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Summary record of the 2890th meeting

Topic:
Reservations to treaties

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29. Lastly, Mr. GAJA wished to support two concerns raised by Mr. Matheson. First, it seemed premature to say, in draft guideline 3.3.2 (Nullity of invalid reservations), that “[a] reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void”. Such a guideline could give the impression that the Commission considered that reservations not in conformity with article 19 of the 1969 Vienna Convention had no consequence for the participation in the treaty of the State making the reservation; in other words, that invalid reservations should be considered not to exist. The question should be considered further with a view to eliminating any ambiguities. Second, with regard to draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he believed that, in the absence of relevant State practice, the draft guidelines should not countenance the possibility that States might derogate from the reservations regime of a treaty. It was nevertheless tacitly understood that a unanimous agreement could affect the reservations regime. It was important to spell out in the report or commentary that such agreement should be reached by the competent authorities of each State.

The meeting rose at 11.15 a.m.

2890th MEETING

Friday, 7 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2, A/CN.4/572, A/CN.4/574, A/CN.4/L.685 and Corr.1)

[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA thanked the Special Rapporteur for his very detailed study on reservations to treaties. She was sorry that the Commission had allotted so little time for the consideration of such a complex topic, which was of considerable interest to the entire international community.

2. With regard to reservations that were incompatible with the object and purpose of a treaty, she said that there was an additional category of reservations that merited study, namely reservations to provisions concerning the implementation of treaties through domestic law. Many

treaties, particularly human rights treaties, were non-self-executing and thus became inoperable if a reservation was formulated to the provision by which they were incorporated into national legislation.

3. As for the definition of the object and purpose of the treaty, discussed in the Special Rapporteur’s note (A/CN.4/572), she believed that the threshold of *raison d’être* was too high. Both versions of draft guideline 3.1.5 set far too many conditions. A reservation was made to a specific rule and not to the object and purpose of the treaty, which could only be discerned from the treaty as a whole. Yet a treaty often had more than one object, and if a particular provision concerned one of the objects without affecting the *raison d’être* of the treaty it might nevertheless affect a significant part by going against the object and purpose of the treaty. Such a reservation must therefore be excluded. As for the determination of the object and purpose of the treaty (draft guideline 3.1.6), she was in favour of keeping the bracketed reference to subsequent practice for the reasons given by Mr. Momtaz at the preceding meeting.

4. In draft guideline 3.2 as proposed in the tenth report (para. 167), which dealt with competence to assess the validity of reservations, the reference to domestic courts should be retained. It was important to distinguish between bodies whose assessments were merely recommendations and those whose assessments had binding consequences, such as courts, including domestic courts. In discussing dispute settlement bodies, she thought that special reference should be made to judicial bodies because their decisions could have different consequences from those emanating from the decisions of other bodies.

5. Draft guideline 3.2.1, on competence of the monitoring bodies established by the treaty, stipulated that the findings made by such bodies in the exercise of such competence should have the same legal force as that deriving from the performance of their general monitoring role. However, several of those bodies had quasi-judicial functions in addition to their general monitoring role. Acting like courts, they could rule on complaints not only from States but also from associations and individuals. Although their decisions did not have the force of a sentence, they had often been enforced by States, including in cases where compensation had been ordered. It was also unclear whether such bodies with quasi-judicial functions were covered by the second sentence of draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies), or whether that sentence referred only to courts. As for draft guideline 3.2.4, she felt that when there was a plurality of bodies competent to assess the validity of a reservation, an indication should be given that some assessments were more binding than others. All such bodies should not be lumped together as if they were identical; instead, it should be determined what the effect would be on the reservation if the assessment was made by a judicial or a quasi-judicial body.

6. While she supported draft guideline 3.3, on the consequences of the non-validity of a reservation, she did not agree entirely with draft guideline 3.3.1, which stipulated that the formulation of an invalid reservation did not engage the responsibility of the State or international

organization that had formulated it, and which was perhaps too general. A reservation that went against *jus cogens* would probably go against article 12 of the draft articles on State responsibility for internationally wrongful acts²⁰⁵ and ought therefore to engage the responsibility of the body that formulated it. Lastly, she believed that draft guideline 3.3.4, on the effect of collective acceptance of an invalid reservation, should be deleted, for the term “collective” merely referred to a series of bilateral consultations between the depositary and the other contracting parties. The result amounted to a revision of the treaty, making the draft guideline incompatible with articles 39 to 41 of the 1969 Vienna Convention, which stipulated that a treaty could be modified only through a process of negotiation.

