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Summary record of the 2557th meeting

Topic:
Law and practice relating to reservations to treaties

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87. Mr. KABATSI pointed out that guideline 1.1.6 contained two elements—obligations and rights—although its title mentioned only obligations.

88. Mr. Sreenivasa RAO said that he shared the doubts expressed about guideline 1.1.1. The way in which a State intended to apply a treaty was determined by a positive logic and could not be assimilated to the notion of reservation, which had a negative connotation. There was also a divergence between the title of guideline 1.1.2 (Instances in which reservations may be formulated) and its content, which addressed the means of expressing consent to be bound by a treaty.

89. Mr. PELLET (Special Rapporteur) said that the whole constituted by guidelines 1.1.5 and 1.1.6, which were poorly drafted in his view, had been adopted by the Drafting Committee by a very large majority but against his recommendation.

90. Mr. SIMMA (Chairman of the Drafting Committee) pointed out, with regard to the limits referred to by Mr. Lukashuk, that there was a saving clause on the permissibility and the effects of reservations. As to the comments on guideline 1.1.1, the adopted formula certainly rubbed shoulders occasionally with the concept of interpretative declaration, but most of the members of the Drafting Committee had thought that it should be retained in the definition of the object of reservations.

91. Mr. Goco's proposal on the title of guideline 1.1.4 was a good one. The comments of Mr. Kabatsi and the Special Rapporteur addressed a very complicated issue, in connection with which the Drafting Committee had decided, by a very large majority, to take up the question of substitution in the commentary and not in a guideline. However, the title of guideline 1.1.6 might usefully refer also to the rights of the author State. Mr. Sreenivasa Rao's comment on guideline 1.1.2 was pertinent, but the Committee had decided to retain the phrase "means of expressing consent" for lack of a better alternative.

The meeting rose at 1.15 p.m.

2557th MEETING

Thursday, 6 August 1998, at noon

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu,

Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, 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]

CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION (*continued*)

1. Mr. BENNOUNA said that the wording of guideline 1.1.1 (Object of reservations) should be less problematic since, as the Special Rapporteur had pointed out, it dealt not with the definition of reservations but with their object. He still had doubts, however, about the concept of reservations having territorial scope (guideline 1.1.3), which did not seem to be entirely consistent with article 29 of the 1969 and 1986 Vienna Conventions. As far as guidelines 1.1.5 (Statements purporting to limit the obligations of their author) and 1.1.6 (Statements purporting to increase the obligations of their author) were concerned, considering the position taken by the Special Rapporteur, it might be advisable to ask the Drafting Committee to review them and to consider the possibility of combining them into a single guideline. At any rate, guideline 1.1.5 did not contribute anything to the draft, but worked against the principle of useful effect, and guideline 1.1.6 envisaged hypothetical situations that were highly unlikely to occur.

2. Mr. AL-BAHARNA said that he found guideline 1.1.1 to be rather superfluous, inasmuch as the object of reservations was implicit in the definition itself, in the expression "in their application to that State or to that international organization". Hence, at least, the phrase "the way in which a State, or an international organization, intends to apply" should be deleted from the guideline. Guideline 1.1.2 should be redrafted along the following lines: the expressions "instances in which" and "include all the means of expressing" should be deleted, and the word "mentioned" should be replaced by the words "in accordance with". Guideline 1.1.6, including its title, should be reworded to indicate clearly that it referred to the obligations and rights of the author of the reservation. Drafting changes should also be made in guidelines 1.1.3 (Reservations having territorial scope), 1.1.4 (Reservations formulated when notifying territorial application) and 1.1.5, as well as to the final guideline, which had not yet been numbered.

3. Mr. CRAWFORD said that the problem posed by guideline 1.1.6 lay in the fact that it did not make a clear distinction between cases in which a State made a unilateral statement undertaking obligations going beyond

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

those envisaged in the treaty—which did not constitute a reservation—and cases in which a State made a unilateral statement purporting to increase its obligations under a treaty while at the same time expecting reciprocity. In the latter case, there would indeed be a reservation, since the legal effect of the treaty would be modified.

4. Mr. LUKASHUK said that guidelines 1.1.3 and 1.1.4 were related and could be combined. The commentary to guideline 1.1.7 (Reservations formulated jointly) should include an explanation of the legal ties which a reservation formulated jointly would establish between its authors, particularly with regard to the power each one would have, to withdraw “its” reservation unilaterally.

