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Summary record of the 2720th meeting

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the reservation was prohibited, but not when there was a problem of compatibility. However, draft guideline 2.1.7 *bis* was well-balanced and deserved to be referred to the Drafting Committee. Its advantages included the fact that, since the reserving State knew that the exchange of views with the depositary would be communicated to the other contracting States, it might reconsider its reservation. It was useful to restrain the rather widespread practice by which, contrary to the provisions of article 19, paragraph (c), of the 1969 and 1986 Vienna Conventions, even a reservation that was not in conformity with the object and purpose of the treaty could be formulated.

48. During the discussions at the preceding session, some members had expressed their interest in a text stating the obligation of the depositary to communicate interpretative declarations, regardless of when they were made. He hoped that that suggestion could be considered by the Drafting Committee, even if no additional draft guideline had been proposed.

The meeting rose at 1 p.m.

2720th MEETING

Wednesday, 15 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 2]

1. Mr. GAJA, Chair of the Working Group on responsibility of international organizations and Special Rapporteur, announced that the working group would consist of Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Simma, Mr. Tomka, Mr. Yamada and Mr. Kuznetsov (member *ex officio*).

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his seventh report on reservations to treaties (A/CN.4/526 and Add. 1–3), which had usefully summarized developments to date, and his draft Guide to Practice, which was appreciated by legal experts the world over.

3. The function of the depositary (draft guideline 2.1.7 *bis*) was an important and closely watched issue. It was generally accepted that the depositary had communication and coordination functions, including with regard to any interpretations, declarations or reservations of States. The depositary also gave States guidance in formulating their positions on an informal basis. The aim was to ensure that the treaty was properly used by States and truly reflected their position on its provisions. But problems had arisen in the past and would do so in the future if a depositary was asked to judge the State's position, whether directly or indirectly, expressly or impliedly. States had been opposed to such a function. In one instance, the Government of India had taken issue with the depositary's statement that reservations India had made were contrary to the object and purpose of a treaty and, as such, not valid. The matter had been brought before the General Assembly, which had found that the functions of the depositary did not lie in the area of judgement.

4. To say that a reservation was manifestly impermissible already implied a judgement. If something was clearly prohibited, then there was nothing manifest about it: it was simply not allowed. For example, if India declared that it was reversing its position on a convention's provisions concerning the settlement of disputes and submitted its position to the depositary, the latter could simply say that it was not permitted, and the matter would be closed. If, on the other hand, a document was submitted which a State said was not a reservation, whereas in the view of the depositary it was, what action must the depositary take? That was where the word "manifestly" came into play. There, the depositary had every right, in an informal setting, to communicate his views in writing or verbally on how a State was using a particular declaration. He had had such a dialogue with depositaries on occasion, and agreement had then been reached. As it stood, the proposition did no service to either the depositary or the State concerned. The depositary could not be placed in a position of conflict with States. There might be different positions taken at the time of the formulation of a particular principle, and there could be constructive ambiguity in the treaty that allowed certain formulations on both sides. In such situations, the 1969 Vienna Convention provided the requisite guidance. One might hope that a more

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

* Resumed from the 2717th meeting.

homogeneous, harmonious practice would develop, but as States were divided and not well-coordinated, certain ambiguities and lack of commonality were inevitable. That could not be solved through the legal fiction of assigning depositaries functions they should not have. In his view, wherever a reservation was not admissible under a treaty, a depositary was entitled to reject it. But where there was room for opinion, he could not endorse the use of the words “manifestly impermissible”; it was a question which should be left to States.

5. Mr. COMISSÁRIO AFONSO said that he was in favour of referring guideline 2.1.7 *bis* to the Drafting Committee, but was concerned about the word “manifestly”. The advisory opinion of ICJ regarding the *Reservations to the Convention on Genocide* case had used the word in a different context, when it had spoken of the character of the Convention on the Prevention and Punishment of the Crime of Genocide. But above all, he had misgivings about the word “impermissible”, which suggested a test of permissibility. It was difficult for the depositary to answer that question. In actual fact, the word “permissibility” or “impermissibility” had to do with the compatibility or incompatibility of a reservation with the object and purpose of a convention, and that meant interpreting the convention; it was not a function that could be left to the depositary. Of course, the United Nations Convention on the Law of the Sea clearly stated that reservations were not accepted in certain matters. Similarly, the Rome Statute of the International Criminal Court did not allow reservations. There, the depositary was clearly in a position to say whether a reservation was permissible or not. In fact, at issue was the non-admissibility of a reservation, although the word did not appear in the 1969 Vienna Convention.

6. The Commission could refer guideline 2.1.7 *bis* to the Drafting Committee to recast it in a more acceptable manner. There were two possibilities. One would be to give the depositary guidance on how to react to a manifestly impermissible reservation. The other would be to use the word “inadmissible”, but in that case he did not think that there was any problem of permissibility or non-permissibility.