7. Mr. FOMBA welcomed the fact that the Special Rapporteur had reviewed the definition of the object and purpose of the treaty, which in his view was barely functional insofar as the Guide to Practice was concerned. The two versions proposed for draft guideline 3.1.5 in the Special Rapporteur’s note (A/CN.4/572) were more workable than the text initially proposed, and offered a good basis for the work of the Drafting Committee. The first version was preferable because it was more in keeping with the general spirit of the definitions adopted in the Guide to Practice thus far, even if the concern for harmonization did not rule out other approaches. However, the meaning of the expression “the balance of the treaty” should be clarified in the commentary. Also, Mr. Gaja had said that a distinction had been drawn in article 60, paragraph 3 (b), of the 1969 Vienna Convention between the object and purpose of the treaty on the one hand and the rules on the other, yet what that paragraph actually said was that when a provision essential to the accomplishment of the object or purpose of the treaty was violated, there was a substantial violation of the treaty; there was thus a functional link between the two elements.

8. Draft guideline 3.2 was relevant to the extent that it was a general provision that recalled the many different ways in which a reservation could be assessed and highlighted the complementarity that existed among them. It did not call for any particular observation, except to say that the bracketed words in the first subparagraph would be better placed in the commentary. Draft guidelines 3.2.2 and 3.2.3 likewise did not merit any particular observations, although the bracketed phrase at the end of the latter could in fact be deleted, given that the idea it expressed seemed already to have been taken into consideration. Draft guideline 3.2.4 presented no problem.

9. As the Special Rapporteur had felt it was premature to take up the question of the consequences of an assessment of the validity of a reservation, which must be preceded by an in-depth study of the effects of the acceptance of and objections to reservations, the draft guidelines of the non-validity of a reservation ought to be considered on a provisional basis. Draft guideline 3.3 was based on a convincing substantive argument, and its wording did not pose any particular problem. Draft guideline 3.3.1 sought to dispel any remaining ambiguity surrounding the question of the non-validity of reservations and the question

of responsibility for an internationally wrongful act. It had been suggested that the second sentence should be deleted, but he thought that the idea that the formulation of an invalid reservation did not necessarily engage the responsibility of the State or international organization formulating it should be retained, since all the necessary conditions must be met, a fact that was not immediately obvious.

10. Draft guideline 3.3.2 (Nullity of invalid reservations), which was based on the doctrine and practice of human rights treaty monitoring bodies, defined when a reservation was null and void, even if the Commission had yet to express itself on the consequences of such nullity. That was a coherent way to proceed and one that could hardly be argued with. Draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation) was just as logical and had a relatively clear and limited scope, given that a distinction was made between the actual effect, which was the intrinsic nullity, and the possibility that other effects could be produced, an issue that could in fact be dealt with in the commentary. Draft guideline 3.3.4, meanwhile, dealt with a question that required further study, as did a number of others; however, it also had a certain logic in that it was based on a comparison with the late formulation of reservations, which was of interest both in theory and in practice. The Commission could therefore provisionally accept those guidelines, taking into account the pertinent observations that had been made, particularly by Mr. Momtaz.

11. In conclusion, Mr. FOMBA considered that, on the whole, the proposed draft guidelines went in the right direction. With regard to the question of whether the Commission should deal with the consequences of the nullity of reservations, he was of the view that the Guide to Practice should be as complete as possible, and that it should fill the gaps of the 1969 and 1986 Vienna Conventions and help decision-makers and practitioners decode the process of formulating and implementing reservations. Such a guide would therefore be incomplete if it did not deal with the effects of the nullity of reservations. In conclusion, Mr. Fomba proposed referring to the Drafting Committee draft guidelines 3.1.5, 3.2 and 3.2.1 to 3.2.4, and continuing the study of draft guidelines 3.3 and 3.3.1 to 3.3.4.

12. Mr. KEMICHA said he was pleased that the Special Rapporteur had modified the definition of the object and purpose of the treaty with a view to making it more concrete. He preferred the first of the two versions proposed for draft guideline 3.1.5 but found the title of the second, “Incompatibility of a reservation with the object and purpose of the treaty”, to be more explicit. The Drafting Committee ought to be able to combine the two versions in a satisfactory manner.

13. The draft guidelines relating to assessments of the validity of a reservation and their effects were, like the tenth report as a whole, models of their kind. Draft guideline 3.2 was entirely acceptable, provided that the phrase in square brackets in the first subparagraph was deleted, since, as the Special Rapporteur recalled in paragraph 168 of the report, domestic courts were an integral part of the State from the standpoint of international law. Draft

²⁰⁵ See footnote 8 above.

guideline 3.2.1, on the competence of monitoring bodies, was sufficient in and of itself, and there was no need to supplement it with draft guidelines 3.2.2 and 3.2.3, which were actually just recommendations. Draft guideline 3.3 was based on highly convincing arguments. Draft guideline 3.3.1 was perhaps not indispensable, given that the question of engaging State responsibility should not even be raised, but it could be retained if the Special Rapporteur felt it was useful in a guide to practice. Draft guidelines 3.3.2 to 3.3.4 were also useful, again from the standpoint of a guide to practice. Consequently, he believed that the whole set of new draft guidelines should be referred to the Drafting Committee, subject to the comments he had made.

