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Summary record of the 2544th meeting

Topic:
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the concept of estoppel, but that would make the scope of the topic too broad.

48. Mr. BROWNLIE said that the explanations that the Chairman of the Working Group had given about the term “notorious” showed that the problem was of a drafting nature because the word “notorious” was very strong and meant not only “public”, but also “widely known”. It would be regrettable to use a term such as “public”, as had been proposed, because that would unjustifiably restrict the scope of the study. The fact that a declaration was public could be sufficient, but, as practice currently stood, it was certainly not necessary.

49. Mr. HE said that, at the current stage, the word “declaration” in square brackets in paragraphs 8 and 11 should be deleted.

50. Mr. BENNOUNA said that the biggest problem was the limitation of the scope of a unilateral act in the legal sense of the term. Paragraphs 8 and 9 should be regarded as a provisional conclusion and a preliminary approach to the sensitive issue of delimitation. The words “autonomous and notorious expression of the will of a State” did not refer to just any expression of the will of a State because, when it took part in a treaty, a State also expressed an autonomous will. If the Commission was to stay within the realm of a unilateral act, it should have used the words “autonomous expression of the will of a State intended in itself to produce international legal effects”. When there was a meeting of wills, what was involved was no longer a unilateral act, but an agreement, even if it could be reached by means of the meeting of two unilateral acts in terms of form. That was apparently the question with which the Special Rapporteur should deal in his second report.

51. Distinguishing between a unilateral act *stricto sensu* and agreement and custom was an extremely complex task because custom could, as case law had shown, also be bilateral and restricted and there could also be conduct and customary acts of concern to only two or three States. He did not think that the theory of estoppel should have been referred to at the current stage because it was a principle borrowed from a particular legal order, that of the common law, even though it had been interpreted by international legal decisions on many occasions, particularly in the *North Sea Continental Shelf* cases.⁴ No one knew exactly whether estoppel was a kind of adaptation of custom. The theory of estoppel must in any event be handled with a great deal of care in order to be adapted to the international level. In paragraph 10 of its report, the Working Group cautiously stated that the Special Rapporteur should examine the question of estoppel and the question of silence; the wording was very vague and it should be taken for what it was, namely, as not involving any kind of commitment because, in his view, silence had no place in the study of unilateral acts, except as the tacit conclusion of an agreement, when it was characterized.

52. The CHAIRMAN said that, despite the comments made and doubts expressed on some specific points, the Commission appeared to endorse the report of the Working Group on unilateral acts of States and should therefore be able to adopt it.

The meeting rose at 11.40 a.m.

2544th MEETING

Tuesday, 9 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Nationality in relation to the succession of States (A/CN.4/483, sect. A, A/CN.4/489,¹ A/CN.4/L.557 and Corr.1)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR AND REPORT OF THE WORKING GROUP

1. Mr. MIKULKA (Special Rapporteur), said he wished to introduce briefly his fourth report on nationality in relation to the succession of States (A/CN.4/489), which had served as the basis for the discussions of the Working Group on nationality in relation to the succession of States. Though titled “Fourth report on nationality in relation to the succession of States”, the report dealt only with the second part of the topic, namely the nationality of legal persons. The Commission had decided that that part would be taken up once its work on the first part, the nationality of natural persons, had been completed.

2. The General Assembly, in paragraph 5 of resolution 52/156, had invited Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on that portion of the topic. It might therefore be useful for the Commission to give preliminary consideration to the directions for its future work on the second part of the topic. That was why he was submitting his fourth report, which summed up the debate on the second part of the topic in the Commission and in the General Assembly. He drew attention to chapter II, which set out a number of issues the Commission might explore. Paragraph 30 of the report contained a recommendation that the Commission should assign preliminary examination of those issues to the Working Group.

3. Speaking as Chairman of the Working Group on nationality in relation to the succession of States, he said he also wished to introduce the report of the Working

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

Group (A/CN.4/L.557). He said that the Working Group had been established, with him as Chairman, by a decision of the Commission on 14 May 1998.² The Working Group had discussed the issues outlined in chapter II of the fourth report in the course of two meetings, held on 14 May and 2 June 1998, and had agreed on a number of preliminary conclusions. The first conclusion was that, as the definition of the topic currently stood, the issues involved in the second part were too specific and the practical need for their solution was not evident. Obviously, the Commission could recommend to the General Assembly that, at the current time the work on the nationality of natural persons had been completed, consideration of the topic should be concluded and the nationality of legal persons should not be taken up. The Working Group had nonetheless wished to examine alternative approaches. It had agreed that there were, in principle, two options for enlarging the scope of the study of problems falling within the second part of the topic. Both of them would require a new formulation of the Commission's mandate for that part.