7. Ms. ESCARAMEIA said that the way in which the question had been put to the Sixth Committee (para. 44 of the report) had not been sufficiently clear, because it had merged the issue of a reservation being manifestly inadmissible and that of specifying when it was prohibited by the treaty. Had the question been phrased differently, the answer might have been clearer. In her view, most States would understand that, if a treaty clearly prohibited a reservation and a reservation was then entered, the depositary could simply refuse to accept it. But the Sixth Committee had gained the impression that the depositary would have a much broader role, and its response had been somewhat ambiguous. The argument used by some in the Sixth Committee that the 1969 Vienna Convention did not point in that direction was not convincing, because article 77, paragraph 1, in setting out the functions of the depositary, said “in particular”, thus not excluding other functions, and article 77, paragraph 2, even opened up such a possibility. Hence, the role of the depositary now proposed by

the Special Rapporteur would be in line with the Convention as well as human rights treaty practice.

8. She proposed that a different draft should be referred to the Drafting Committee, adding a paragraph to the effect that, when a treaty did not allow reservations or when a reservation was expressly prohibited, the depositary could refuse it. That would concern indisputable cases, for instance, when a reservation said that it could not be applied solely to parts of a country and a State then went ahead and applied it to part of the country. Guideline 2.1.7 *bis* would then concern manifestly impermissible cases, albeit not indisputable ones, and it could go to the Committee. As for paragraph 2, a time limit must be included. It was not clear when States could make objections to reservations; of course, they could only do so once the depositary had communicated the reservation to them. That might not be until after the completion of a lengthy procedure. The Commission should specify the time when a reservation was considered to have been made.

9. Mr. SIMMA said that, as he understood paragraphs 44 to 46 of the report, the Commission had put a question to the Sixth Committee, which had responded, and as a result, the Special Rapporteur had proposed guideline 2.1.7 *bis*. The question put to the Sixth Committee could not simply be transformed into a guideline. The idea behind the question mentioned in paragraph 44 of the report would have done too much violence to the principle that, in the final analysis, it was for the other States parties to a multilateral treaty to assess the permissibility of a reservation. Again, a problem might arise if the depositary did not communicate the reservation to the other States parties, which might have an effect opposite to the one underlying the proposal, because a reservation had been made, and it might stand if nothing further was done.

10. He strongly supported draft guideline 2.1.7 *bis*. The dialogue on reservations was often a dialogue of the deaf: in most instances, States did not react, and if they did, it was in such a way as to leave a number of questions open. For example, a State rarely specified what consequences it would draw from another State’s having made an impermissible reservation. The proposal added a strong, responsible voice to the dialogue. He would emphasize the word “responsible”, because a depositary would not tell a State making a reservation that, in its view, the reservation was impermissible. That would not be taken lightly. He agreed with the Special Rapporteur that the word “manifest” was almost as ambiguous as “reasonable”. Perhaps article 46, paragraph 2, of the 1969 Vienna Convention, which contained a definition of a manifest violation, might provide guidance for determining when a reservation was manifestly impermissible.

11. The new guideline might be useful for cases covered by article 19, subparagraph (c), of the 1969 Vienna Convention, namely where, in the view of the depositary, the reservation was incompatible with the object and purpose of a treaty. To limit that possibility for a depositary to cases under subparagraphs (a) and (b) of article 19 would detract too much from the proposal and unduly limit its thrust. In his opinion, guideline 2.1.7 *bis* could result in the depositary’s taking the lead and giving guidance to

States parties on how to react to another State's reservation and it would make the depositary the guardian of a community interest behind those multilateral treaties in which a reservation made by another State did not immediately and automatically impinge upon benefits for other States.

12. Another problem might be what to do if the depositary was lenient in exercising his function under guideline 2.1.7 *bis*. If the depositary had not made a statement beforehand, States parties might be reluctant to say that they unilaterally considered a reservation to be impermissible. Another problem might arise if there was a divergence of views between a depositary who might not have made a statement under guideline 2.1.7 *bis* and, later on, a treaty body that took up the question and arrived at the opposite result. But those problems already existed. Hence, he was in favour of referring guideline 2.1.7 *bis* to the Drafting Committee.

13. The CHAIR, speaking as a member of the Commission, said that he agreed with Mr. Simma.

14. Mr. MOMTAZ said that there were a number of undeniable advantages to guideline 2.1.7 *bis*. It settled from the outset the difficulties that manifestly impermissible reservations posed in international relations, in particular manifestly impermissible reservations to human rights conventions. Moreover, the publicity given to a legal discussion between the depositary and the State making the reservation would have a deterrent effect: at the very least, it might lead other States preparing to ratify a given instrument to think twice before making the same manifestly impermissible reservation. States would probably be unwilling to engage in a public discussion that might reveal the weakness of their arguments in support of a manifestly impermissible reservation and instead would refuse to ratify the treaty in question. In such cases, discretion and the absence of publicity might prove more constructive. The Special Rapporteur himself had recognized that executive heads and other officials of international organizations who had the function of depositary usually confined themselves to making discreet appeals to States whose reservations were manifestly impermissible. It would be interesting to know to what extent those calls had in fact been heard: he was convinced that they were more effective than publicity, which might lead to a hardening of the position of the State making the reservation. He agreed in that connection with Mr. Simma that it might result in a dialogue of the deaf.