14. Mr. ECONOMIDES shared the highly positive views of his colleagues with regard to the section of the tenth report of the Special Rapporteur on the determination of the validity of reservations and consequences thereof. With regard to draft guideline 3.1.5, which he had supported at the fifty-seventh session in 2005, he welcomed the effort by the Special Rapporteur to provide a better definition of a key notion in the law of treaties. Although he did not find the two new variants proposed by the Special Rapporteur in his note (A/CN.4/572) to be entirely satisfactory, particularly the expression “the balance of the treaty” and the word “serious”, which appeared in both variants, he believed that they must be referred, along with the texts initially submitted, to the Drafting Committee in the hope that the Drafting Committee would find the “magic formula” that would define the object and purpose of the treaty.

15. The phrase in square brackets in the first subparagraph of draft guideline 3.2 should be placed in the commentary. National authorities other than courts could, given their competence, find themselves considering the validity of certain reservations formulated by other States. Moreover, nothing prevented other contracting States or organizations from acting jointly or individually in such cases, something that might be spelled out in the draft guideline or at least in the commentary. The final phrase in square brackets in draft guideline 3.2.3 should be deleted, as it was superfluous and could be misinterpreted. It would be advisable to add the words “in principle” after the phrase “the competence of that body” in the first sentence of draft guideline 3.2.4, for it was not certain under what circumstances such bodies might have competence to hear a case.

16. The final phrase of draft guideline 3.3—“without there being any need to distinguish between these two grounds for invalidity”—was highly relevant and should be retained. Of course, reservations implicitly or expressly prohibited by the treaty were immediately identifiable, which was not the case with reservations that were incompatible with the object and purpose of the treaty. However, it must be recalled that the legal regime of invalid reservations was the same in all cases. As at the previous session, he strongly objected to draft guideline 3.3.1, for no rule of international law prohibited a State from invoking, if it so chose, the responsibility of another State for having violated treaty provisions having to do with reservations, and the Commission was far from being a legislative body that could address such

injunctions by States. The draft guideline was also open to criticism on other grounds, and he referred in particular to the statements made in that connection by Mr. Momtaz and Ms. Escameia. He supported draft guidelines 3.3.2, 3.3.3 and, to a lesser extent, 3.3.4, which seemed to him unnecessary, given that States were always free to make radical changes to the regime of reservations if they so desired.

17. In conclusion, he agreed that all the draft guidelines with the exception of guideline 3.3.1 should be referred to the Drafting Committee.

18. Mr. CHEE commended the Special Rapporteur, who had once again produced an excellent report.

19. The 1969 Vienna Convention was silent with regard to “validity”, perhaps because it was the acceptance or rejection of a reservation that was most important; it would therefore seem that the issue of validity was irrelevant. He agreed with Mr. Candioti that it would be preferable to speak of permissibility or impermissibility rather than validity.

20. With regard to draft guideline 3.1 (Freedom to formulate reservations), he hoped that the Special Rapporteur would explain why he had departed from the wording of article 19 of the 1969 Vienna Convention and used the word “freedom”. He endorsed draft guideline 3.1.1 (Reservations expressly prohibited by the treaty), which reflected subparagraph (b) of article 19 of the 1969 Vienna Convention, and draft guidelines 3.1.2 (Definition of specified reservations) and 3.1.4 (Compatibility of reservations authorized by the treaty with its object and purpose), which provided a useful explanation. However, he did not accept draft guideline 3.1.3 (Reservations implicitly permitted by the treaty), for even if it was not prohibited by the treaty, a reservation that went against the treaty could not be implicitly formulated.

21. He also did not think that it was accurate to say in draft guideline 3.1.5 that the *raison d'être* was the basic element of the object and purpose of the treaty, as they could be expressed in the preamble or other important parts of the treaty. As for draft guideline 3.1.6, it would be preferable to use the word “interpretation” rather than “determination”. He was opposed to draft guideline 3.1.7 (Vague, general reservations) because even if a treaty provision was vague or general, the binding nature of the instrument meant that it was still valid. He supported draft guidelines 3.1.8 (Reservations to a provision that sets forth a customary norm), 3.1.9 (Reservations to provisions setting forth a rule of *jus cogens*) and 3.1.13 (Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty).

22. With regard to draft guideline 3.2, he would prefer that competence to assess the validity of a reservation should be vested in the dispute settlement bodies having competence to interpret or apply the treaty, such as the ICJ or an arbitral tribunal. He did not support draft guidelines 3.2.1, 3.2.2, 3.2.3 and 3.2.4 because he did not agree that the bodies responsible for monitoring the implementation of a treaty should have competence to determine the permissibility of a reservation to the treaty,

an idea that was set out in the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.²⁰⁶

23. While he supported draft guideline 3.3, he doubted whether it was actually necessary. He also supported draft guidelines 3.3.1 to 3.3.4.