5. Mr. ELARABY said he endorsed the proposal for deleting from guideline 1.1.1 the phrase “the way in which a State, or an international organization, intends to apply”. Maintaining that phrase would affect the right of States to make interpretative declarations, and hence the guideline would not be truly consistent with the practice of States. With regard to guideline 1.1.6, the Commission should wait to see how it would fit into the overall picture after the guidelines on interpretative declarations had been examined.

6. Mr. SIMMA (Chairman of the Drafting Committee) explained that, in regard to guideline 1.1.7, the Drafting Committee had unanimously agreed that in defining joint reservations it would not be necessary to take a position on the legal ties between the authors of such reservations, and that that matter should be discussed in the commentary. The proposal to delete a phrase from guideline 1.1.1 was unacceptable for two reasons: on the one hand, the reservations envisaged in that guideline referred to the way in which the reserving State intended to apply the treaty and, on the other hand, the amended text would be opposed by all members of the Commission who considered that a reservation on a treaty as a whole would be impermissible or would not constitute a reservation at all. The only real problem seemed to be the one posed by guideline 1.1.6; perhaps the Drafting Committee should be asked to review guideline 1.1.6 in conjunction with guideline 1.1.5.

7. Mr. GALICKI said that guideline 1.1.3 should not envisage excluding the application of a treaty as a whole but only some of the provisions of a treaty.

8. Mr. ECONOMIDES said he did not agree with the argument that, when a State made a statement which had the effect of increasing its obligations while calling for reciprocity on the part of another State, that constituted a reservation because it entailed modifying the legal effect of the treaty. The legal effect of the treaty did indeed change, but only as the result of two unilateral statements establishing an agreement that was collateral to the treaty; in no way did that constitute a reservation. A reservation always had a limiting effect and could not extend beyond the clauses of the agreement. The wording of guideline 1.1.6 was therefore correct from the legal standpoint.

9. Mr. CRAWFORD said he could not think of a specific example, but the situation he had referred to would be one in which a State would accede to a convention on the condition that a given provision of the treaty should have a certain meaning, and the State’s interpretation of

the provision went beyond the meaning intended in the treaty.

10. Mr. PELLET (Special Rapporteur) said it was reasonable for members of the Commission to want to have their positions on the draft guidelines reflected in the summary record, and he would make every effort to include those views in the commentary. The main problems were those which referred to guideline 1.1.1 and to guidelines 1.1.5 and 1.1.6, which seemed inseparable. As far as guideline 1.1.1 was concerned, aside from all drafting considerations, it could not reasonably be said that there was no point in including it. It was useful in that the Vienna definition, which it simply reproduced, stated that a reservation was a unilateral statement whereby a State purported to exclude or to modify the legal effect of certain provisions of a treaty. Actually, that was not always the case, and many reservations did not deal with specific provisions of a treaty (general reservations). Guideline 1.1.1 was meant to reflect that reality.

11. In that regard, Mr. Elaraby’s position would seem untenable, since he himself acknowledged that the phenomenon in question did occur, and therefore he could hardly say, at the same time, that it should not be taken into account. It remained to be seen whether such statements would or would not constitute reservations. Saying that a unilateral statement constituted a reservation was not the same as saying that it was or was not permissible: it was simply a definition. Once the definition was established, the questions raised by Mr. Elaraby could be addressed; the constant repetition of certain State positions would seem to indicate that it was permissible.

12. The problems posed by guidelines 1.1.5 and 1.1.6 were somewhat different. Mr. Economides was right on one point, namely, that in the Vienna definition it was clear that a reservation purported to modify the legal effect of certain provisions of a treaty. That definition was being corrected, in the light of actual practice, by way of guideline 1.1.1, which referred specifically to “the treaty as a whole”. When a State attempted to increase its rights, as well as the obligations of other States, and did so in a positive way by adding to general law, the State was no longer modifying the legal effect of certain provisions of the treaty, it was trying to modify the provisions themselves. That was not at all the same thing. That did not mean that in proposing something that was actually an amendment to a treaty, a State was doing something impermissible; it simply meant that the legal effect of the provision was not at issue, but rather that the provision was to be changed. One example would be the matter of the Shield of David, the “reservation” whereby Israel had sought to increase its rights under the treaty, as well as the obligations of other States, without amending the treaty itself.²

13. The Drafting Committee had perhaps tried to conclude its examination of a technical and complex subject rather hastily; the Chairman of the Committee had ended the discussion with a vote. The formulations that had been adopted were not entirely satisfactory; guideline 1.1.5 appeared to state the obvious, and guideline 1.1.6 dealt

² See 2549th meeting, footnote 6.

jointly but not exhaustively with some very different problems.

