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Summary record of the 2781st meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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25. In paragraph 39 of his report, the Special Rapporteur pointed out that the Head of the Legal Advice Department and the Treaty Office of the Council of Europe had noted that, in some instances, States had requested the Secretariat of the Council of Europe to provide information on whether and how reservations could be modified. The Secretariat's response to such questions had always been the same: modifications which would result in an extension of the scope of existing reservations were not acceptable. He believed that the practice of the Council of Europe should be followed, even though the United Nations had used the opposite practice, which, in his view, was very dangerous.

26. During the second reading of the draft guideline, the possibility of formulating a late reservation should be restricted. The State must prove that it had already formulated the reservation prior to depositing its instrument of ratification in order for such a reservation to be accepted.

The meeting rose at 11.45 a.m.

2781st MEETING

Tuesday, 29 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

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

Reservations to treaties[1] (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,[2] A/CN.4/L.630 and Corr.2)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN said that the eighth report (A/CN.4/535 and Add.1) was rich and useful. The conclusions drawn by the Special Rapporteur in Chapter I, on the withdrawal and modification of reservations and interpretative declarations, were quite correct, and the draft guidelines contained there could therefore be referred to the Drafting Committee. The logic underlying them was sound, and he endorsed the view, expressed in paragraph 36 of the report, that the rules applying to a late formulation of a reservation also held good for "enlargement" of the scope of a reservation, a term that could be interpreted in the commentary.

2. He could also subscribe to the Special Rapporteur's opinion that an interpretative declaration could be withdrawn at any time since, according to the general rule, it could be formulated at any time, although it was not clear why partial withdrawal was impossible. Draft guideline 2.4.9 was acceptable, and the new variants of guidelines 2.4.3 and 2.4.6 were, as the Special Rapporteur had said, more elegant. Personally he, like several other members of the Commission, would prefer to extend the provisions on reservations to conditional interpretative declarations as well.

3. The definition of objections to reservations, dealt with in paragraphs 98 and 105, was of central importance. The principal element of the definition was the intention of the objecting State "to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection" (para. 98). That element was consonant with article 21, paragraph 3, and with article 20, paragraph 4 (*b*), of the 1969 Vienna Convention, the latter provision being the only one in the Convention that referred to the intention of the objecting State. Nevertheless, there was nothing in the Convention or in State practice to indicate that that was the sole possible intention of States objecting to reservations. It was possible to discern the intention of the objecting State above all by analysing the text of the objection.

4. While the Special Rapporteur had done much research into State practice, he had held that only reactions to reservations that evidenced their authors' intentions could be termed objections. Accordingly, he had doubted whether Sweden's reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[3] qualified as an objection to that reservation. In fact, the text of the objections of Sweden and Norway[4] to that reservation did show that their aims had been quite different, as the quotation in paragraph 96 of the report made plain, namely, to secure the application of the treaty to the objecting State and to persuade that State to withdraw its objection.

5. Recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe to member States on responses to inadmissible reservations to international treaties was pertinent to an analysis of the intentions of

[1] For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook … 2002*, vol. II (Part Two), para. 102, pp. 24–28.

[2] Reproduced in *Yearbook ... 2003*, vol. II (Part One).

[3] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 316 (reservation by Qatar) and 318 (objection by Sweden).

[4] *Ibid.*, p. 317.

objecting States, and greater attention should therefore be devoted to it. Although it was only a recommendation of a regional organization, it testified to the existence and acceptance of a practice that was spreading in the domain of objections to reservations. First, the model responses set out in the recommendation were models of objections to reservations and not of any other kinds of reactions. Second, the reactions of Sweden and Norway, which he had just mentioned, had been fully in line with one of those model responses. Moreover, those countries had reacted in a similar manner to the reservation entered by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism.[5] Consideration of those objections by the Council of Europe's Ad Hoc Committee of Legal Advisers on Public International Law had led to the finding that, at least as far as the member States of that organization were concerned, they were indubitably objections to reservations.

6. Third, only 2 of the 11 model responses in the recommendation said that such an objection prevented the entry into force of the treaty between the objecting State and the State acceding to the treaty. That showed that the member States of the Council of Europe regarded the intention that was central to the definition of an objection proposed by the Special Rapporteur to be only one of several possible intentions.

7. Fourth, paragraph 88 of the report suggested that Austria's reaction to Malaysia's reservation to the Convention on the Rights of the Child[6] could be deemed either conditional acceptance or a conditional objection, yet one of the model responses in the recommendation of the Council of Europe reproduced almost word for word the final clauses of the Austrian reaction and termed it an objection. If the view were taken that, in that case, the objecting State was reserving the right to make a final appraisal of the reservation after it had received further explanations, it would be possible to call that a conditional objection or, better, a preliminary objection, but certainly not a conditional acceptance. The intention of the objecting State was clearly, as the Special Rapporteur had admitted, to prompt the State making the reservation to withdraw or modify it. The Council's recommendation had shown that very often the intention of objecting States was not to prevent the entry into force of a treaty between them and States entering reservations but, on the contrary, to secure the integrity of the treaty regime by persuading those States to withdraw their reservation. That was especially important in the context of universal international treaties establishing *erga omnes* obligations.