4. The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of States to the question of the nationality of legal persons in international law in general. The Working Group had tried to determine the advantages and disadvantages of such an approach, one benefit being that it would contribute to clarification of the general concept of the nationality of legal persons in international relations. A difficulty that might be encountered was that, owing to the wide diversity of national laws, the Commission would be confronted with problems similar to those that had arisen during the consideration of the topic of jurisdictional immunities. Other potential difficulties were a certain overlap with the topic of diplomatic protection, the highly theoretical nature of the study and the enormity of the task, which should not be underestimated.

5. The second possibility would consist in keeping the study within the context of the succession of States, but going beyond the problem of nationality to include other matters, such as the status of legal persons and the conditions of operation of legal persons flowing from the succession of States. Accordingly, the study might focus on how the States concerned should treat legal persons which, owing to the succession of States, changed their nationality (preservation of conditions for the operation of legal persons during the interim period before they could comply with the requirements applicable to foreign persons). It might address the question of how far the Commission could go in dealing with related issues such as property rights and contractual rights and duties of legal persons. In the Working Group's view, the benefits of such an approach would be that it would help clarify a broader area of the law of State succession. The problems the Commission might encounter would arise from the diversity of the relevant national laws and the difficulty of establishing a new delimitation of the topic.

6. Irrespective of which option was chosen, if the Commission decided to continue at all with its consideration of the second part of the topic, a number of issues would

have to be addressed. First, should the study be limited to the problem of the nationality/status of legal persons in public international law? The answer seemed to be obvious, but was it possible to limit the study strictly to public international law and avoid even partly entering into the field of private international law? Which substantive problems might be studied? Secondly, to which legal relations should the study be confined? It had been stressed in debates in the Commission that, unlike natural persons, legal persons did not necessarily have the same nationality in all their legal relations. The Commission would therefore have to decide to which legal relations the study should be limited.

7. Thirdly, which categories of legal persons should the Commission consider? Contrary to natural persons, legal persons could assume various forms. Legal personality could be possessed by corporations, both private and State-owned, State organs, departments or other "instrumentalities", transnational corporations, and international organizations. It would make no sense to cover transnational corporations and international organizations in a study of the impact of the succession of States on nationality. They should, however, be included if the object of the study was broader and extended to questions such as the conditions of operation of legal persons following State succession. Finally, what could be the possible outcome of the Commission's work on that part of the topic, and what form could it take?

8. The Working Group had regarded its discussions as preliminary in nature, because the Commission was not asked to take a final decision at the current session on the future direction of its work. An appropriate time to take that decision would be at the fifty-first session. The Working Group had thought it might be useful, however, to identify the type of problem that could be raised by examining the nationality of legal persons and to draw them to the attention of Governments, which were to provide, before the end of October 1998, their comments on practical issues of interest to them in connection with the second part of the topic. In the light of those comments, the Commission could, at its fifty-first session, return to the Working Group's preliminary conclusions and adopt a final decision on the future direction of work on the second part of the topic. In the absence of positive comments from States, the Commission would have to conclude that States were not interested in a study of the second part of the topic and, accordingly, it should not undertake one.

9. Mr. BENNOUNA said he was not convinced of the need to establish a Working Group at the current time or of the efficacy of its work as set out in the report. Far from shedding light on what should be the Commission's future course of action, the report only obscured matters. He had already drawn attention to the problems connected with the succession of legal persons in respect of investment, acquired rights and the status of private property, among other things.

10. The first option presented to the Commission did not fall within the topic at all, for the possibility of considering the nationality of legal persons in international law had never been raised. It would bring the Commission into the realm of diplomatic protection, namely the opposability of nationality in the event of violation of the rights

² See 2530th meeting, para. 60.

of legal persons or the impact of a legal person's nationality link on the State of nationality's relations with the host country, a subject on which a report would be presented to the Commission at the next session. Alternatively, it might draw the Commission into consideration of the conduct of transnational corporations, on which an ineffectual code had been produced.³ Such conduct could entail non-compliance with domestic legislation when the corporation engaged in "intra-corporation trade" in a number of countries. In order to study the nationality of legal persons, the law would have to be consolidated, and an attempt made to see whether such a concept existed in legislation. That was the work of special conferences and fell into the domain of private international law.