14. He therefore supported the proposal of the Chairman of the Drafting Committee that guidelines 1.1.5 and 1.1.6 should be referred to a future drafting committee, in order to allow the Commission to agree on formulations that would be somewhat more consistent.

15. Mr. RODRÍGUEZ CEDEÑO said that the Commission seemed to have unanimously agreed that the second scenario envisaged in guideline 1.1.6 did not constitute a reservation. On the other hand, in the first scenario, when a State undertook obligations going beyond those imposed on it by a treaty, it was performing an autonomous legal act which, strictly speaking, was unilateral in nature, as noted by the Commission in other areas.

16. A commentary should therefore be included on those provisions on which there was no consensus, and the two paragraphs on which the Commission had not reached agreement should be re-examined by the Drafting Committee.

17. Mr. ROSENSTOCK said it was not clear that the statements in question were unilateral in the traditional meaning of the term. The distinction was not a gratuitous one; on the contrary, it was essential if the parties to a multilateral treaty wanted to avoid finding themselves subsequently committed to additional obligations to which they had not agreed. That did not necessarily mean that the wording of the draft was perfect or that it provided the best definition of what did or did not constitute a reservation.

18. Mr. AL-KHASAWNEH said that several members of the Commission had formulated reservations or interpretative declarations regarding the document on reservations to treaties. That raised the question of whether the document would really be useful in determining what did or did not constitute a reservation. The interaction between the Drafting Committee and the Commission should not be so inflexible that members who had not attended the Drafting Committee's discussions were not allowed to express their views on drafting matters in the plenary meeting. The Special Rapporteur had rightly allowed some provisions to be returned to the Drafting Committee in order to enable the Commission to reach a consensus. The matter raised by Mr. Elaraby was also very important and should be referred back to the Drafting Committee.

19. He would like to ask for clarification on some points relating to guidelines 1.1.3 and 1.1.4. In his view, those guidelines did not make a distinction between the following two cases: that of a State formulating a reservation concerning the application of a treaty to part of its own territory, and the case of third States formulating a reservation regarding the application of a treaty to part of a territory (as in the case of Berlin). The distinction might not have any legal effect if the situations were considered basically similar, but the matter should perhaps be mentioned. In that case also, the question should be referred back to the Drafting Committee.

20. Mr. ELARABY said that the text of guideline 1.1.1 went considerably beyond the Vienna definition; that was

not necessarily wrong, since the Commission had indeed been entrusted with re-examining the guidelines, but it raised a number of problems. The definition overlapped with the definition of interpretative declarations, and it should therefore be re-examined when the time came to review the concept of interpretative declarations. The Commission could then define the scope of each of the two concepts and try to reach a consensus.

21. Mr. Sreenivasa RAO said he agreed with the speakers who had suggested that guideline 1.1.1, as well as guidelines 1.1.5 and 1.1.6, should be sent back to the Drafting Committee in order to enable the Commission to reach a consensus. On the matter of procedure, he pointed out that the work of the Drafting Committee and the discussions in the Commission were complementary; since plenary meetings ranked above those of the Drafting Committee, they should not be precluded from dealing with certain drafting matters.

22. Mr. SIMMA (Chairman of the Drafting Committee) said that it would facilitate matters if guideline 1.1.1 could be discussed at the end of the debate on the definition of interpretative declarations and on the distinction between such declarations and reservations. If the Special Rapporteur agreed to send the question back to the Drafting Committee, he would not object, although he felt that guideline 1.1.1 was suitable in its current form. Indeed, during the debate at the forty-ninth session on the admissibility of certain reservations relating to human rights, many examples had been given of reservations that were similar to those mentioned by Mr. Al-Khasawneh and Mr. Elaraby. Since Mr. Elaraby had been absent at that time, no one had pointed out that the statements being discussed were in fact reservations. The Commission should wait until a definition of interpretative declarations had been reached before deciding to adopt guideline 1.1.1.

23. Mr. CRAWFORD said it would not be right to send to the Sixth Committee a draft guideline on which the Commission had left so many questions pending. The Drafting Committee could quickly re-examine the objections that had been raised on drafting matters, on the understanding that if it rejected them they would not be taken up again by the Commission.

24. Mr. PELLET (Special Rapporteur) said it was unacceptable that some members of the Commission should express dissatisfaction with some of the guidelines and request that they be sent back, when the Commission had already agreed on the general orientation of all guidelines that were to be sent to the Drafting Committee. He did agree that guidelines 1.1.5 and 1.1.6 should be sent back to the Drafting Committee, which had not been able to discuss them in depth; however, he wished to point out that if the Drafting Committee, when it met, decided to amend yet again the text of the guidelines being reconsidered, he would not write any commentary. He urged the Commission to adopt all the guidelines except guidelines 1.1.5 and 1.1.6.