8. Apart from that, the intention of the objecting State was frequently to ensure that a reservation could not subsequently be made opposable to it, or to preclude the possibility of a customary norm based on the reservation being made opposable to it.

9. He therefore suggested that, if it was considered expedient to include the intention of the objecting State in the definition of objections, that intention should not be restricted in the manner proposed by the Special Rapporteur, since it was often quite different. Naturally, the question arose whether it was necessary to link the intention of the objecting State with the legal effects of the objection, which were provided for in the 1969 Vienna Convention. If those issues were interrelated—and he was not certain that they were—then possibly the adoption of the definition of objections to reservations should be postponed until the legal effects of objections had been studied.

10. Ms. ESCARAMEIA thanked the Special Rapporteur for a clearly structured, highly informative report. His summary of the seventh report[7] and its follow-up had also been most useful. The efforts of the Special Rapporteur to secure the cooperation of a number of other important legal bodies were commendable.

11. The Special Rapporteur had drawn an analogy between enlargement of the scope of existing reservations and late formulation of reservations, to which draft guidelines 2.3.1 to 2.3.3 referred, and suggested that such enlargement was fine if all the parties accepted it. The reasons given were that, while no encouragement should be given to such a widening of the scope of reservations, legitimate grounds for doing so might exist and so some allowance had to be made for that eventuality. Similarly, a parallel was drawn with article 39 of the 1969 Vienna Convention, which required unanimous agreement among the parties whenever a treaty was amended, even though enlargement of the scope of a reservation entailed less modification than a treaty amendment.

12. The Special Rapporteur had, however, mentioned two contradictory practices: that followed by the Directorate General of Legal Affairs of the Council of Europe, which related more to human rights treaties, where no enlargement of the scope of reservations was accepted because it would jeopardize both the certainty of the treaty and its uniform application, and that followed by the Secretary-General of the United Nations, where enlargement of the scope of reservations was treated in the same way as late reservations.

13. Mr. Economides had raised the issue of bad faith and good faith, but in her opinion late reservations, or enlargement of the scope of a previous reservation could be prompted by either, although bad faith was a more likely motive for enlargement. The 1969 and 1986 Vienna Conventions provided a basis for adopting a more rigid position with regard to both the definition of reservations and their formulation and did not even allow late reservations. The principle of the integrity of treaties, particularly important in human rights treaties, deserved some consideration, and it was also necessary to remember that later interpretations of reservations to exclude the legal effects of treaty provisions were totally forbidden. For all those reasons, she believed that modification of a reservation by broadening its scope would affect the integrity of a treaty, and draft guideline 2.3.5 should either be deleted or limits should be placed on the extent to which the scope of a reservation could be enlarged. If that draft guideline was retained, a second paragraph should be added to define what was meant by "enlargement of the scope of a reservation". On the other hand, she agreed with the Special Rappor-

[5] *Ibid*., vol. II, p. 141.

[6] *Ibid*., vol. I, pp. 289 (reservation by Malaysia) and 294 (objection by Austria).

[7] See 2780th meeting, footnote 3.

teur that a distinction should be established between an objection to a process and an objection to the contents of a reservation, and that different wording should be used to describe dissimilar situations.

14. As to the question of the withdrawal and modification of interpretative declarations, guideline 2.2.12 was acceptable and the sentence in brackets should be included for the sake of clarity. She was against dealing with conditional interpretative declarations as if they were different from reservations, but if the Commission was intent on doing so, she agreed with guideline 2.5.13 and also guideline 2.4.10, on the modification of conditional interpretative declaration, and guideline 2.4.9, on the modification of interpretative declarations.

15. As far as the reservations dialogue was concerned, undue weight seemed to have been given to the 1969 Vienna Convention in the Special Rapporteur's efforts to find a firm basis for a definition of objections to a reservation, although he then went on to mention circumstances in which a reservation dialogue could centre on quasi-objections, or in which States merely wished to give their reasons for withdrawing a reservation, or wanted to engage in a dialogue which would not necessarily culminate in an objection, but in which they would press another country to modify its position. Those situations, for which no provision was made in the 1969 and 1986 Vienna Conventions, did not really involve objections, but were encountered in practice. As the Conventions did not, in fact, define objections to reservations, the draft guideline rested on an analogy with the contents of article 21, paragraph 3, of the Conventions. Article 21, paragraph 3, offered scope for great flexibility, in that it implied that reservations could have a very wide ambit and were not necessarily restricted to situations making it impossible for treaties to enter into force, or for the particular provisions to apply between the two parties. The Conventions might allow for more elasticity than that offered by the addendum to the report. At all events, the definition proposed in guideline 2.6.1 closely followed the relevant articles of the 1969 Vienna Convention and was the most rigorous interpretation, but State practice needed to be taken into account, and allowance must also be made for many other situations which would not produce the effects mentioned in the guideline. For that reason, the definition of objections to reservations should be more flexible and guideline 2.6.1 *bis* should be included in the Guide to Practice. Finally, the Commission should make a recommendation to the effect that, as far as possible, the reasons for the objection should be stated.

16. Mr. KOSKENNIEMI said that the character and effects of objections to reservations were significant and perhaps controversial aspects of the regime of the 1969 and 1986 Vienna Conventions. The Special Rapporteur's definition of objections was too limitative and did not reflect ongoing discussions of the topic. He therefore agreed with Mr. Kolodkin that it was strange to define objections by reference to their actual or intended effects.