11. The second option was the only appropriate subject of the Commission's inquiry: the status, or fate, of legal persons in a case of State succession. States should be asked for their comments on problems in that regard, which were likely to be less critical than in the case of natural persons. If, after all, no problems were mentioned, then work on the second part of the topic should be abandoned and the Commission's efforts deemed to have been limited to the study of the effects of State succession on the nationality of natural persons.

12. Since the death of the second part of the topic was being foretold, he would have preferred a much more exhaustive elaboration of the numerous relevant issues. For example, the problem of the wide diversity of national laws, mentioned in the first sentence of paragraph 9 of the report of the Working Group, could have been analysed. In passing it might be said that the phrase "the fact that the Commission would be confronted with" was superfluous and should be deleted.

13. The main question, however, was what happened to the bond between a legal person and a given legal order in the event of a change in the territorial bases of that legal order. That bond was usually of a formal nature, entailing recognition of a legal person by the legal order. But many other problems might also be uncovered. It might be useful to look at national legislation or international agreements regulating State succession in relation to legal persons and to see how any problems that arose in such situations were dealt with. Quite clearly, the Commission's future work should focus on the second option put forward in the report of the Working Group.

14. Mr. BROWNLIE thanked the Chairman of the Working Group for his conscientious efforts. Both the subject of nationality of legal persons in international law and the relation of legal persons to the succession of States were topics that satisfied the criteria referred to in the report of the Commission to the General Assembly on the work of its forty-ninth session.⁴ However, in view of the problems of defining the nationality of legal persons it would be illogical to focus on the State succession aspect, without first studying the nationality of legal persons. The definition should, he believed, include universities, for example, and not just corporations. The subject was thus precisely at the stage when the Commission's interest was

warranted: it was not totally undeveloped, but was not entirely stable either.

15. Mr. ROSENSTOCK said that his initial reaction to the topic of the nationality of legal persons had been that it was a good way of developing primary rules which would be of enormous help to those dealing with secondary rules, such as in the case of diplomatic protection. Then, however, he had been somewhat dissuaded by what was described in the report as the wide diversity of national laws. Increasingly, he had begun to wonder whether the Commission could produce anything coherent on such a diverse concept as legal persons and to think that perhaps it was dealing with a false analogy between the nationality of natural persons and the nationality of legal persons and was drifting from a manageable topic to one which was exceedingly broad.

16. Again, the status of legal persons in relation to State succession involved a variety of national practices which raised questions about whether or not it was a practical issue to undertake and one from which principles of general application could be easily derived. Paragraphs 10 and 11 of the report of the Working Group shared those concerns with the General Assembly, noted that States had apparently not shown as much interest in that part of the topic, and therefore rightly raised the question whether or not the topic should be continued. There was a certain ambiguity in paragraph 11 in that it assumed that, if the Commission did not hear from States, it signified they did not care and did not want the topic continued. That was reasonable enough, but a qualifier might be appropriate to the effect that if States favoured continuation of the topic, either in the form set forth in the first or in the second option, they should indicate how the nationality of legal persons was determined, what kind of treatment was granted to legal persons which, as a result of the succession of States, became "foreign" legal persons, and so on.

17. On the whole, it had been worth looking at the question of the utility of continuing with the topic at the current time. The matters discussed had been valid and did raise the issue of whether or not the Commission could produce something containing useful general comments, given the near infinite variety of the subject matter.

18. Mr. MELESCANU said that he agreed with Mr. Bennouna. Most of the participants in the Working Group had been opposed to the first option, because the Commission did not have a mandate from the General Assembly to address the subject of the nationality of legal persons in international law exhaustively, and most members had preferred the second option, namely to study the status of legal persons in relation to the succession of States, on the understanding that the Commission should not confine itself solely to questions of succession.

19. The form of language employed being somewhat esoteric, it would be difficult for outsiders to understand what the Commission's point of view had been and it might therefore be useful to indicate in a more direct manner the fact that most members had been in favour of the second option.