24. Mr. PELLET (Special Rapporteur) said that it was unacceptable to revert to draft guidelines that had been sent to the Drafting Committee at the previous session and adopted by the Drafting Committee and, subsequently, by the Commission. He had also been quite shocked at the previous meeting when Mr. Candioti had questioned the terms "validity" and "permissibility", issues that had already been settled, rightly or wrongly, but settled nonetheless. Members would be able to return to decisions taken when the Commission undertook its second reading.

25. Mr. CANDIOTI said that he had not sought to reopen the discussion on decisions taken by the Drafting Committee, but had merely wished to express his disagreement with the use of terms "validity", "nullity" and "responsibility" in the current context.

26. The CHAIRPERSON said that it was indeed inappropriate to reopen a debate at the current session on draft guidelines that had already been adopted.

27. Mr. YAMADA commended the Special Rapporteur on his tenth report and said that he endorsed the draft guidelines from guideline 3.1.5 onward; nevertheless, he wished to offer some comments from the standpoint of a practitioner.

28. In draft guideline 3.1.5 it would be difficult to go further than the new definition of the object and purpose of the treaty proposed by the Special Rapporteur in his note (A/CN.4/572). He had no preference for either alternative. He did wish to note, however, that when a treaty prohibited any reservation, that did not necessarily mean that all the provisions of the treaty were essential and constituted its *raison d'être*. Likewise, when a treaty allowed specific reservations, that did not necessarily mean that the specific provisions to which reservations could be made were not essential provisions. Decisions concerning reservation clauses were made during the negotiation of the treaty on the basis of the prevailing political atmosphere. When a treaty was silent on reservations, that did not necessarily mean that the political, economic or social context of the treaty regime could be neglected. Accordingly, it should be understood that in applying draft guideline 3.1.5 to a particular treaty, that context must be taken fully into account.

29. From that point of view he welcomed draft guideline 3.1.6, paragraph 1 of which reproduced article 31, paragraph 1, of the 1969 Vienna Convention. The Special Rapporteur had taken care to omit the last phrase—"in the light of its object and purpose"—to avoid a tautology. The Commission was thus faced with a dilemma: in order to interpret a treaty, it was necessary to know what the object

and purpose of the treaty was. Unfortunately, he had no answer to offer.

30. He had no problem with draft guideline 3.1.7, so long as it was read in the context of paragraphs 107 to 114 of the tenth report. By virtue of the reservation it had entered to article 4, subparagraphs (a) and (b), of the International Convention on the Elimination of All Forms of Racial Discrimination, Japan had indicated that it would fulfil its obligations under those provisions to the extent that doing so was compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under its Constitution. That reservation had not been contested, and it was his understanding that such a reservation was not covered by the draft guideline.

31. He understood draft guideline 3.1.8 to mean that a State could opt out of a provision setting forth a customary norm in its relations with States that accepted the reservation but that it continued to be bound by the norm *vis-à-vis* other States. If that was so, he supported that formulation. He had no comment on draft guidelines 3.1.9 to 3.1.13.

32. With regard to draft guidelines 3.2 and 3.2.1, he stressed that the competence of treaty monitoring bodies to assess the validity of reservations must be clearly conferred on such bodies by the treaty itself, and he supported draft guideline 3.2.2 (Clauses specifying the competence of monitoring bodies to assess the validity of reservations) on the basis of the same reasoning. He had no particular comment to make on draft guidelines 3.2.3 to 3.3.1.

33. Although he had no objection to the content of draft guidelines 3.3.2, 3.3.3 and 3.3.4, he, like Mr. Matheson, would prefer to defer their consideration, as he thought it should be noted that a State might object to a reservation not only when it considered the reservation to be incompatible with the object and purpose of the treaty, but also when it acknowledged that it was compatible.

34. Having said that, he agreed that the Commission should refer draft guidelines 3.1.5 to 3.3.1 to the Drafting Committee.

35. Mr. PELLET (Special Rapporteur) said he wished to know why Mr. Yamada thought that draft guideline 3.1.7 did not cover reservations of the type formulated by Japan with regard to article 4, subparagraphs (a) and (b), of the International Convention on the Elimination of All Forms of Racial Discrimination. He added that he did not know the exact content of that reservation.

36. Mr. YAMADA said that he would transmit the text of the reservation in question to the Secretariat so that Mr. Pellet could see it.

37. Ms. XUE said that the example provided by Mr. Yamada seemed particularly relevant, and she pointed out that the United Kingdom had made a reservation to the International Convention on the Elimination of All Forms of Discrimination against Women. In its reservation the United Kingdom had stated that it would discharge its obligations under the instrument to the extent that they were consistent with the country's internal legislation,

²⁰⁶ See footnote 201 above.

while indicating clearly that that legislation could be amended in the future. However, one could never tell just how legislation might evolve, so that such a scope of a reservation could be considered very vague and challenged on the grounds that it was incompatible with the object and purpose of the treaty. Such reservations, which were often formulated by States in practice, might thus be considered invalid under draft guideline 3.1.7, and that posed a problem.