17. No doubt the regime of objections to reservations left much to be desired. The fact that few States took the opportunity to raise such objections might be indicative of a somewhat cavalier attitude to the way in which other States acceded to treaties, or it might simply stem from a lack of time and resources for engaging in systematic reservation-watching. Not that making an objection was merely a matter of bureaucratic routine, since the "reservations dialogue" might well affect the relations of parties to the dialogue and give rise to some unease about individual States making judgements about others' reservations, because such judgements conflicted with the principle of sovereign equality.

18. That unease and the unsatisfactory character of the regime of objections under the 1969 and 1986 Vienna Conventions were caused by the decentralized and open-ended nature of the reservations regime. In the best of all worlds, judgements as to the permissibility of reservations would be made by law-applying organs that were not dependent on the political preferences of States parties and unaffected by the needs of diplomatic courtesy. Such a development had already occurred in some areas. The European Court of Human Rights and the Inter-American Court of Human Rights had determined that their jurisdiction extended to the scrutiny of the permissibility of particular reservations to the relevant conventions, and the European Court of Human Rights had found that it also had the competence to declare some reservations invalid, but to hold a State party bound irrespective of such a reservation. The doctrine of severability was, however, controversial.

19. The practice of individual States filing objections that applied to the severability doctrine was even more controversial. Nevertheless a number of States insisted that, in some situations, a State must be bound by a treaty as a whole, irrespective of a reservation it had made, when that reservation was contrary to the object and purpose of a treaty and undermined its integrity and the basis upon which it had been agreed. Such a view had been taken particularly with regard to multilateral treaties which gave rights and powers to third parties, human rights treaties being a case in point. The Special Rapporteur was aware of that practice since he had quoted an example of it in paragraph 96 of the report.

20. When a State made such an objection, it was principally motivated by a concern to maintain the integrity and effectiveness of the treaty and less by a concern to protect the consent of the reserving State. Whether or not the objection achieved that effect was a moot point, but the practice was gaining acceptance, as was shown by the fact that 33 objections made by States to reservations to the Convention on the Elimination of All Forms of Discrimination against Women[8] and to the Convention on the Rights of the Child[9] had applied the severability doctrine.

21. The best arguments in defence of the severability practice, which many States regarded as legally dubious, could be found in considerations that transcended the language of article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 Vienna Convention. Although a distinction should be made between *ab initio* impermissible reservations and permissible objections that entailed the reciprocal functioning of the Vienna regime, the Special

[8] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 225 *et seq*.

[9] *Ibid*., pp. 282 *et seq*.

Rapporteur, instead of dealing with that question in connection with the effects of objections to reservations, had made the unprecedented suggestion that such objections were not real objections.

22. His point was that the definition of an objection was one thing, and the definition of the effects of particular types of objection was another. Nothing was gained by mixing the two: on the contrary, that merely produced counterintuitive language that failed to reflect the usage and understandings that actually prevailed in the *dialogue réservataire* among States.

23. The suggestion that an objection that applied the severability doctrine—what the Special Rapporteur called the "super-maximum effect"—might not qualify as an objection under the 1969 Vienna Convention conflicted with one of the Convention's most obvious principles, referred to by the Special Rapporteur in paragraph 79 of the report, namely that the intentions of States took precedence over the terminology they used to express them. The Special Rapporteur went on to say that the same should apply to objections. Whatever one might say about the legal effects of an objection like the Swedish one[10] reported in paragraph 96 of the report, one thing was clear: it was intended as an objection, and it was intended to fall under the Convention. If what the Special Rapporteur said about the relevance of intent was true, it must follow that such acts were objections. Nobody had ever suggested otherwise, nor did the Special Rapporteur show any authority in support of the opposing view.

24. The Committee of Ministers of the Council of Europe had adopted a recommendation on responses to inadmissible reservations to international treaties containing model clauses for responses to non-specific reservations, sweeping reservations that, for example, proclaimed primacy of national law over the treaty. He went on to cite one of the responses set out in a model clause, pointing out that it was worded as an objection and intended as one; indeed, the Committee of Ministers might be surprised to learn that it was something quite different from an objection.

25. Additional aspects of the *dialogue réservataire* showed that even controversial objections were intended as objections, worded as objections and always treated as objections. The Special Rapporteur stated in paragraph 97 that it was contrary to its very essence for an objection to challenge the rule advocated by the reserving State, instead of the position adopted by that State. Such an objection actually consisted of two parts. The first was a reaction to the reserving State's position: its reservation was contrary to the object and purpose of the treaty, and as such was inadmissible. The second part was the consequences as seen by the objecting State, namely, that the reservation was invalid and the treaty entered into force between the two States, unaffected by the reservation. Many States often made the first point without the second. In cases like that, there would seem to be no problem. The consequences would be those, unclear as they might be, laid out in the 1969 Vienna Convention. Surely, the fact that an objecting State saw particular consequences in its reaction to the reserving State's position and that those consequences might be controversial did not nullify or extinguish its reaction. Just as a reservation did not cease to be a reservation even if it was inadmissible, an objection did not cease to be one merely because there was controversy about its legal consequences. A will remained a will under domestic inheritance law even if it was partly invalid because the testator had violated the right of the offspring to a specified portion of the inheritance.