15. Depositary States which wanted to be more than a "letter-box" had always preferred to act with discretion in objecting to manifestly impermissible reservations; injunctions from the secretaries-general of international organizations, too, might not be welcomed. In that regard, the example had been mentioned of a denunciation of the Convention on Fishing and Conservation of the Living Resource of the High Seas in the early 1970s; the Convention did not contain a denunciation clause and the desire of the Secretary-General of the United Nations, as a depositary, to act as more than a mere conduit for the transmission of reservations had been rejected by the majority of States parties.

16. For those reasons, it might be preferable to delete the second sentence of guideline 2.1.7 *bis*.

17. Mr. KUZNETSOV said that paragraph 2 of the guideline was unacceptable; in any dialogue, each party's comments were a reflection of the views previously expressed by the other party. In any case, it would be inappropriate for the depositary to report the views of the reserving State to other contracting parties. Admittedly, the Commission was engaged in the progressive development, not merely the codification, of international law, but special care was called for in the case at hand.

18. Ms. XUE said that, generally speaking, she agreed that the Special Rapporteur had taken a cautious, balanced approach to guideline 2.1.7 *bis*. However, the guideline reflected the drafting history of the 1969 Vienna Convention. The draft of that instrument which the Commission had adopted on second reading at its eighteenth session provided that the functions of the depositary comprised "[e]xamining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles".³ In article 77, paragraph 1 (*d*), of the final instrument, those words had been replaced by "Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form...".

19. For obvious political and legal reasons, States tended to give the depositary a limited and purely procedural role, as illustrated in the topical summary of the discussion in the Sixth Committee on the report of the Commission during the fifty-sixth session of the General Assembly (A/CN.4/521, paras. 60–67). The views of Member States were not binding on the Commission, but State practice was of fundamental importance to the topic under consideration.

20. For example, the term "impermissible" was likely to give rise to disputes among States. Although modified by the word "manifestly", it might give depositaries an opportunity to consider both procedural and substantive aspects of reservations. It would be particularly inappropriate for them to pass judgement on the legal aspects of interpretative declarations, some of which could be categorized as reservations. And, as Mr. Sreenivasa Rao had pointed out, international organizations which acted as depositaries should not undertake to make such judgements. Moreover, a depositary's statement that a reservation was substantively inadmissible was likely to lead to a dispute with the reserving State, which might in turn delay timely notification of the reservation to other signatory States.

21. Unlike Mr. Simma, she thought it unwise to make the depositary the guardian of the international community. States might have good reasons for making, in the view of the depositary, "manifestly impermissible" reservations, but they should not be required to justify the content of these to the depositary. Even in the case of a reservation clearly in contradiction with general practice, the drafting history of the treaty in question might provide a clear explanation that would be accepted by the

³ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269.

other contracting States. Moreover, a depositary with no knowledge of the parties' intentions should refrain from commenting on the result of their negotiations.

22. For example, the Government of her own country, China, and the Government of the United Kingdom had agreed that most of the treaties implemented in Hong Kong, even those to which China was not a party, would remain in force after the restoration of Hong Kong to China in 1997. Such an agreement was contrary to general treaty practice, but the two Governments had not expected to enter into a debate on its legality with the depositaries; they had merely hoped that all other States parties to the instruments in question would be given prompt notification of the matter and, in fact, the depositaries had raised no objections. Furthermore, she agreed with Mr. Momtaz that any exchange of views between the depositary and the reserving State should not be made public; if the impermissibility of the reservation was in fact manifest, it would not be overlooked by other contracting parties.

23. Thus, she did not believe that guideline 2.1.7 *bis* was ripe for drafting. The Special Rapporteur should reflect further on the Commission's views. The goal of enhancing the role of the depositary and strengthening the treaty system was a good policy objective, but it must be borne in mind that States were the real "players" in the performance of their international treaty obligations.

24. Mr. TOMKA said that Ms. Xue's comments on the Hong Kong situation should be viewed in the context of State succession and considered under section V of the provisional plan of the study contained in the Special Rapporteur's second report. He hoped that the Commission would be able to complete its work on the topic of reservations to treaties by the end of the current quinquennium.

25. The term *illicites* in the French text of guideline 2.1.7 *bis* did not fully correspond to the English "impermissible". A reservation constituted an act; to qualify such an act as *illicite* (unlawful) was to engage the international responsibility of States, which was surely not the Special Rapporteur's intention. The French text of the draft should be amended accordingly.

26. A depositary which considered a reservation inadmissible generally engaged in a dialogue with the reserving State; in other cases, a delegation of parties might assume that function. For example, on a twice-yearly basis the Committee of Legal Advisers on Public International Law of the Council of Europe exchanged information on reservations to which member States had objected or planned to object. However, for policy or other reasons, such practices did not usually lead other States to raise similar objections to the reservations in question.