20. He sympathized with Mr. Rosenstock's suggestion to ask States their opinion and not to leave the Commis-

³ E/1991/31/Add.1.

⁴ *Yearbook . . . 1997*, vol. II (Part Two), p. 71, para. 238.

sion's later activities unclear. It was too vague and undiplomatic to say in paragraph 11 that, in the absence of positive comments from States, the Commission would have to conclude that they were not interested in a study of the second part of the topic. Instead, States should be asked for their comments on the usefulness of the Commission's effort and the future approach; the Commission could then decide how to proceed. He agreed with Mr. Brownlie; it was a very interesting subject which was perhaps ripe for codification.

21. Mr. CRAWFORD said that, of the two options presented in the report of the Working Group, it seemed clear that only the second was viable within the framework of a study focusing on State succession. He agreed with other members that the subject of the nationality of legal persons might be worth a study in its own right and could be considered by the Working Group on future topics. But the nationality of legal persons as a general subject went well beyond anything to do with State succession. The problem of dealing with it in the framework of State succession—the present framework and clearly one that ought not to be enlarged—was that a view still had to be formed about the notion of the nationality of legal persons and how it operated, because the nationality of legal persons was only remotely analogous to the nationality of physical persons, that is to say, individuals, in international law. Many countries did not attribute nationality to their corporations, and such nationality had to be attributed *ex lege* by international law for the purposes of diplomatic protection.

22. Another reason for not taking up the first option was the overlap with the subject of diplomatic protection. He agreed with the Special Rapporteur and the Working Group that to study merely the question of the effects of State succession on the nationality of legal persons would be unduly arid and that if the topic was to be considered at all, a broader formulation was desirable. The problems of finding such a formulation were twofold: the first being the practical problem of discerning whether it was useful. That was in the hands of the Special Rapporteur. If he recalled correctly, the literature did not say very much on the subject, but it would be interesting to know to what extent recent cases of State succession had presented actual difficulties. That was something Governments might tell the Commission, but again they might not, because in theory the Governments most likely to tell the Commission were those which had experienced the difficulties, yet they might not be enthusiastic about disclosing them. Hence, it would be helpful if the Special Rapporteur could provide a brief outline of the problems in his next report, something which would be valuable in itself, irrespective of whether the Commission then proceeded to a full-scale study.

23. The second difficulty was knowing where to stop. He felt instinctively that the Commission would not simply be dealing even with the question of the continued status of legal persons; in other words, the moment after the succession was deemed to have occurred. Apart from anything else, that moment was a construct, which at the time would be very unclear. The Commission would more likely start to trench upon the difficult problems of the principle of acquired rights and the continuity of acquired rights upon a succession in the case of legal persons, and

that was an aspect of a broader topic about acquired rights on succession which lay outside the scope of the Special Rapporteur's mandate.

24. Mr. Melescanu and Mr. Brownlie were right to say that the subject was of general interest. Whether it was of practical concern and whether a sufficiently precise formulation of what was to be studied could be reached was another matter. Rather than submit to States the negative wording in paragraph 11, it might be better to be more proactive and suggest to them that a problem did exist and ask not only for guidance but also for information. The Special Rapporteur might also provide the Commission with further details, so that it would be in a better position to take a decision at its fifty-first session as to whether and how to proceed with the topic. But it seemed clear that, if the Commission did go ahead with it in the context of the present topic, then it must be on the basis of some refinement of the second option.

25. Mr. ECONOMIDES said he endorsed Mr. Melescanu's remarks in support of the second option, which the vast majority in the Working Group had supported, while criticizing the first. The same had been true of the members of the Commission, a fact that should be reflected in the report to show the Sixth Committee that both possibilities had been considered and the second was preferred.

26. The list of advantages might then state that a study conducted on the basis of the second option would provide the Commission with useful information about international practice in cases of State succession in regard not only to the nationality of legal persons but also to other questions pertaining to the status of such legal persons that might be affected by a succession of States. Recent international practice was not well known and it would be very useful to have more information on it. A decision would then be taken on whether to follow up the topic. He therefore agreed with Messrs Bennouna, Brownlie, Crawford and others that the second option should be presented in a more positive fashion.

27. Mr. MIKULKA (Chairman of the Working Group on nationality in relation to the succession of States) said he had encouraged the Working Group to focus also on the first option because, when the Working Group had taken up the second part of the topic, for the first time, several members of the Commission in its previous composition had displayed an interest in it, but, the only examples they had cited had concerned the nationality of legal persons in general and had no bearing whatsoever on State succession. The same situation had repeated itself in the Sixth Committee.