26. He had dwelt on his point extensively for two reasons. First, he did not think that the Special Rapporteur's ingenious effort to use definitional fiat to avoid dealing with one of the most difficult questions about the *dialogue réservataire* was a successful codification strategy. Perhaps that was not his intention, however. Perhaps, following the practice he had suggested in paragraph 101 of his report, the Special Rapporteur intended to distinguish between objections under articles 20 and 21 of the 1969 Vienna Convention and what he wished to call "opposition". Even in that case, however, it was hard to see how "opposition" could be defined as anything other than a species in the genus of objection, the type of objection that deemed the reservation invalid and the State bound irrespective of it. Such a redefinition would deal with the substantive problem—perhaps inelegantly, but still clearly—and would be acceptable, but a more economical approach would be to define objections on the basis of the Special Rapporteur's reasoning in paragraph 101 regarding objections to the late formulation of a reservation. He could propose wording for a new guideline 2.6.1 *bis* to the effect that an objection might also mean a unilateral statement whereby a State or an international organization purported to prevent the application of an inadmissible reservation while holding that the treaty would enter into force between itself and the author of the reservation without the latter benefiting from its reservation. Yet ultimately, the best technique might be to widen the language of guideline 2.6.1 so as to cover all types of unilateral reactions to reservations in which the objecting State put forward its view as to the permissibility and legal effects of the reservation, and then to deal with such effects in a separate provision.

27. The second reason he had emphasized the need to codify aspects of the *dialogue réservataire* was that in State practice a distinction was evolving between various types of treaties and the various ways in which reservations and objections operated in them. In the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, which the Commission had adopted at its forty-ninth session,[11] it had refused to make that distinction or to recognize the *de facto* development of a regime of objections. However, many States now objected to reservations that seemed inadmissible because they went against the fundamental object and purpose of a treaty, holding that such reservations were null and void. In their view, if a State wished to join the treaty community, it must do so on the basis of broad equality of treaty burdens and a good-faith commitment to the realization of the treaty's aims. No one should be able to pick and choose—not where key aspects of the treaty relationship were at stake, at any rate. To hold such reservations invalid might be controversial, but it was re-

[10] See footnote 3 above.

[11] *Yearbook … 1997*, vol. II (Part Two), p. 57, para. 157.

ceiving increasing support from States and international bodies. The argument that that went against the consensual basis of treaty law was weak, for real consent must surely encompass the object of the treaty relationship and entail what ICJ in the *Nuclear Tests* cases had referred to as good faith, trust and confidence in international relations. The Commission could surely do worse than to face up to some of the real difficulties in applying existing law so as to strike a balance between sovereign consent and the effectiveness of treaty regimes. It should be open to the argument that if developments that went beyond the language of the 1969 Vienna Convention were taken into account, the underlying ideas of that instrument would only be better reflected.

28. Mr. MELESCANU thanked the Special Rapporteur for his eighth report and welcomed the efforts he was making to open up a dialogue with other United Nations bodies which were also dealing with reservations, with a view to developing a set of rules that would be general in scope, not reserved to specific domains. He looked forward to the forthcoming dialogue on reservations to human rights treaties with the Committee on the Elimination of Racial Discrimination, *inter alia*.

29. The Special Rapporteur had a judicious position on enlargement of the scope of reservations, namely, that it should be dealt with as a late formulation of a reservation to which the rules in guidelines 2.3.1 to 2.3.3 applied. Mr. Economides' objections on that point were not entirely convincing. The rules were formulated in such a way as to dissuade States from making late reservations, and in practice it would be difficult to distinguish between a late reservation and enlargement of the scope of a reservation. The State practice cited by the Special Rapporteur in paragraph 43 of his report—the Finnish reservation to the Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals concluded at Vienna on 8 November 1986 (with annexes),[12] and the modification by the Government of the Maldives of its reservations to the Convention on the Elimination of All Forms of Discrimination against Women[13]—while not extensive or decisive, nevertheless supported his approach. He himself endorsed the idea of treating enlargement of the scope of a reservation as late formulation of a reservation, as long as all the restrictions on late formulation applied. He could agree to the adoption of a text like the one proposed for guideline 2.3.5, with the addition of a paragraph to explain the scope of the provision. Putting the explanation in the commentary would not be a good idea, since the staff of ministries of legal affairs worked under time constraints which often prevented them from reading such additional material.

30. The matter of withdrawal and modification of interpretative declarations did not raise major difficulties. The Commission had already decided that a "simple" interpretative declaration could be formulated at any time, and he therefore assumed that it could be withdrawn at any time. Accordingly, guideline 2.5.12 could be accepted with the inclusion of the words in brackets with a view to simplifying the use of the Guide to Practice.

31. Like other members of the Commission, he had some doubts about withdrawal of a conditional interpretative declaration. A final decision should be taken only after the entire subject had been studied. He could go along with guideline 2.5.13, on the understanding that the bracketed words would be retained.