27. He was not certain that the depositary should be entrusted with the task of considering whether a reservation was compatible with the object and purpose of the treaty. Such a position would constitute an excessive departure from the intentions of those who had drafted article 77, paragraph 1 (*d*), of the 1969 Vienna Convention, which authorized depositaries to consider matters of form, not substance. On the other hand, where there was a *prima facie* prohibition of reservations or of certain types of

reservations, it might be appropriate for the depositary to bring the problem to the attention of the reserving State and, if the latter insisted on making the reservation, to communicate that fact to other States parties, including any written, but not oral, exchange of views on the matter.

28. He would support the proposal to refer the paragraph to the Drafting Committee, on condition that it was amended to reflect those comments.

29. Mr. KOSKENNIEMI said that the opposition to guideline 2.1.7 *bis* was surprising, since it represented a compromise which reflected previous discussions in the Commission and the Sixth Committee. Like other members, he was concerned to ensure the neutrality of the depositary, but that term must not be confused with passivity, for the depositary to function merely as a "letter-box" would promote reservations disruptive to the treaty as a whole and might introduce error into the system. The very neutrality of depositaries made it incumbent on them to take action in certain situations.

30. For example, the authors of manifestly inadmissible reservations to a treaty to which all, or certain types of, reservations were prohibited must be given the opportunity to correct their mistake. Notification need not lead to an argument between the depositary and the reserving State. It need not be thought of in adversarial terms. For example, his own country, Finland, had delegated responsibility in treaty matters to the various ministries; consequently, expertise in the subtle game of reservations was not always available and the Foreign Ministry would be grateful to be informed that an inadmissible reservation was being made.

31. Furthermore, if depositaries confined themselves to passively registering all reservations received, there could be no dialogue between States since Governments could not object to reservations they were unaware of. In this regard, it would not go contrary to the play of reservations between States. Instead, it would make this game possible. Finally, depositaries were in any case already empowered to make value judgements under article 77, paragraph 1 (*d*), of the 1969 Vienna Convention, since appreciations of "due and proper form" were necessarily subjective in nature. Moreover, the depositary would in any case be required to interpret the Guide to Practice. Form and content were, after all, related and, as Mr. Sreenivasa Rao had pointed out, the depositary's role was not that of a judge, but rather that of an intelligent, responsible participant. He believed that guideline 2.1.7 *bis* should be referred to the Drafting Committee.

32. Mr. ADDO said that guideline 2.1.7 *bis* was most welcome. The privilege of making reservations was an incident of the sovereignty and equality of States. He did not, however, consider the depositary as a mere conduit for the transmission of documents. Pursuant to article 77, paragraph 1 (*d*), of the 1969 Vienna Convention, the functions of a depositary included "[e]xamining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question". Thus, where a treaty prohibited reservations, the functions of the depositary would include

drawing the attention of the author of the reservation to its impermissibility, and, if the author maintained the reservation, communicating the text thereof to the signatory States, contracting States and international organizations. Such action might persuade the author to abandon the reservation. Accordingly, he would join with those members who favoured referring guideline 2.1.7 *bis* to the Drafting Committee.

33. Mr. FOMBA said that the case of manifestly impermissible reservations raised a number of questions, such as the definition of what constituted a “manifestly impermissible” reservation, who was to define it, and what the consequences thereof would be. A basis for a definition was to be found in article 19 of the 1969 Vienna Convention, which prohibited a State from formulating a reservation in three specified circumstances. In all three circumstances, however, problems of interpretation might arise where the wording of the treaty in question was unclear. Other legal and practical difficulties had been referred to by Mr. Kamto and Mr. Gaja. Among the arguments adduced in favour of a more active role for the depositary was that it seemed logical to recognize the depositary’s right not to communicate a reservation it deemed manifestly impermissible. That presupposed, however, first, that States would be prepared to concede the depositary that right; and second, that the depositary would be able systematically and incontestably to define what constituted a manifestly impermissible reservation. Neither of those assumptions, however, could be taken for granted. It also needed to be borne in mind that article 76, paragraph 2, of the Convention proclaimed the international and impartial character of the depositary’s functions; and that article 77, paragraph 1 (*d*), of the Convention accorded the depositary the right to examine whether a communication relating to the treaty was in due and proper form. Both those provisions, however, needed to be interpreted correctly.

34. With regard to the question whether or not to refer guideline 2.1.7 *bis* to the Drafting Committee, it seemed clear that if, as the Special Rapporteur proposed, the substance of the draft guideline was not to be considered in plenary at that stage, then that task must fall to the Committee. Such a procedure raised questions concerning the Commission’s working methods—methods which were perhaps themselves in need of some codification. Should it be decided to refer draft guideline 2.1.7 *bis* to the Committee in its current formulation, the Committee would have to decide, with regard to the first paragraph, on the issue of definition, and on whether that definition was to be determined by States, the depositary or a third party; with regard to the second paragraph, it would have to decide on the precise nature of the procedure that would ensue following the communication of the text of the reservation—in other words, to decide what was the true purpose of the operation.

