. As far as the words “made by a State or an international organization” were concerned, it was obvious that the Commission was dealing only with that type of declaration. With regard to the words “in response to a reservation”, it had been stated that the words “in response to” were too weak. In his view, however, they could not be separated from what followed and, in the light of what followed, they were justified. The words “oppose” and “opposition” might nevertheless offer a solution which it was up to the Drafting Committee to find. Although one speaker had referred to the words “formulated” and “made”, no one had picked up on a contradiction that he had discovered while preparing his statement. In paragraph 22 of the report, he had used the word “made” to refer to an objection and the word “formulated” to refer to the reservation being objected to, whereas the definition of a reservation contained in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and in draft guideline 1.1.1 referred to a unilateral statement “made”, not “formulated”. That was another question on which the Committee would have to take a decision.

35. The words “purports to modify the effects expected of the reservation [by the author of the reservation]” were the part of the definition which had given rise to the most “reservations” and “objections”, or simply to doubts and questions. There had not been any reaction to the square brackets and they could, if necessary, be dealt with by the Drafting Committee. The Commission could probably also rely on the Drafting Committee to deal with the words “whereby the State or organization”, which had been described as ambiguous because, grammatically, they could refer to the author of the reservation, whereas what was being referred to was the author of the objection. The text seemed quite clear to him, but, if the Commission so wished, the ambiguity might be removed by using the words: “whereby the objecting State or organization purports to…”.

36. “Purports to” do what was the crux of the issue. Originally, he had considered the possibility of referring to the 1969 and 1986 Vienna Conventions and using the following wording:
“‘Objection’ means a unilateral statement whereby a State or an organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, 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.”

37. He had decided against that wording because he had been convinced that it closed the door to any possibility that an objection might give rise to effects other than those provided for by the 1969 Vienna Convention. Ultimately, the only acceptable effects of an objection might well be those provided for by the 1969 and 1986 Vienna Conventions, but the practice of States clearly showed that they often intended to have their objections produce other effects. Perhaps those other effects intended by States were not legally possible, as he believed; perhaps objections with super-maximum effect were not valid; and perhaps the same was true of objections with intermediate effect, although he did not believe so. However, he did not see why the Commission should “excommunicate” those objections out of hand, right at the definition stage. That was not what it had done in the case of reservations and he therefore did not see why there could not be valid and invalid objections, just as there were valid and invalid reservations. The Commission’s discussions at the preceding session were what had convinced him on that point and had led him to make rather far-reaching changes in the definition of objections he had proposed: in the definition contained in paragraph 15 of the report, the author of the objection “purports to prevent the reservation having any or some of its effects”.

38. The members who had spoken had explained why they had a weakness for the word “prevent”, and he recalled that, at an earlier meeting, he had also explained why, in the definition contained in paragraph 22 of the report, he had replaced the word “prevent” by the word “modify”: primarily to take account of objections with intermediate effect, those that went further than a minimum effect but less far than the maximum effect, since their authors did not go as far as to refuse the entry into force of the treaty in their relations with the author of the reservation, but nevertheless considered that the balance of the treaty would be destroyed in the mutual relations between the two States if some of the provisions of the treaty to which the reservation did not relate directly were applied. Those objections with intermediate effect remained within the boundaries of the two extreme cases provided for in the 1969 and 1986 Vienna Conventions, but when their effect was analysed it was hard to say that they “prevented” the reservation from producing its effects. However, they did modify the effects that the reservation would have had in the absence of an objection. In his view, the word “modify” covered all those possibilities, but, on the basis of the reactions to which that word had given rise, it obviously did not. As several members had suggested, the only solution was to combine the definitions contained in paragraphs 15 and 22 and use both the word “prevent” and the word “modify” or equivalent words. The word “exclude” would probably be better than the word “prevent”, if only because it was the word used in the definition of reservations.

39. It still had to be determined what was to be prevented or excluded and modified. In the definition contained in paragraph 22 of the report, he had proposed that reference should be made to the modification “of the effects expected of the reservation”. The word “expected” had been criticized, but another word could probably be found. The most important thing, however, was whether reference should be made to the effects which the author of the reservation expected of its reservation or intended it to have or to the effects which the reservation would produce objectively in the absence of an objection. He had been convinced by the members who had said that the Commission should go back to the definition contained in paragraph 15. Since the purpose intended by the author of the objection must be the key element of the definition of an objection, there was no reason to refer to the “subjectivity” of the author of the reservation itself. If the Commission retained the “subjectivity” of the author of the objection, which he definitely wished to keep, he was entirely willing to give up that of the author of the reservation and keep “only” its effects. Some members had regretted the fact that the relative element contained in the definition of reservations was not to be found in the definition of objections. By definition, a reservation had an effect only vis-à-vis its author in its relations with the other States parties to the treaty. That was what was meant, in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions, by the words “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. He had been convinced by the members who had expressed the view that that element of relativity should also be introduced in the definition of objections. Like a reservation, an objection could have effects only in the relations between its author and the reserving State or international organization. The law of reservations was basically a transition from pure multilateralism to modulated bilateralism, and that must be taken into account in the definition of objections. After a great deal of thought, which had been prompted by the Commission’s discussions, he was now proposing the following new text of draft guideline 2.6.1:

“‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international organization [in response to] [which objects to] a reservation to a treaty [made] [formulated] by another State or international organization, whereby the objecting State or international organization purports to exclude or modify the legal effect of the reservation in the relations between the author of the reservation and the author of the objection.”