38. Mr. PELLET (Special Rapporteur), addressing Mr. Yamada's remark first of all, said that he was not certain that the reservation entered by Japan was sufficiently precise to permit a true assessment of its validity. As for Ms. Xue's observation, he emphasized that the key issue at hand was determining whether States, when formulating reservations, provided elements that made it possible to assess the validity of those reservations. When States accepted a treaty on condition that it was in conformity with their domestic legislation while reserving to themselves the possibility of amending their legislation as they sought fit, it seemed clear that such a reservation was not in keeping with the rules governing the regime of treaties. That being said, a State could formulate a reservation with regard to a particular provision of a treaty that might not be in conformity with its domestic legislation at a given moment, while stipulating that as its legislation was brought into line with the treaty the reservation would change. The State could then withdraw it, as the Commission had already agreed. It was obvious, however, that a State could not formulate a reservation having a limited objective while keeping open the possibility that that it could be subsequently expanded as the State's legislation evolved, for that would completely distort the entire treaty system.

39. Mr. KOLODKIN noted first of all that in its work on reservations to treaties the Commission was trying to define a number of principles with a view to providing practical guidance. The objective was not to establish rules of law but to draw on the practice of States and international organizations in the context of the 1969 and 1986 Vienna Conventions in order to formulate recommendations intended for all those who applied international law so that they could find their way in an area that was particularly complex, insofar as the implementation of such treaties had given rise to a number of unanswered questions. That was why the content of the draft guidelines proposed by the Special Rapporteur did not appear in the 1969 and 1986 Vienna Conventions or differed from the language of those instruments in several cases, and it was therefore important to move cautiously. That being said, most of the draft guidelines reflected problems that did indeed arise in the context of treaty relations and that the Commission must try to solve one way or another in the absence of corresponding provisions in the 1969 and 1986 Vienna Conventions.

40. Reviewing the various draft guidelines proposed by the Special Rapporteur, he suggested that several of them needed to be looked at in greater depth. For example, the first version of draft guideline 3.1.5 proposed in paragraph 7 of the Special Rapporteur's note (A/CN.4/572) fell far from the desired mark. Technical terms such as the "architecture of the treaty" or the "balance of the treaty"

did not provide the necessary clarifications where the definition of the object and purpose of the treaty was concerned, even if they did help in determining the incompatibility of a reservation with the object and purpose of the treaty. Meanwhile, the second version proposed in paragraph 8 of the same document was not really a definition. If the Commission wished to define the concepts of the object and purpose of a treaty, it would be better to retain the text proposed by the Special Rapporteur in his tenth report, which could serve as a basis for the work of the Drafting Committee. He supported draft guidelines 3.1.6 to 3.1.13, for they clearly reflected needs that had been identified in practice, and he believed that they could be referred to the Drafting Committee.

41. As for draft guidelines 3.2 and 3.3, he shared Mr. Candiotti's views regarding the appropriateness of using the notion of validity of reservations, a notion that did not exist in the 1969 and 1986 Vienna Conventions, even if the Commission was already using it and he himself had operated on the basis of that notion as Chairperson of the Drafting Committee for the topic of reservations to treaties. If one was going to talk about the validity of reservations, then it was entirely logical to speak also of their invalidity. And yet he continued to have doubts on the matter. To a certain extent, a reservation was a proposal to include an agreement in a treaty, and the 1969 and 1986 Vienna Conventions specified the cases in which that could or could not be done, without going any further; thus the question of the invalidity of reservations arose only when there was a contradiction between the reservation and the imperative norms of international law. As the Special Rapporteur presented it, however, the notion of the invalidity of reservations applied not only to reservations to specific provisions of a treaty setting forth an imperative norm of international law but also to many other reservations. He therefore questioned whether it was right to follow that approach, and wondered whether the notions of permissibility and impermissibility, on which the 1969 and 1986 Vienna Conventions were based, might not be more appropriate. When it was a competent international body that assessed the invalidity of a reservation there was no problem, for the decision relating to the invalidity of the reservation could be challenged by all the parties to the treaty. However, when it was a State party to the treaty that ruled on the invalidity of a reservation, the reservation in question could then be invalid for some States but valid for others. In his view, that was somewhat contradictory, and draft guidelines 3.3.3 and especially 3.3.4 were imprecise.

42. Draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies) stressed the need to take fully into account the monitoring body's assessment of the validity of the reservation. Yet the decisions of such bodies were seldom binding, and he did not see why the decisions they took on the basis of their competence for determining the validity of reservations should be considered to be implicitly binding. If the draft guideline was transmitted to the Drafting Committee, he hoped that the word "fully" would be deleted.