25. Mr. ECONOMIDES said that the Drafting Committee might not have time to review the points that had been raised and submit new texts that would be acceptable to all members of the Commission; in any case, the Special Rapporteur would not have time to draft the commen-

taries. He proposed that some guidelines should be placed in square brackets, with an explanatory note stating that the provisions in question had not been adopted by the Commission and would be re-examined at a later stage. That way, the draft guidelines could be sent to the Sixth Committee, whose comments would be useful to the Commission at its next session.

26. Mr. SIMMA (Chairman of the Drafting Committee) said he would prefer it if, as proposed by the Special Rapporteur, the Commission simply adopted the guidelines, except for guidelines 1.1.5 and 1.1.6. If the Commission wished to place some guidelines in square brackets, he would accept such a decision, but he agreed with the Special Rapporteur that at the current stage in the Commission's work, it would be neither normal nor useful to try to rewrite the draft guidelines.

27. Mr. ELARABY said that since the Special Rapporteur was prepared to send draft guidelines 1.1.5 and 1.1.6 back to the Drafting Committee, he saw no reason for not sending back draft guideline 1.1.1 as well. It was extremely important for the Commission to determine the scope of reservations and of interpretative declarations. He was willing to accept any solution that would allow the Commission to re-examine guideline 1.1.1.

28. Mr. AL-KHASAWNEH explained that in saying he did not understand draft guideline 1.1.3, he had meant that he could not accept it any more than he could accept draft guideline 1.1.1. He hoped the Commission would re-examine those guidelines in good faith.

29. Mr. PELLET (Special Rapporteur) said he took note of the fact that Mr. Al-Khasawneh could not accept a text in the drafting of which he had not participated. With regard to Mr. Elaraby's comments, he stressed that the problems posed by guideline 1.1.1 and by guidelines 1.1.5 and 1.1.6 were very different. The Drafting Committee had changed the original order of the guidelines because most of the others depended on guideline 1.1.1. Neither guideline 1.1.3 nor guideline 1.1.5 would make sense unless it was borne in mind that a reservation could apply either to a specific provision or to an entire treaty.

30. It seemed to him that there was general agreement among members of the Commission that it would not be possible to disregard general reservations. There was, however, profound disagreement on the matter of whether a statement purporting to increase the rights of its author could be considered a reservation. In the case of guideline 1.1.1, the Drafting Committee had seen it as referring to reservations as defined in the preceding paragraphs, and had therefore excluded interpretative declarations from the beginning. He urged the Commission to adopt guideline 1.1.1.

31. Mr. BENNOUNA said that, in his view, the compromise proposed by Mr. Economides in connection with draft guideline 1.1.1 provided a way out and addressed the concerns of Mr. Al-Khasawneh and Mr. Elaraby, as well as those of the Special Rapporteur. He proposed that the Drafting Committee should include an explanatory note indicating that the Commission had adopted the draft guideline provisionally and reserved the right to review it, if necessary, and to confirm it when it discussed interpretative declarations.

32. Mr. PELLET (Special Rapporteur) said he was prepared to accept Mr. Bennouna's proposal and to explain, either in a note or in the commentary (possibly at the beginning), that guideline 1.1.1 referred only to reservations, and would be re-examined in the light of the Commission's decision on the matter of interpretative declarations. With regard to guidelines 1.1.5 and 1.1.6, the Commission could either decide to follow that same procedure or to adopt the suggestion made by the Chairman of the Drafting Committee, which seemed reasonable since he [the Special Rapporteur] would not have time to draft commentaries for the Sixth Committee.

33. Mr. MIKULKA said he endorsed Mr. Bennouna's proposal, but felt that the explanation should be included in the commentary. The Special Rapporteur should indicate that the Commission had realized there was a category of reservations that applied to treaties as a whole, but had decided that the relevant guideline should be formulated in the context of the definition of interpretative declarations.

34. Mr. ELARABY said that he also endorsed Mr. Bennouna's proposal.

35. Mr. AL-KHASAWNEH, noting that the Special Rapporteur did not seem to want to refer guideline 1.1.3 back to the Drafting Committee, asked for a vote on the matter.

36. Mr. BENNOUNA suggested that the following week, when the Drafting Committee met to re-examine draft guidelines 1.1.5 and 1.1.6, it should also consider draft guideline 1.1.3.