40. In his view, that definition would “pass the test” of the statements which had been made by the Russian Federation and the Republic of Moldova in response to Pakistan’s reservation.10 The new text was, of course, only one example of what the Drafting Committee might come up with and he did not ask the members of the Commission to accept or even discuss it, or to refer it as it stood to the Drafting Committee. It would be sufficient for draft

---

1 See 2821st meeting, footnotes 4–6.
guideline 2.6.1 to be referred to the Drafting Committee, on the understanding that the Committee would have full freedom, in the light of the discussions, to combine, rearrange, merge or amend the various versions that he had proposed, particularly those contained in paragraphs 15 and 22 of his report and, possibly, the new version that he had just proposed orally.

41. Draft guideline 2.6.2 had been broadly accepted and its referral to the Drafting Committee should not give rise to any problems. Only one member had expressed some doubts, but, as he himself had recognized, those doubts were based on his well-known hostility to the late formulation of reservations. In fact, all members were hostile to such late formulation of reservations, but it was a fact of international legal life which States held dear and which the Commission had taken into account. He was absolutely not prepared to go back over that point, and, since the Commission had unwisely decided to describe the opposition of a State or an international organization to the late formulation of a reservation as an “objection”, it was essential to clarify matters, and that was precisely what draft guideline 2.6.2 was intended to do.

42. In conclusion, he expressed the hope that draft guidelines 2.6.1 and 2.6.2 would be referred to the Drafting Committee in the way that he had indicated.

43. Mr. ECONOMIDES said that he thought that the Special Rapporteur was trying to build on the wrong legal foundation. He referred to an “intermediate” effect between the two possibilities provided for in the 1969 and 1986 Vienna Conventions, those of excluding the provision to which the reservation related or objecting to the application of the treaty as a whole. Those two possibilities were enumerated exhaustively and there was no “intermediate” effect. The Commission could, of course, ignore those Vienna Conventions and build on the basis of the new practice, but it had decided from the very beginning to respect the Conventions. Paragraph 18 of the report showed that the effect of an objection could be not only to exclude the provision to which the reservation related, but also to exclude other provisions of the treaty which had not been affected by the reservation. In such a case, however, what were involved were new reservations, formulated by the objecting State, and the reserving State had to be given the right to formulate an objection to those new reservations. The Special Rapporteur should therefore prepare a draft guideline on reservations formulated by an objecting State and another on objections formulated by the reserving State.

44. The Special Rapporteur’s approach suggested that he was influenced by the concept of countermeasures, because, in presenting a State that formulated an objection as though it was applying a countermeasure, he was moving from the law of treaties into the law of State responsibility. The practice which had come into being since the adoption of the 1969 and 1986 Vienna Conventions was naturally worth taking into account, but two principles must be established in respect of any new practice: it must be compatible with the 1969 Vienna Convention, and, if that Convention contained gaps, it must be useful and positive and not likely to destroy the law of treaties. However, the concept of the “intermediate effect” of an objection might well destroy the law of treaties.

45. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 2.6.1 and 2.6.2 to the Drafting Committee.

It was so decided.

The meeting rose at 12.40 p.m.

2823rd MEETING

Tuesday, 27 July 2004, at 10.10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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


[Agenda item 9]

REPORT OF THE PLANNING GROUP

1. Ms. XUE (Chairperson of the Planning Group), presenting the report of the Planning Group (A/CN.4/L.664/Rev.1), said that at its three meetings the Planning Group had discussed the report of the Working Group on long-term programme of work; new topics for inclusion in the current programme of work; the Strategic Framework (2006–2007) for Programme 5: Subprogramme 3 (Progressive development and codification of international law); the documentation of the Commission; and the dates and place of the fifty-seventh session.

2. The Chairperson of the Working Group on long-term programme of work had presented an oral progress report to the Planning Group. After a thorough debate, the Planning Group had decided to recommend to the Commission the inclusion of the topic “Obligation to extradite or prosecute (aut dedere aut judicare)” in its long-term programme of work.

3. Moreover, since the Commission was likely to complete the first reading of two topics at its current session, the Planning Group had decided to recommend the inclusion of two new topics in its current programme of work: “Effects of armed conflicts on treaties” and “Expulsion of aliens”.

4. In response to the Acting Legal Counsel’s request for comments on the new Strategic Framework for