28. Accordingly, in view of the interest shown by some members of the Commission and by some delegations in the question of the nationality of legal persons as such, but not necessarily in the context of a State succession, he had recognized that there were two possibilities for enlarging the subject. He could not imagine what could usefully be done under the current mandate, which specified that the Commission should focus on nationality of legal persons in the context of State succession. As the concept of nationality of legal persons did not exist at all, in some legal systems it seemed that the subject matter was too

specific. The preference in the Working Group and in the Commission was for the second option, but that was not nearly so clear as far as States were concerned. The fact that two or three delegations in the Sixth Committee had said it would be useful to know more about the question of the nationality of legal persons did not clearly demonstrate that the international community was really interested in the topic. It had seemed to him that the best course was to encourage the discussion in the Sixth Committee and to say that, if it really wanted a study of the second part of the topic, it should at least indicate to the Commission which problems it had in mind and what the appropriate framework for the second part should be.

29. The best approach at the current time would be to follow the usual procedure and state in a few paragraphs in the report of the Commission to the General Assembly on the work of its fiftieth session that the Working Group had examined a number of issues. The report of the Working Group could be annexed to the report of the Commission and, if the Commission so wished, the matters raised in the current discussion could be mentioned in order to show Governments on which specific points the Commission would like to have their comments.

30. The CHAIRMAN suggested that account should be taken of the last proposal and that the report should be recast for a decision to be taken on Friday, 12 June. He said that, if he heard no objection, he would take it that the Commission agreed to that course of action.

It was so agreed.

Diplomatic protection (concluded)* (A/CN.4/483, sect. E, A/CN.4/484,⁵ A/CN.4/L.553)

[Agenda item 6]

REPORT OF THE WORKING GROUP

31. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection) said that the Working Group which had met on two occasions, had taken into account his preliminary report as Special Rapporteur on the topic of diplomatic protection (A/CN.4/484).

32. After recalling that customary law on the subject must serve as the basis, the Working Group had reaffirmed the secondary nature of the rules in question as compared to primary rules, that is to say, rights and obligations relating to the status of foreigners. Needless to say, the primary rules would be referred to whenever it was necessary to clarify a particular secondary rule. The same approach had been advocated by Mr. Crawford, Special Rapporteur for the topic of State responsibility. Hence, they were in agreement on the secondary rules approach.

33. Paragraph 2 (c) of the report of the Working Group was essential in the framework of the discussions to which his preliminary report had given rise. The right of the State to exercise diplomatic protection was distinct

from the rights and interests of those of its nationals for whom it was taking action. But those two elements of diplomatic protection complemented each other perfectly, since the State, in exercising diplomatic protection, was duty-bound to take account of the rights and interests of its nationals. The State had the right to take action at international level, and its nationals enjoyed rights which the host State had an international obligation to respect.

34. On a drafting point, he said that the words “in the exercise of this right”, in the second sentence of paragraph 2 (c), should be changed to read: “In such exercise”, so as to bring the sentence into accord with the first. He hoped that the Secretariat would take note of that change and issue a corrigendum.

35. In paragraph 2 (d), the Working Group stressed the important development of international law in increasing recognition and protection of the rights of individuals and providing them with more direct and indirect access to international forums to enforce their rights. That evaluation should be examined in the light of State practice. The right of the State to exercise diplomatic protection was viewed by the Working Group as a discretionary right which Governments could, however, undertake under their domestic laws to exercise in respect of their nationals (para. 2 (e)). In paragraph 2 (f), the Working Group suggested that the Commission should request Governments to provide it with certain documentation, for instance, national legislation and decisions by domestic courts, and in paragraph 2 (g) it recalled the Commission’s earlier decision to complete the first reading by the end of the current quinquennium.

36. In paragraph 3, the Working Group suggested that his second report as Special Rapporteur should concentrate on the issues raised in chapter I of the outline proposed at the previous session.⁶ Lastly, he thanked the members of the Working Group for their spirit of cooperation and open-mindedness, which had made it possible to lay the foundations for the preparation of future reports on the topic.