32. Given the lack or even non-existence of State practice, the Special Rapporteur was proposing a logic-based approach to the modification of "simple" interpretative declarations or of conditional interpretative declarations. He endorsed the inclusion of the draft guidelines proposed but felt that the Special Rapporteur had posed a dilemma as to their placement, forcing the Commission to choose between elegance and the legal logic of the Guide. He favoured logic and accordingly endorsed guidelines 2.4.10 and 2.4.9 as proposed in paragraphs 61 and 63 of the report. A final decision on placement should be postponed until the draft was completed, since, if there were other areas where the presentation could be improved, a solution could be applied to the entire draft.

33. The formulation of objections to reservations—the "reservations dialogue"—was of special practical importance to the States. It was an area that involved not codification but progressive development of international law, since objections as such had not yet been clearly defined, not even in the Vienna Convention. In paragraphs 83 *et seq*. and the introductory remarks of his report, the Special Rapporteur had given a good idea of the complexity of the subject, which was to be taken up in earnest next year.

34. He supported the approach proposed by the Special Rapporteur and did not agree with some of his colleagues that the State's objective in formulating an objection should not be included in the definition of an objection. As the court of arbitration in the *Continental Shelf between the United Kingdom and France* case had stated, whether a reaction by a State amounted to a mere comment, a mere reserving of its position, a rejection of a particular reservation or a wholesale rejection of relations with the reserving State depended on the intention of the State concerned. One could not define an objection to a reservation without reference to the State's intention. On the other hand, a practical or useful definition could not be developed without reference to the effects which the act might produce at the international level. The very purpose of the Guide to Practice was to provide States with the requisite tools to make full use of the fundamental institution of the multilateral treaty. For that reason, he favoured including both aspects—intention and effects—either in the definition of the reservation, as proposed by Mr. Gaja, or in some other part of the draft, as Mr. Koskenniemi had suggested. If such elements were added to the definition of the reservation, which was already quite complex, the result might be somewhat cumbersome. A choice would have to be made, and some elements might have to be omitted—for example, the status that the person representing a State or international organization must have in order to formulate a reservation.

35. The discussion launched by Mr. Kolodkin's comments on the recommendation by the Committee of Ministers of the Council of Europe seemed to be based on a misunderstanding. Mr. Kolodkin's reasoning was impec-

[12] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), p. 793.

[13] *Ibid*., p. 231.

cable, but his premise was false. The Council of Europe had been dealing solely with inadmissible reservations, and the intention of all objections thereto was to prevent the application of such reservations in relations between States. It was thus a very limited and specific instance of reservations. Unlike Mr. Koskenniemi, he thought it was not a good idea to draft special provisions for certain types of objections—to human rights treaties, for example. The main objective should be to find the most general rules possible and then to look at whether exceptions should be envisaged for certain specific cases. The Commission should resist the temptation to do the opposite: to take exceptions as the basis for building rules. If it did so, it might provide arguments to those who thought there were two separate strains in international law: general, relating to inter-State relations, and specific, creating rights and obligations not for States but for individuals. The Commission's main concern should be to develop general rules.

36. Mr. KOSKENNIEMI, responding to Mr. Melescanu, said that, first, he had not formulated his arguments on the basis of the proposition that international law was divided into two parts—general international law and human rights law. He would certainly not wish to endorse such a division. Second, the recommendation by the Committee of Ministers of the Council of Europe was not limited to human rights treaties, as was borne out by its title, which referred to responses to inadmissible reservations to international treaties. Third, it was important to draw a distinction between reservations which were inadmissible and prompted States to raise objections along the lines of Sweden[14] and others which, although admissible, were still subject to the regime of objections for various reasons. If that was a meaningful distinction then it surely must follow that the States concerned would recognize it. He endorsed Mr. Melescanu's suggestion that the definition should be broad enough to encompass the wide variety of statements that might be made, as in the case of Sweden. However, he recognized that, irrespective of whether the objection had the consequences it purported to have, it was controversial, and that controversy should be dealt with separately in the part of the text dealing with effects and not that relating to the definition itself.

37. Mr. MOMTAZ said that, as usual, the Special Rapporteur had submitted a very high-quality report, with ample illustrations of State practice and a very useful analysis of doctrine. Those compliments were not made merely for the sake of it, as he endorsed most of the conclusions and affirmations contained in the report.

38. In general, he failed to understand why the Commission need stick so closely to the 1969 Vienna Convention, especially where its provisions were ambiguous. There was nothing to prevent it from showing some flexibility and disregarding the spirit of Vienna in some cases. Indeed, that was the very purpose of the Guide to Practice and the guidelines on reservations now being drafted. That remark clearly applied to the thrust of guideline 2.6.1 relating to the definition of objections to reservations. If he had understood correctly, the wording proposed departed from the 1969 and 1986 Vienna Conventions, which reserved the right to object to a reservation to the State or international organization that was already party to the instrument concerned. He believed that such a right should also be granted to the State or international organization which was signatory to the instrument in recognition of the obligation undertaken in signing it.