43. He also failed to see why draft guideline 3.3 should contain a reference to the "implicit" prohibition of a reservation; he would like to see the text split in two, with the

first part explaining when a reservation was invalid and the second emphasizing that there was no need to distinguish between various grounds of invalidity. He likewise did not see why draft guidelines 3.3.1 and 3.3.2 addressed the issue of substantiating invalidity in a different manner. Moreover, the statement that the formulation of an invalid reservation produced its effects within the framework of the law of treaties should not be included in draft guideline 3.3.1; the issue should be dealt with in the commentary. Lastly, he wished to point out that draft guideline 3.3.4 referred to the competence of the depositary, even though the Commission had decided not to address that issue.

44. Mr. PELLET (Special Rapporteur) said he was most surprised that Mr. Kolodkin, who was Chairperson of the Drafting Committee for the topic of reservations to treaties, should go back on what had clearly been decided in the Drafting Committee and accepted by the Commission. According to him, the discussion of the notion of validity could only be a source of confusion. In fact, the 1969 and 1986 Vienna Conventions clearly set out the conditions under which reservations could or could not be formulated, which was precisely what was meant by the notions of validity or invalidity.

45. Mr. MANSFIELD thanked the Special Rapporteur for his detailed analysis. With regard to the revised version of draft guideline 3.1.5, he said that he remained somewhat sceptical as to the value of trying to define the object and purpose of a treaty. The discussion of the history and meaning of the term in paragraphs 72 to 89 of the Special Rapporteur's tenth report were probably more helpful than any effort to reduce that discussion to a few short phrases. That said, he had no strong objection to either of the two new versions proposed by the Special Rapporteur, which the Drafting Committee might be able to improve; in the end, however, he doubted that any wording would significantly help in defining the object and purpose of a treaty. As to the method to be employed in determining the object and purpose of a treaty, the Special Rapporteur had noted in paragraph 86 of the tenth report that it was not possible to devise a single method and that a certain amount of subjectivity was inevitable. Nevertheless, draft guideline 3.1.6 provided a useful starting point by elaborating what was meant by the term "context" in paragraph 2, although the last part of that paragraph, which said that the context included the articles that determined its basic structure and thus excluded other articles of the treaty, was hard to reconcile with the first paragraph, which said that to find the object and purpose of the treaty it was necessary to read the treaty as a whole. He therefore agreed with other members that it would be best to delete that last phrase.

46. He fully endorsed the underlying ideas in draft guidelines 3.1.7 and 3.1.9 but thought that the guidelines should be modified to reflect the fact that vague and general reservations and reservations to a provision setting out a rule of *jus cogens* were not inevitably contrary to the object and purpose the treaty. He could support the thrust of the other draft guidelines in that set, although he thought that in several cases some refinement of the text by the Drafting Committee might be needed.

47. He supported the thrust of draft guidelines 3.2 to 3.2.4, relating to competence to assess the validity of reservations. However, the phrase "Competence to assess" in the title of draft guideline 3.2 was rendered "competent to rule" in the body of the text. The former phrase was preferable in his view because it was more accurate and consistent with the Commission's earlier preliminary conclusions. Perhaps the guideline should also spell out that that competence was dependent upon the terms of the treaty. He did not think that the reference to domestic courts, which was included in square brackets, was necessary. The same was true for the second sentence of draft guideline 3.2.2.

48. He supported the thrust of draft guidelines 3.3 and 3.3.1 but thought that the last phrase in the former was unnecessary, while in the latter the text needed to be clearer. While he tended to agree with the Special Rapporteur's analysis that had led him to propose guidelines 3.3.2 and 3.2.3, he believed that until the consequences of nullity had been studied it was premature to specify that a reservation that did not fulfil the conditions of validity set out in article 19 of the 1969 Vienna Convention was null and void. More generally, he thought that the Commission would need to take a position on the relationship between articles 19 and 20 of the 1969 Vienna Convention; accordingly, he was not very much in favour of draft guideline 3.3.4. That issue would be best dealt with in the context of the right of parties to amend a treaty by general agreement at any time.

49. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for the quality and thoroughness of his report and commended him for having sought to define the term "object and purpose of the treaty", the meaning of which was difficult to grasp and which was subject to numerous interpretations. The definition proposed was acceptable, even if, as Ms. Escameia in particular had noted, the phrase "the essential provisions of the treaty" referred back to a certain number of elements that might not be accessible to the person interpreting the treaty. The Special Rapporteur's indication in draft guideline 3.1.6 as to how the object and purpose of the treaty was to be determined was therefore to be welcomed.