35. Given that the Drafting Committee and the Plenary were both constituent parts of the Commission, and were not rigidly compartmentalized, some flexibility seemed desirable with regard to working methods. Accordingly, guideline 2.1.7 *bis* should be referred to the Committee for consideration, bearing in mind that it would be for the Plenary to accept or reject any conclusions reached by that body.

36. Mr. GALICKI said that the seventh report on reservations to treaties gave a very useful summary of the Commission’s work on the topic so far and presented a clear picture of future prospects for that work. The documents were thus useful not only for new members but also for “old-timers”, to enable them to take a more systematic approach to the topic.

37. Draft guideline 2.1.7 *bis* had been drafted on the basis of the views States had expressed in the Sixth Committee and the responses they had given the Commission to the question whether a depositary could or should refuse to communicate to the States and international organizations concerned a reservation that was manifestly inadmissible, particularly when it was prohibited by a treaty. The guideline maintained a position mid-way between extreme opinions expressed by States: for example, it did not follow the suggestion to give the depositary the right to reject evidently prohibited reservations by informing the State concerned of the reason for rejection.

38. The sustainable character of the proposed draft guideline seemed its best advantage. It remained within the limits of the functions of depositaries as described in guideline 2.1.7 and of the functions of depositaries, especially as established in article 77, paragraph 1 (*d*), of the 1969 Vienna Convention and in article 78, paragraph 1 (*d*), of the 1986 Vienna Convention.

39. In considering the possibility of extending the functions of depositaries in the event of manifestly impermissible reservations, two things must be remembered. First, any guideline in that field should remain in line with the Vienna rules, for as the Special Rapporteur had rightly pointed out, the Commission was not preparing a new treaty but drafting a set of guidelines based on existing treaty regulations. Second, in view of the close relationship between guidelines 2.1.7 and 2.1.7 *bis*, the Commission must not forget the significant changes that had taken place during the *travaux préparatoires* on the rule laid down in article 77, paragraph 1 (*d*), of the 1969 Vienna Convention. As the Special Rapporteur pointed out in paragraph 164 of his sixth report,⁴ the draft adopted by the Commission on the second reading at its eighteenth session referred to whether a signature, an instrument or a reservation was “in conformity with the provisions of the treaty and of the present articles”,⁵ whereas the final revision of article 77, paragraph 1 (*d*), of the 1969 Vienna Convention used the phrase “in due and proper form”. Guideline 2.1.7 *bis* also adopted that more limited approach. Those who had drafted the Convention had shown a tendency to limit the depositary’s powers exclusively to examining the *form* of reservations, and that approach should not be contested now.

40. A similarly cautious attitude had been taken by the Special Rapporteur in the formulation of guideline 2.1.7 *bis*. Although manifest impermissibility went beyond the strictly formal aspects of reservations, the powers proposed for depositaries were exclusively of an informative nature and in fact analogous to those provided by the general provisions in guideline 2.1.7. The depositary retained the traditional role of facilitator rather than becoming

⁴ See 2719th meeting, footnote 10.

⁵ See footnote 3 above.

an umpire. The Special Rapporteur did not differentiate between the powers of the depositary when reservations were directly prohibited by a treaty and when they were incompatible with the object and purpose of the treaty: in both cases, a final decision on rejection of such reservations was to be taken by the parties to the treaty, not by the depositary. He shared that view.

41. An additional factor not mentioned so far spoke in favour of taking a fairly restrictive approach to the competencies of depositaries. There were many examples of treaties that had more than one depositary. To give substantial powers to such multiple depositaries could create serious problems in terms of political interpretations and the application of such powers by different Governments that were depositaries of the same treaty.

42. Finally, he was of the opinion that guideline 2.1.7 *bis* should be referred to the Drafting Committee for further elaboration, which seemed necessary from the terminological point of view. For instance, did the term “manifestly” mean the same as “manifest” in article 46, paragraph 2, of the 1969 Vienna Convention, where it was defined in connection with violations of internal law regarding competence to conclude treaties? Or should it be given another meaning? Another problem arose in connection with the word “impermissible”, which appeared nowhere else in the draft. The report used the term “inadmissible”, however, which seemed to be more appropriate. The problem may have arisen in the translation from the French. It seemed inevitable that the terminology used in draft guideline 2.1.7 *bis* would have to be harmonized with that used in the rest of the guidelines and in the Vienna Conventions of 1969 and 1986—but that was a task for the Committee.

43. Mr. Sreenivasa RAO said that, apparently, he had not made it clear whether he thought guideline 2.1.7 *bis* should be referred to the Drafting Committee. Having heard more members speak on the matter, he still had doubts about the guideline. The depositary’s functions as envisaged in the 1969 Vienna Convention and as manifested in existing practice had never been expressed in such concrete terms. Very few cases had arisen such as those described in paragraph 1 of the guideline, namely when a State insisted upon presenting a reservation that was not acceptable under a treaty. What normally happened was clearly exemplified by the workings of article 298 of the United Nations Convention on the Law of the Sea: if a State reserved its position on any of the points mentioned therein, the depositary could simply inform it that such a reservation was not permitted, and it would have to be rescinded. If, under a human rights instrument, a State undertook to perform its obligations but placed various conditions upon such performance, the depositary could—and did, in practice—draw attention to the fact that that constituted a reservation and that the State must revise its position.