39. As to the "super-maximum effect" that some writers wished to attribute to an objection to a reservation, he welcomed the example cited in paragraph 96 of the report on Sweden's statement in reaction to Qatar's reservation when acceding to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Yet the Special Rapporteur seemed to adopt a negative position *vis-à-vis* the "super-maximum effect" by subsequently stating (para. 97) that the effect of such a statement was to render the reservation null and void without the consent of the author. Regrettably, he himself had not taken the trouble to examine the contents of Qatar's reservation. However, if it had dealt with a provision of the Optional Protocol that was generally considered as being a well-established customary rule, could it not be deemed as a "super-maximum effect" of the objection to the reservation? Admittedly, it was not possible to enter a reservation relating to a provision that had acquired the status of customary law. Nevertheless, one could imagine a situation in which, although the provision had not been a well-established customary rule at the time the treaty had been drawn up, it had subsequently acquired such status when the reservation in question had been entered. He wondered whether Imbert's view that an expressly authorized reservation could be objected to,[15] mentioned in a footnote in paragraph 94 of the report, referred to that type of situation.

40. It was gratifying to note that special attention would be paid to one of the most notable recent developments in the procedure for formulating reservations, described by the Special Rapporteur as the "reservations dialogue". The report showed clearly that the treaty-monitoring bodies were already moving in that direction. The Human Rights Committee's General Comment No. 24,[16] which had prompted the drafting of guideline 2.5.X, had caused problems both in the Commission and the Sixth Committee. It seemed to contradict the "reservations dialogue" and was at the opposite extreme of the position adopted by many other treaty bodies, including the Committee on the Elimination of All Forms of Racial Discrimination. He therefore wondered whether it would be wise to revert to the issues raised by proposed guideline 2.5.X.

41. The Special Rapporteur's analysis of recent developments with respect to reservations was very useful in identifying relevant State practice. In that connection, he questioned whether the declaration made by the Republic of Moldova relating to the European Convention on Human Rights,[17] mentioned in paragraph 24 of the report, could be qualified as a reservation. In his view, it was a declaration whereby the Republic of Moldova sought to deny all responsibility for possible violations of the Convention on the part of its territory where it had ceased to have effective control. The Moldovan Government would

[14] See footnote 3 above.

[15] See P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), pp. 151–152.

[16] See 2780th meeting, footnote 5.

[17] United Nations, *Treaty Series*, vol. 2045, pp. 28 *et seq*.

nonetheless be held responsible for such violations on that part of the territory over which it had sovereignty, unless the rebel forces managed to overthrow it. That was the concept enshrined in article 8 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.[18] He was in favour of the Commission making a recommendation to States and international organizations, inviting them to give reasons for their objections to reservations, as was proposed in the report (para. 106), since such an approach would undeniably encourage and facilitate the "reservations dialogue".

42. Finally, he endorsed the Special Rapporteur's proposal to deal with enlargement of the scope of reservations in the same way as late formulation of reservations. The cases cited by Mr. Economides at an earlier meeting were very exceptional and would be more appropriately termed "forgotten" reservations.

43. Mr. PELLET (Special Rapporteur) said he totally disagreed with the remark by Mr. Momtaz that it was not possible to object to a reservation to a treaty provision based on a customary rule. It was indeed perfectly possible to enter such a reservation. The rule could not become treaty law, but its customary nature was in no way undermined.

44. Ms. XUE thanked the Special Rapporteur for his eighth report, which provided an in-depth analysis of the practice of States and international organizations and useful information on new approaches. The Special Rapporteur had likened late formulation of reservations to enlargement of the scope of reservations. Logically that was acceptable, since the two forms of reservations produced the same legal effects. However, some members held that late formulation of reservations was not acceptable unless the reserving State could fully demonstrate that the reservation had been made at an earlier stage. Although in theory such a strict approach was conducive to maintaining treaty regimes, in practice it was excessively rigid. As long as its object and purpose were upheld, a treaty's implementation would be ensured if no other contracting parties objected to it. Thus a degree of flexibility could be allowed. A good illustration was the reservation by Finland in acceding to the Protocol on Road Markings Additional to the European Agreement Supplementing the Convention on Road Signs and Signals.[19] The highly technical nature of such treaties was likely to give rise to reservations, but it was not appropriate to impose universally the practice followed in one particular region. Her conclusion was that guideline 2.3.5, on enlargement of the scope of a reservation, should be referred to the Drafting Committee.

45. The withdrawal of an interpretative declaration had little impact on a treaty, so there was no need to be particularly demanding about the form that guideline 2.2.12 should take. She could agree to including the additional phrase in square brackets for the sake of consistency with the rest of the guidelines. The modification of interpretative declarations was a common occurrence in international diplomacy. As the report explained, some modifications were straightforward, but other, more complicated situations occurred. For instance, if one contracting party attached the condition of continuously honouring the treaty and another party opposed that condition, the State party concerned would have no choice but to withdraw from the treaty, which was clearly not in the interests of the international community. Such conditional interpretative declarations did not necessarily deal with provisions of the treaty, but could take the form of a political statement. She hoped that the Commission might consider the matter of whether it was necessary to impose strict conditions. Views still diverged on whether such statements should be divided into two categories—simple interpretative declarations and conditional interpretative declarations. Once that matter was resolved, then perhaps the Commission could accommodate her concern. With the exception of that point, she endorsed the report for referral to the Drafting Committee.