50. The reference in draft guideline 3.2 to domestic courts, which appeared in square brackets, was not necessary, as domestic courts were an integral part of the State under international law. It would also be important to indicate that the decisions of bodies monitoring the implementation of the treaty as to the validity of a reservation were binding. Draft guideline 3.2.1 was acceptable, even if the text could be improved somewhat by the Drafting Committee: in the first paragraph, the phrase "for the purpose of discharging the functions entrusted to it" did not appear very useful, while in the second paragraph the word "findings" should be replaced by a stronger term that denoted the obligatory character of the assessment by the bodies in question. The second sentence of draft guideline 3.2.2, on the adoption of protocols, conveyed an interesting idea which States ought to pursue.

51. As for draft guideline 3.2.3, the second sentence could in fact constitute a separate guideline or be incorporated in guideline 3.2.1. Implementation of

the decision of a monitoring body was not a matter of cooperation but had to do with the decision's binding nature. Draft guideline 3.2.4 was acceptable, but could also be incorporated in draft guideline 3.2.1. Draft guideline 3.3 should be adopted, as should draft guideline 3.3.1, although the second sentence should be deleted. Lastly, he endorsed draft guidelines 3.3.2, 3.3.3 and 3.3.4, although he shared Mr. Kolodkin's views on the latter insofar as the role of the depositary was concerned. All the draft guidelines could be transmitted to the Drafting Committee.

52. Ms. XUE said that, like other members of the Commission, she would have liked to have had more time to consider the tenth report of the Special Rapporteur, which dealt with what was probably the most important aspect of the topic. She recalled that she had made observations at the previous session with regard to the first chapters of the report; accordingly, she would limit her remarks to the part which dealt with assessment of the validity of reservations and the consequences thereof. In that connection, whether one looked at competence to assess the validity of reservations or at the consequences of the invalidity of a reservation, it must be acknowledged that the Special Rapporteur had strayed significantly from positive treaty law and State practice. In the case of competence, for example, draft guideline 3.2 began with the words: "The following are competent to rule on the validity of reservations". In practice, however, contracting parties could assess reservations and decide whether to accept them or to formulate an objection; bodies created by the treaty could also have the power to assess reservations, but there was a distinct difference between assessing and "ruling on". She thus had serious reservations on the matter.

53. In deciding who was competent to assess the validity of reservations, she believed that where dispute settlement bodies were concerned, the current wording of draft guideline 3.2 was too general, since such bodies could rule on the validity of reservations only if they were expressly mandated to do so. The Special Rapporteur did use the word "may", but that was not sufficient to eliminate any ambiguity. Moreover, competence to interpret or apply the treaty was not the same as competence to rule on the validity of reservations. In the case of monitoring bodies, the situation was more complex, and the draft guideline should clearly indicate that unless such bodies had a mandate to rule on the validity of reservations and acted within the framework of that mandate, they were not competent to rule on validity.

54. Draft guideline 3.2.1 was not sufficiently clear to be useful to States; the term "same legal force" in particular should be clarified. More generally, she felt that draft guidelines 3.2.1 to 3.2.4 were not always based on State practice, and some of them, which were based on assumptions, ran the risk of being misunderstood. The guidelines must be compatible with State practice and clarify it. They also had to be able to answer any questions States might raise. Thus draft guideline 3.2.4, which contemplated a case in which several bodies were competent to assess the validity of reservations, was unclear. It did not answer any questions that States might raise, such as what would happen if the various bodies disagreed or if the parties to the

treaty and the monitoring body had different ideas as to the validity of a reservation.

55. With regard to the consequences of the non-validity of a reservation, she said she would like to come back to the term "permissibility", at the risk of upsetting the Special Rapporteur. While the Commission had indeed focused its attention on the terms "permissibility" and "validity" at the previous session, the differences between those two terms had not been very obvious at the time. In fact, when one read the draft guidelines on consequences of non-validity which the Special Rapporteur had proposed, it became clear why he had tried so hard to distinguish between the two terms. Thus one found in the draft guidelines the terms "validity", "null and void" and "nullity". That was not a question of terminology but rather one of substance: under the law of treaties, and particularly in the context of the 1969 Vienna Convention, States parties could only decide whether or not to accept a reservation in order to define their relationship with the reserving State, but they had no authority to rule on the validity or nullity of a reservation, because the law of treaties was based on the principle of free consent.

56. In draft guideline 3.3.1, the first sentence was not precise enough for a guideline. One might well ask what was meant by the phrase "within the framework of the law of treaties". Moreover, the draft guideline gave no indication of the consequences of non-validity. The second sentence, on the other hand, reflected a basic principle in the matter. The term "null and void" in draft guideline 3.3.2 was not acceptable, for such a reservation could have effects in certain situations.

57. As for the last two draft guidelines proposed, 3.3.3 and 3.3.4, she agreed with the view expressed by several members of the Commission that they appeared to suggest a contradiction. The first draft guideline said that acceptance of a reservation by a State did not change the nullity of the reservation. In practice, if a State accepted a reservation the treaty was applied with that reservation in the State's treaty relations with the reserving State. One might ask how many States had to accept the reservation before that acceptance could be taken into consideration. That seemed to be in contradiction with the underlying idea of the first paragraph of draft guideline 3.3.4. As for the second paragraph of that guideline, the depositary should not act as an arbitrator in the context of reservations.