37. Mr. PAMBOU-TCHIVOUNDA, referring to paragraph 2 (e) of the report of the Working Group, said that he would prefer the second half of the first sentence to read: “does not prevent it from defining the conditions and modalities of the right of its nationals to diplomatic protection”. The current wording, which spoke of the State “committing itself to its nationals to exercise such a right”, seemed to him to be somewhat confusing, especially when read in conjunction with the second sentence of the paragraph. However, he would not press the point.

38. Mr. AL-BAHARNA suggested that the first sentence of paragraph 2 (e) should be redrafted to indicate that the discretionary right of the State to exercise diplomatic protection did not stand in the way of its duty to espouse its nationals’ legitimate claims to diplomatic protection.

39. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection) said that in drafting the paragraph, the Working Group had had in mind state-

* Resumed from the 2523rd meeting.

⁵ See footnote 1 above.

⁶ See 2522nd meeting, footnote 8.

ments by some members indicating that their national constitutions went a long way towards recognizing the right of nationals to diplomatic protection by their State. The Working Group had thought that a reference to such practices might be useful, but had wanted to stress its purely domestic scope.

40. In reply to a question by Mr. GOCO, concerning paragraph 2 (f), he said the suggestion was not that the Commission should seek comments from Governments. It should only ask for certain relevant documents on national legislation and practice.

41. Mr. MELESCANU said that the wording of the first sentence of paragraph 2 (e) was less than perfect and an effort should be made to find a better formulation to reflect the lengthy discussion that had taken place. However, he would be reluctant to accept the proposal made by Mr. Pambou-Tchivounda, which would seem to reopen the whole delicate issue of the discretionary nature of the right of the State to exercise its diplomatic protection.

42. Mr. CRAWFORD, supported by Mr. ROSENSTOCK, said that, at the current preliminary stage of the consideration of the topic, the Commission should refrain from entering into a substantive debate on the point raised in paragraph 2 (e).

43. Mr. GALICKI said that, speaking as a citizen of one of the countries referred to in the paragraph as having recognized the right of their nationals to diplomatic protection by their Governments, he fully accepted the Working Group's formulation.

44. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to maintain paragraph 2 (e) as it stood and to refer the report of the Working Group to the Drafting Committee with a view to formally adopting it on Friday, 12 June.

It was so agreed.

The meeting rose at 11.35 a.m.

2545th MEETING

Wednesday, 10 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,¹ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

GUIDE TO PRACTICE (*continued*)*

DRAFT GUIDELINE 1.1.2 (*concluded*)*

1. The CHAIRMAN invited the Commission to resume its consideration of draft guideline 1.1.2, "Moment when a reservation is formulated", as proposed by the Special Rapporteur in ILC(L)/INFORMAL/12.

2. Mr. HAFNER recalled that article 23 of the 1969 Vienna Convention, which dealt with the procedure regarding reservations, provided that a reservation could be formulated at the time of the signature of the treaty and then must be confirmed when the reserving State expressed its consent to be bound by the treaty. He therefore suggested that the beginning of draft guideline 1.1.2 should be amended to read: "The reservation may be formulated or confirmed by a State".

3. Mr. PELLET (Special Rapporteur) said that the text under consideration was based on what was commonly called the Vienna definition, which did not refer to confirmation. However, the amendment proposed by Mr. Hafner was entirely acceptable and the Drafting Committee would probably agree with it.

4. Mr. ECONOMIDES said that the draft guidelines did not refer to the relatively frequent case of late reservations. It could happen that a State forgot to deposit the reservation it had intended to formulate, even though it had been approved by its parliament. Experience showed and the Treaty Section of the United Nations Office of Legal Affairs confirmed that, in such a case, all contracting parties were asked whether they agreed to consent to a kind of "catch-up" procedure. That was a useful solution which existed in practice. Perhaps it should be formalized in the Guide to Practice.

5. Mr. PELLET (Special Rapporteur) confirmed that the situation referred to by Mr. Economides did exist and referred to the case of Egypt, which had forgotten to formulate the reservation it had intended to make when it had signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Two years later, it had wanted to remedy that oversight, but by making a "statement",² and that had caused an outcry from the other States parties. The case thus deserved to be taken into account in the Guide to Practice, but it should probably be settled not in the context of definitions, but in the part which would follow on procedures for the formulation of reservations.

* Resumed from the 2542nd meeting.

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

² See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), p. 924, footnote 5.