46. The addendum provided a brief outline of matters pertaining to the formulation of objections (para. 73 of the report) and five elements on the definition of objection (para. 75) as contained in the 1969 and 1986 Vienna Conventions. The Special Rapporteur correctly observed that the most important aspect of objection was intention. Information was also provided on significant developments in State practice, particularly in the field of human rights. Behind the "reservations dialogue" was a political dialogue on human rights. Objections to reservations might not always be accompanied by explanatory statements, but even when they were, they would not necessarily have any legal force. In practice, the State could object to the reservation of another State but not to the entry into force of a specific treaty or article thereof. The State concerned must explicitly express its intention in the declaration. She endorsed the Special Rapporteur's explanation regarding Sweden's statement in reaction to the reservation by Qatar (paras. 97 and 98) and consequently the proposed text for guideline 2.6.1, on the definition of objections. Nevertheless, there was still cause for concern. In paragraph 100 the Special Rapporteur implied that article 2, subparagraph (*f*), of the 1986 Vienna Convention was not made use of and in fact enlarged the scope of objections to reservations. That did not make any legal sense. Perhaps what was being referred to was the inclusion of signatory States. According to article 18 of the 1969 and 1986 Vienna Conventions, if the signatory State agreed to be bound by a treaty, it would also be a State within the meaning of article 2, subparagraph (*f*). Moreover, the State as referred to under article 20, paragraph 4 (*b*), would make legal sense only if the State was a contracting party.

47. She had no strong views on the question raised in paragraph 101 of the report. Drawing a distinction between an objection to a reservation and an objection to a late formulation was difficult in the Chinese language and in practice would make only a minor difference in legal effects. Thus, any of the formulations proposed could be referred to the Drafting Committee.

48. With reference to paragraph 106 of the report, it was not necessary for the Commission to invite States and international organizations to explain to reserving States the reasons for their objections to a reservation. Such matters should be decided among the parties concerned. It was well known that in the field of human rights such dia-

[18] See 2751st meeting, footnote 3.

[19] See footnote 12 above.

logue often took the form of criticism rather than positive assessment, even though the explanatory statement had been submitted in good faith.

49. The views of many members of the Commission seemed to be based on the practice of member States of the Council of Europe. She wondered, however, how far such practice really reflected the situation at the global level. It would be very interesting to hear in more detail about the 35 cases, referred to earlier, that were based on studies by the Finnish Ministry for Foreign Affairs. In that context, she questioned the force of the statement, quoted in paragraph 96 of the report, that Qatar would not benefit from its reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography *vis-à-vis* Sweden, which had objected to the reservation. The reserving State was surely not expected to amend its own law or practice; if not impossible, such a course of action would be by no means easy. Once a State had made a reservation, it was acting in bad faith or saying that it was unwilling to assume its obligations; it was hardly likely to change in response to an objection. To assume otherwise was a simplistic approach that did not bode well for dialogue between States, since it was for the reserving State itself to decide whether or when to withdraw its reservation. If the objecting State was merely making its position clear, its objection had no legal effect. Although that position should be respected, the law of treaties should not apply to an objection to which the State concerned had no intention of giving legal effect, since that would mean reopening negotiations. Further serious thought should also be given to the question of whether a definition of the effect of objections to reservations was required. In any case, any action should be taken not through the law of treaties but through treaty negotiation.

50. All in all, the report comprehensively reflected the practice of States and the proposed texts should be referred to the Drafting Committee. As for objections to reservations, guideline 2.6.1 could form the basis of discussion.

51. Mr. AL-BAHARNA, after commending the Special Rapporteur on a thorough and well-researched report, recalled that, although the progress achieved to date had been generally welcomed by the Sixth Committee, many delegations had expressed the hope that the project would be completed during the current quinquennium. It had also been suggested that the commentaries should be shortened, since lengthy commentaries on non-controversial matters might give the impression that the law was less clear or more complex than it really was.

52. He welcomed the account, in section B of the report, of the contacts and exchanges of views between the Commission and the human rights bodies but regretted that those contacts had been unjustifiably slow and few in number, as was stated in a footnote in paragraph 17 of the report and in paragraph 18. He requested the Special Rapporteur to keep the Commission informed of any progress and, in particular, how many of the human rights bodies had so far responded positively to the request contained in the model letter appearing in the annex to the report.

53. As for the draft guidelines themselves, the Special Rapporteur seemed to equate the enlargement of the scope of reservations, as far as its legal effects were concerned, with the late formulation of reservations and, on that basis, proposed a text for guideline 2.3.5. However, even with the suggested addition of paragraph 2 of the draft guideline as contained in paragraph 48 of the report, the proposed guideline did not provide a sufficient solution to the question of enlargement of the scope of a reservation, which called for separate, independent treatment. Modifications of reservations fell into two categories: in some cases they were intended to lessen and in others to enlarge—and not merely to strengthen—the scope of the reservation. There might be no problem in principle with regard to the first category, as was stated in paragraph 34 of the report. On the other hand, it could not be said with certainty that guideline 2.3.1, 2.3.2 or 2.3.3 could be applicable to a situation which amounted to limiting the legal effect of the modified reservation with a view to ensuring more completely the application of the provisions of the treaty to the reserving State. In such a case, guideline 2.5.11 should be applicable, but it should be redrafted in a manner that emphasized the limitation of the legal effect of the initial reservation—for example, by stating that modification of a reservation for the purpose of limiting its legal effect amounted to partial withdrawal of that reservation.