44. The phrase “manifestly impermissible” was unclear—did it mean reservations that were prohibited altogether or interpretative declarations and similar statements? States did make declarations and interpretative statements when reservations were otherwise prohibited, and it was from the language in which they made those

communications that one could assess whether they were standard reservations or reservations that were impermissible. As currently structured, the draft guidelines separated reservations, interpretative declarations, statements and so on into different categories, but guideline 2.1.7 *bis* merely blurred those distinctions.

45. He agreed with Mr. Koskeniemi that a depositary was not a dormant institution, but a legal mind with a function to perform. Depositaries must not be insulated from the inclement weather of the international community but given guidance and reasonable rules to apply *vis-à-vis* States. That was why the two paragraphs of guideline 2.1.7 *bis* must be carefully constructed. He experienced no difficulty in referring the guideline to the Drafting Committee, but a great deal of work was required and a distinction must be drawn between reservations clearly prohibited and statements that might or might not be reservations or interpretative declarations for which different guidelines were provided and in respect of which it must be clearly stated what the depositary should or should not do.

46. Ms. XUE said she felt compelled to make a point of principle: after her earlier statement, Mr. Tomka had said that the restoration of Hong Kong was really a question of succession. That was not so, nor had it been treated as such during the negotiations. Therefore, the issue of reservations to treaties had not been dealt with in accordance with the rules on succession. Current practice regarding treaties in Hong Kong continued to reflect such arrangements.

47. Mr. KAMTO said he thought the problem raised by guideline 2.1.7 *bis* was not the neutrality of the depositary, but rather the role that should be given to the depositary, which should be envisaged in the light of the 1969 Vienna Convention. The Commission should avoid transforming the depositary from an administrator of a treaty, as foreseen in article 77 of the Convention, into an umpire of legal relations between States. Guideline 2.1.7 *bis* should be referred to the Drafting Committee, with certain amendments designed to avoid the term “manifestly impermissible” and to incorporate the wording of article 19, subparagraphs (a) and (b), of the Convention.

Unilateral acts of States (A/CN.4/524, A/CN.4/525 and Add.1 and 2,⁶ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

48. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his fifth report on unilateral acts of States (A/CN.4/525 and Add. 1 and 2), said that addenda 1 and 2 to the report had not yet been issued, but would be made available in the course of the session. The entire fifth report comprised four chapters. The introduction referred to previous consideration of the topic, consideration of international practice, the viability and difficulties of the topic

⁶ See footnote 2 above.

and the content of the fifth report and the recapitulative nature of its chapter I.

49. Chapter I dealt with four aspects of the topic considered by the Commission at its previous session: definition of unilateral acts; conditions of validity and causes of invalidity; rules of interpretation applicable to unilateral acts; and their classification.

50. Chapter II examined three questions that might make possible the development of common rules applicable to all such acts, regardless of their material content and their legal effects: the rule regarding respect for unilateral acts, the application of the act in time, and its territorial application.

51. Chapter III dealt briefly with the equally important subject of determination of the moment at which the unilateral act produced its legal effects, and would encompass three extremely important and complex issues: revocation, modification and suspension of the application of the act, and its termination.

52. Finally, chapter IV set out the structure of the articles already drafted and the future plan of work. The Commission would shortly have at its disposal a document containing the texts considered thus far, which would be examined by the Drafting Committee and the Working Group on unilateral acts of States in the course of the current session.

53. His present statement would relate only to the introduction of the report and to the first section of chapter I, concerning the definition. He would introduce the other subjects dealt with in chapter I at a later meeting.

54. It should be reiterated that the topic of unilateral acts was highly complex and had proved difficult to tackle. The literature was extensive, but unfortunately not always consistent. He had considered it in depth, together with the most important jurisprudence—arbitral and judicial decisions referring to unilateral acts and forms of conduct in general, not all of which were to be considered in the context of the Commission's task of codification and progressive development. Unfortunately, he had been unable to consider the full range of State practice, for various reasons. The information available on State practice was basically factual. Serious difficulties arose in determining States' beliefs regarding the performance of those acts, their nature and the intended effects. In most cases, however, those beliefs could be inferred. It was an acknowledged fact that States constantly performed unilateral acts and made unilateral declarations in the context of their external relations. A rapid review of the media would confirm that fact. But the question then arose whether those acts were political or legal. That seemingly simple question could be resolved only through an interpretation of the author States' intention—a highly complex and subjective issue.

55. Even if it was concluded that the act was legal in nature, it would still have to be decided whether it was a treaty act or a unilateral act; and, if the latter, whether it was a formally unilateral act within a treaty relation-

ship, to which the Vienna regime would apply; or whether it was a purely unilateral act, namely, one not linked to another legal regime, which gave rise to effects in and of itself. It was that latter case which was of interest to the Commission, and which might benefit from the elaboration of rules to regulate its functioning.