58. Mr. OPERTTI BADAN said that owing to the shortage of time he would limit his remarks on the excellent tenth report on reservations to treaties to two draft guidelines.

59. Draft guideline 3.1.7, on vague, general reservations, was extremely important, for it often happened that a reservation was vague in form or content or both, which prevented the parties to the treaty from assessing its scope. A reservation could also be general, which was different; a reservation containing references to constitutional provisions was a good example of such a reservation. It could be said that a general reservation fell into the grey area separating reservations from interpretative declarations. Nevertheless, he doubted that the Commission should attach such a radical consequence as the one the

Special Rapporteur was proposing to the vague or general character of a reservation, namely that it became incompatible with the object and purpose of the treaty.

60. As for draft guideline 3.3.1, a text that had elicited very distinct views, he felt that the second sentence enunciated a widely recognized principle, but that it should be emphasized that the formulation of an invalid reservation might be an indicator that a State might take a potentially unlawful position in the future.

The meeting rose at 1.05 p.m.

2891st MEETING

Tuesday, 11 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Reservations to treaties (concluded) (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2, A/CN.4/572, A/CN.4/574, A/CN.4/L.685 and Corr.1)

[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on reservations to treaties.

2. Mr. PELLET (Special Rapporteur) said that the debate had been rich and had afforded him a number of insights. The length of his tenth report on reservations to treaties and the late submission of parts thereof accounted for the Commission's failure to complete its discussion of the report at its fifty-seventh session in 2005.²⁰⁷ Of the 24 draft guidelines proposed, only 5 had been referred to the Drafting Committee and had subsequently been adopted on first reading.²⁰⁸ In his remarks, he would take account of comments made at both the previous and the current sessions on draft guidelines 3.1.5 to 3.1.13, contained in the third section of the report. Draft guidelines 3.2 to 3.3.4, contained in the last section of the report had been discussed only at the current session.

3. He was grateful to all those members who had spoken and disappointed that some had not. The task of a Special

Rapporteur was often a thankless one, and the best recompense he could hope to receive was for members to show an interest in the reports submitted. If that interest was expressed in the form of criticism, all well and good, especially if the criticism was constructive. When special rapporteurs and other members of the Commission engaged in real dialogue, leading to rapid and often vigorous exchanges of views within the Drafting Committee, the Commission did its best work; the resulting drafts were the fruit of collective efforts that must be respected. Hence his annoyance with recent statements that had again raised what was in his view the purely terminological question of the "validity" of reservations. The Commission had resolved that question and he hoped that those who had already had an opportunity to express their views on the matter would not revert to it.

4. He had been surprised to hear some members complain of not having had enough time to consider the tenth report. True, it was voluminous and covered some thorny issues, but it had been distributed a year previously, which seemed to allow sufficient time for reading, reflection and reaction. It had also been alleged that insufficient time had been set aside for discussion of the report, yet that time had not been used to best advantage, as most speakers had chosen to delay making their statements until the last meeting devoted to the topic. While most statements had been constructive, others had given the impression that speakers had read the draft guidelines without consulting the report that introduced and explained them. He would confine his remarks to questions not answered in the report.

5. Turning to the draft guidelines proposed in the tenth report, which were also grouped in its annex, he noted that draft guidelines 3.1.5 and 3.1.6 formed a whole. The first, also addressed in the Special Rapporteur's note on it (A/CN.4/572), in which he proposed two new alternative wordings that were more precise than the formulation proposed at the previous session, aimed at defining the concept of object and purpose of the treaty. The second sought to indicate, albeit very concisely, how the object and purpose were to be determined in respect of a specific reservation in a given situation. Despite the lingering doubts expressed by some members, a substantial majority now seemed to favour referring the two draft guidelines to the Drafting Committee. Most members acknowledged that the two draft guidelines were complementary, even though some considered that draft guideline 3.1.5 was unworkable and of no obvious usefulness, while others had found it necessary and indeed essential, and one member had somewhat optimistically suggested that a so-called "magic formula" might be found by combining the three alternative versions. In all honesty he was not convinced, since the very concept of object and purpose of the treaty conserved, not some element of mystery, as in practical terms it was not as enigmatic as had been claimed, but an element of subjectivity that was inherent in such concepts, extremely frequent in law and by no means exceptional, as had been suggested. Many speakers seemed to agree that it might be useful to try to capture that subjectivity. That did not mean, however, that there was agreement as to the best wording. A majority had expressed a preference for the first of the two new alternatives in the note, at least one member had opted for

²⁰⁷ See footnote 197 above.

²⁰⁸ For the study of the report of the Drafting Committee (A/CN.4/L.685 and Corr.1), see the 2883rd meeting above.