54. As for cases in which the purpose of the modification was to enlarge and strengthen the legal effect of the treaty in favour of the reserving State, it might not be accurate to equate such a situation with late formulation of a reservation. Clarification was required, and indeed the permissibility of modifying the reservation should be considered. Article 39 of the 1969 Vienna Convention concerned amendments to treaties, which was quite different from going to the lengths of authorizing one of the parties to modify the treaty using the unwarranted process of an enlarged reservation. Yet, despite the practice and literature he himself quoted, the Special Rapporteur called objections to the process "too rigid". Invoking the practice of depositaries, the Special Rapporteur called for an alignment of practice in the matter of enlarging the scope of reservation with that regarding late formulation of reservations. State practice, however, was varied and hardly consistent. The issue should be treated on its own. The definition contained in paragraph 48 could be adopted as a starting point for the proposed guideline 2.3.5, but it should contain another provision that would treat enlarged reservations as impermissible.

55. Guideline 2.2.12, on withdrawal of an interpretative declaration, seemed simple and logical, and it would be useful to retain the last phrase, currently appearing in square brackets, for it provided added clarity. As for conditional interpretative declarations, the Special Rapporteur accepted the principle that the rules were necessarily identical with those applying to reservations, thus supporting the view of several delegations to the Sixth Committee and some members of the Commission that conditional interpretative declarations should not be treated as a separate category and should be equated with reservations. In paragraph 16 he nonetheless stated that a final decision should be taken after the Commission had decided on the permissibility of reservations and interpre-

tative declarations and their effects. There was no need to hurry to reverse the order of the draft guidelines adopted on first reading. The Special Rapporteur should maintain his present practice of developing the rules for conditional interpretative declarations separately from the legal regime of reservations. In that regard, draft guideline 2.5.13 was acceptable, as long as the last phrase, contained in square brackets, was retained.

56. The Special Rapporteur's position on the modification of interpretative declarations, whether conditional or not, was confusing. On the one hand, he held that modification amounted to withdrawal, to which guideline 2.5.13 should apply. On the other hand, in paragraph 59 of the report he stated that there was no question that an interpretative declaration might be modified, despite admitting that some declarations could be deemed more restrictive than others or, on the contrary, could be enlarged. At the same time, he saw no need to distinguish between those two possibilities. Since, however, he stated that conditional interpretative declarations could not be modified at will, there appeared to be a need to formulate a rule restricting, in particular, modifications of declarations that amounted to enlargement of their scope. Proposed guideline 2.4.10 did not seem sufficient. There should be a separate rule restricting the right of a State to enlarge the scope of its initial conditional interpretative declaration. If, however, the draft guideline proved acceptable to the Commission, it should remain as it was, without being combined with guideline 2.4.8—it would be unnecessary and cumbersome to revise a guideline that had already been adopted. Moreover, to retain separate guidelines for the late formulation of declarations and the modification of such declarations would be more convenient for reference and classification purposes.

57. While guideline 2.4.9 was acceptable in itself, he did not agree with the principle of modifying an interpretative declaration that had been made at the time the author expressed its consent to be bound by the treaty. Such a practice was uncommon and, in any case, should not be encouraged. If accepted, however, the guideline should not be amalgamated with guidelines 2.4.3 and 2.4.6, for the reasons he had given in respect of guideline 2.4.10.

58. Mr. MATHESON said that, if his understanding was correct, the Special Rapporteur was proposing stricter rules for conditional interpretative declarations than for reservations: the former could be modified only if no objection was made by any of the other contracting parties, whereas that was true of reservations only if the modification enlarged the scope of the reservation.

59. The definition of an objection would present difficulties if the underlying question of the consequences had not been dealt with. Indeed, as paragraph 96 of the report showed, an objecting State could not bind a reserving State in a manner contrary to the expressed terms of the reservation. The Commission had not yet reached the point of considering what the consequences of an objection would be, but he suspected that it might prove difficult. He therefore agreed with Mr. Kolodkin that, if it intended to pursue such a definition, the Commission should perhaps defer the discussion to a later stage, when it would consider the question of the consequences of a reservation. Indeed, he was not convinced that an elaborate definition was required at all, as long as the State in question was clear that it was objecting.

60. Mr. PELLET (Special Rapporteur) said that, following the statements by Mr. Kolodkin, Mr. Al-Baharna and Mr. Matheson, he had to concede that paragraph 57 of his report was slightly obscure. His point had been that, once a declaration had been made, it was difficult to see how the interpretation could be "enlarged". He had made every effort to look for examples but had succeeded in finding only modifications. If any member of the Commission could point to an example of enlargement, he would gladly withdraw the paragraph.

The meeting rose at 1 p.m.

2782nd MEETING

Wednesday, 30 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

later: Mr. Teodor Viorel MELESCANU

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

Reservations to treaties[1] (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,[2] A/CN.4/L.630 and Corr.2)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI said that the eighth report of the Special Rapporteur on reservations to treaties (A/CN.4/535 and Add.1) contained draft guidelines dealing with two items that were not directly connected. The first part of the report wrapped up the "leftovers" from the seventh report[3] that had been discussed the year before, dealing in general with the withdrawal and modification of reserva-

[1] For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook … 2002*, vol. II (Part Two), para. 102, pp. 24–28.

[2] Reproduced in *Yearbook ... 2003*, vol. II (Part One).

[3] See 2780th meeting, footnote 3.