37. Mr. SIMMA (Chairman of the Drafting Committee) said it was his understanding that the Commission was about to reach agreement on draft guideline 1.1.1, and that draft guidelines 1.1.5 and 1.1.6 were to be referred back to the Drafting Committee. However, he did not think that the Drafting Committee would have time, during the current session, to prepare a text that would satisfy everyone; it would be better to leave those draft guidelines for the next session.

38. The CHAIRMAN asked Mr. Al-Khasawneh whether he maintained his request that the Commission take a vote.

39. Mr. AL-KHASAWNEH said that the wording of draft guideline 1.1.3 was not suitable and should be corrected. He thought it was reasonable to ask the Drafting Committee to re-examine it. If he did not get satisfaction, he would have to ask for a vote.

40. Mr. ECONOMIDES said it appeared that a solution had been found for draft guideline 1.1.1, and that the only objections remaining were to the last phrase of draft guideline 1.1.6, "or purports to assume a right not contained in a treaty", and the expression "the application of a treaty" in draft guideline 1.1.3. The Drafting Committee should be able to settle those problems quickly, unless the Commission decided to place the draft guidelines in square brackets, noting that they would be taken up again at the next session. At any rate, he felt that it would not be wise to take a vote on some of the guidelines.

41. Mr. SIMMA (Chairman of the Drafting Committee) asked Mr. Al-Khasawneh if he would agree to the inclusion of explanatory notes to draft guidelines 1.1.1 and 1.1.3 stating that the Commission would take those guidelines up again at its next session.

42. Mr. AL-KHASAWNEH said he was prepared to accept any proposal that would make it clear that a problem remained and that the draft guideline would be re-examined at a later date.

43. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the last proposal made by the Chairman of the Drafting Committee.

44. Mr. PELLET (Special Rapporteur) said he would agree to having a vote taken, whatever the result might be, but in principle, he considered it irregular for a member of the Commission to keep insisting until he got his way when he did not really have grounds for making a judgement. However, he would ensure that the commentary reflected all the positions that had been expressed.

45. Mr. ROSENSTOCK said he questioned the usefulness of an explanatory note on draft guideline 1.1.3. He supported the Special Rapporteur, and felt that the problem raised by draft guideline 1.1.3 was different from the problem raised by draft guideline 1.1.1; in the latter case, the Commission might wish to reserve its position because its future work would help clarify the matter further.

46. Mr. SIMMA (Chairman of the Drafting Committee) explained that his proposal was not intended to address only the concern expressed by Mr. Al-Khasawneh. The question whether reservations could apply to treaties as a whole or only to some of their provisions had been raised by several members of the Commission, and concerned several draft guidelines, particularly draft guidelines 1.1.1 and 1.1.3. In draft guideline 1.1.3, the expression “purports to exclude the application of a treaty”—which was understood to refer to a treaty as a whole—referred to a problem which was quite similar, although not identical, to the one raised by draft guideline 1.1.1. It would therefore be reasonable for the Commission to re-examine that important question at its next session.

47. Mr. PELLET (Special Rapporteur) said that if the Commission intended the position taken on draft guideline 1.1.1 to extend to the entire set of draft guidelines, including draft guideline 1.1.3, he would be willing to accept the proposal of the Chairman of the Drafting Committee. He would also include the relevant explanations in the commentary.

The meeting rose at 1.18 p.m.

2558th MEETING

Friday, 7 August 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

1. The CHAIRMAN invited the Observer for the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe to brief the Commission on the work of the Council, and more particularly on the work of CAHDI.

2. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) summarized and commented on the main points of a document that had been prepared and circulated exclusively for the use of the members of the Commission. He drew the Commission's attention in particular to the appendices to the document, especially appendix 3, which contained the text of a recommendation of the Committee of Ministers of the Council of Europe to member States on debts of diplomatic missions and permanent missions, as well as those of their members;¹ and appendix 4, with the text of a recommendation on the classification of documents concerning State practice in the field of public international law.² The Secretary General of the Council of Europe had transmitted the two recommendations to the Secretary-General of the United Nations, in the context of the United Nations Decade of International Law.³

3. The Second Summit of Heads of State and Government of the Council of Europe had adopted a declaration

* Resumed from the 2554th meeting.

¹ Council of Europe, Committee of Ministers, 595th meeting of the Ministers' Deputies, recommendation No. R (97) 10 (12 June 1997).

² *Ibid.*, recommendation No. R (97) 11 (12 June 1997).

³ Proclaimed by the General Assembly in its resolution 44/23.