56. Reference to the law of treaties was essential in considering the present topic. When the articles on the law of treaties had been drafted, the situation had been more straightforward, inasmuch as practice in relation to treaty acts had been clearer. In the case of unilateral acts, doubts arose, not as to whether such acts existed, but as to their nature. There was no clear conviction on the part of States that any given unilateral act belonged to the category with which the Commission was concerned. Consequently, at its fifty-third session the Commission had prepared a questionnaire that had been circulated to States with a view to obtaining fuller information on State practice.⁷ He was particularly grateful to the Governments of Estonia and Portugal for the valuable information they had submitted concerning international practice (see A/CN.4/524). Those Governments had not only provided examples of unilateral acts, but had also classified them and, most importantly, referred to their legal effects, thereby showing that it was indeed possible to find examples of acts considered by States themselves to be of relevance to the Commission's study.

57. It was clear, as most doctrine recognized, that treaties were the form most widely used by States in their international legal relations; but that did not alter the fact that unilateral acts of States were increasingly used as a means of conditioning their subsequent conduct. Nothing prevented the State from making unilateral international commitments, without the reciprocity or mutual concessions that were generally the hallmark of treaty texts. The State was authorized to formulate acts of that kind, described by the doctrine as "heteronormative". Thus, according to international law, the State could formulate an act without any need for participation by another State, with the intention of producing certain legal effects, without the need for any form of acceptance by the addressee or addressees.

58. In section C of the introduction, as a further illustration of the difficulties to which the topic gave rise, it was noted that the unilateral acts considered by the Commission to be the most frequent, namely, waiver, protest, recognition and promise, were not always expressed through declarations, and, furthermore, were not always unilateral. For example, recognition might be effected through conclusive or implicit acts. The State might recognize an entity implicitly, through a legal or political act other than a declaration of recognition of a State—for instance, through an exchange of ambassadors or the reciprocal opening of diplomatic or consular missions. Thus, recognition was not always a unilateral act of the type with which the Commission was concerned. Furthermore, it might sometimes take the form of a treaty, as in the case

⁷ See *Yearbook ... 2001*, vol. II (Part Two), pp. 19 and 205, paras. 29 and 254, respectively. The text of the questionnaire is available at <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.

of recognition of the United States of America and of the two Germanys.

59. Nor were promises always unilateral. There appeared to be nothing preventing a promise from being expressed through a treaty act. A State could promise another State or States that it would observe a certain form of conduct, through a treaty relationship. In such cases, of course, although that was a promise in the sense usually understood in doctrine, the rules applicable to the act from which it stemmed would be the Vienna rules on the law of treaties, even though the undertaking was unilateral.

60. Protest, on the other hand, was essentially—perhaps exclusively—unilateral; and should not be confused with unilateral collective protest, when two or more States formulated a protest by means of a single act.

61. Waiver, too, was a complex and varied phenomenon. International doctrine and jurisprudence had established that it could only be explicit. There could be no such thing as implicit or tacit waiver—a matter of relevance to the topic of diplomatic protection, in the context of waiver by the respondent State of the requirement that local remedies be exhausted. Such waiver must be clear and unequivocal, and must accordingly be explicit. The unilateral act of waiver that was of interest to the Commission was an unequivocal manifestation of the will of the State, with the intention of producing specific legal effects. The persisting uncertainty with regard to the subject matter of the work of codification, to which he drew attention in paragraph 4 of his report, raised the question whether codification of the issue was a viable proposition. Despite the complexity of the topic, a substantial majority, both in the Commission and in the Sixth Committee, had considered that the topic was appropriate for codification and progressive development.

62. Chapter I focused on the definition of unilateral acts, in an attempt to come up with a definition that encompassed the various acts not covered by previous attempts at a definition. With regard to the evolution of the definition and of its constituent elements since the submission of the preliminary report,⁸ the word “declaration” had been replaced by the word “act”, which had been considered less restrictive, covering unilateral acts not formulated by means of a declaration. As Special Rapporteur, he had considered that most, if not all, unilateral acts, including waiver, promises, protest or recognition, could be formulated only through a declaration. However, in response to some members’ comments, he had substituted the word “act” for the word “declaration”.

63. The concept of “autonomy” had been excluded from the definition, although as Special Rapporteur he had considered that one of the characteristics of those acts was that they were independent of other legal regimes such as treaty regimes. The characteristic of autonomy could, however, be dealt with in the commentary.

⁸ See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, 319.

64. The phrase “unequivocal expression of will which is formulated by a State with the intention of producing legal effects” had been included in the definition. There seemed to be no doubt that the legal act was “an expression of will”: that such acts were defined on the basis of a manifestation of the will of the author was confirmed by doctrine. Will was a constituent element of consent, and also indispensable to the formulation of the legal act. The phrase “manifestation of will with the intention of producing legal effects” had been regarded by some as tautological. In his view, however, it encompassed two different and complementary concepts, namely, performance and purpose. The phrase “the intention to produce legal effects” replaced the previous expression “the intention to acquire legal obligations”, which the Commission had found to be restrictive, in that it ruled out any possibility of the State establishing a separate relationship with the addressee. In his view, one thing was clear: the State could not impose obligations on another subject of international law without its consent—a view confirmed by international doctrine and jurisprudence, in the principles of *res inter alios acta* and *pacta tertiis nec nocent nec prosunt* and in a number of cases cited in paragraph 60 of the fifth report, although the law of treaties established exceptions to that rule such as the stipulation in favour of third parties, and the most favoured nation clause, which required the consent of the addressee.

65. Could a State impose obligations on another State that had neither taken part in the formulation of a unilateral act nor accepted the corresponding obligations? An analysis of those unilateral acts that were considered most representative showed that neither promise nor waiver created obligations for third parties. Indeed, the author State undertook obligations in formulating the act and by the same token granted rights to other States. Stipulation in favour of third parties required no acceptance or reaction signifying acceptance. As ICJ had pointed out in its decisions in the *Nuclear Tests* cases, the unilateral act created obligations from the moment it was formulated. That moment was comparable, *mutatis mutandis*, to the entry into force of a treaty.

66. Recognition of States could perhaps bear closer examination as a unilateral act formulated expressly and not implicitly. While there was no doubt that the author State assumed obligations *vis-à-vis* the addressee State, one might ask whether the latter State thereby assumed obligations imposed by international law. The answer obviously depended on the way one viewed recognition of States, on whether it was seen as declarative or constitutive. If it was the former, the recognizing State merely took note of an existing situation, namely statehood, which obtained not because of a statement of recognition but because the necessary conditions existed for the entity to constitute a State. The State’s obligations therefore stemmed from its status, not from the act of recognition. In the second hypothesis, reflecting a view he did not share, the situation would be different.

67. In past discussions of the term “unequivocal”, it had been suggested that it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions. Some mem-

bers considered that the expression of will must always be clear and comprehensible, and that if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. The term in any event remained in the definition which was now before the Drafting Committee.

68. The excessively broad term “publicity” had been replaced by the word “notoriety”, since “publicity” was seen as having been used exclusively in the case of a unilateral act formulated *erga omnes*, whereas the key element was that the act should be known to the addressee.

69. The fact that the definition gave States alone the capability to formulate unilateral acts—the matter covered by the Commission’s mandate—should in no way be construed as meaning that other subjects of international law, particularly international organizations, could not do so. The notion of addressee was seen in broad terms, such that a unilateral act could be directed not only at one or more States, but also at an international organization. Some members of the Commission believed that other international legal entities, including liberation movements, could be the addressees of such acts. That raised a number of issues that deserved measured consideration, including international responsibility and international capacity in the event of a dispute, but the draft as it stood remained limited expressly to States and international organizations.

70. The definition of unilateral acts was now before the Drafting Committee and it was crucial that it be adopted at the present session to permit progress on other draft articles. Extensive consideration had been given to the definition, and its conception had evolved on the basis of comments by members of the Commission and by Governments. A recapitulation of the progress made and the reasons why certain concepts and terms had been changed had been provided in response to suggestions made the previous year. While all unilateral acts were similar in formulation and common rules could be elaborated for them, some acts differed in their legal effects. The structure of the draft would therefore have to be divided into two or three parts, depending on the classification made of unilateral acts. He recalled that the Commission had considered that work could be focused in the next stage on international promise and other acts by which States assumed unilateral obligations.

71. With those remarks, he commended the introductory portion of his fifth report to the members of the Commission, on the understanding that at the next meeting he would submit additional aspects of the topic for their consideration.

72. Mr. PELLET said the recapitulation of the Commission’s work presented by the Special Rapporteur was interesting, especially for new members, but there were no new elements or new draft articles for discussion. What were members being asked to speak about in the upcoming meetings on the topic?

73. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said it had been Mr. Pellet himself who had suggested that

a recapitulation be presented, for which he was grateful, since it would help new members of the Commission to assess the progress made. True, there was little that was new for other members, but paragraphs 44 and 45 of the report raised certain points on which he would welcome comments: the application to unilateral acts of the general rule of *pacta sunt servanda*; the application of the unilateral act in time, which raised the issue of retroactivity; the application of the unilateral act in space; and determination of the moment when the unilateral act began to produce its legal effects.

The meeting rose at 1 p.m.

2721st MEETING

Friday, 17 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Organization of work of the session (*continued*)

[Agenda item 2]

1. Mr. YAMADA (Chair of the Drafting Committee) announced that, taking into account the wishes of the members of the Commission and the need to ensure an equitable distribution of geographical regions and languages, it had been decided that the Drafting Committee on the topic of reservations to treaties would be composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue and Mr. Kuznetsov (Rapporteur of the Commission, *ex officio* member). He understood that the Chair of the Commission was willing to take part as an *ex officio* member. The Committee was open to the participation of all the