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Summary record of the 2782nd meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
2003 vol. I
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 objectioning state could not bind a reservation. In that regard, draft guideline 2.5.13 was acceptable, as long as the last phrase, contained in square brackets, was retained.

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. Opretti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.


[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 report3 that had been discussed the year before, dealing in general with the withdrawal and modification of reserva-

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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.
tions and interpretative declarations. In that connection, the only item left for the eighth report was the enlargement of the scope of a reservation. There was some lack of logic, however, in having the subsection on enlargement designated with the letter A, whereas, according to the seventh report, it was to have been treated as a second part, designated as “2”, of subsection B (Modification of reservations), to follow the first part contained in the seventh report and entitled “Reduction of the scope of reservations (partial withdrawal)”. Consequently, the part of the eighth report entitled “Withdrawal and modification of interpretative declarations” should be designated not as part B but as part C.

2. The addendum to the eighth report marked the start of the consideration of a new set of problems connected in general with the formulation of objections to reservations and interpretative declarations, although it was actually limited to the definition of objections to reservations based on the content of objections. Once again, the system adopted by the Special Rapporteur did not seem to be entirely clear or fully convincing. Since the analysis of the problems relating to objections had not been completed in the eighth report, the members of the Commission had only half the picture, especially with regard to the very important and interesting question of the “reservations dialogue”, which was introduced only in a very general way in paragraph 70 of the report, with a promise from the Special Rapporteur that it would be developed later. The Special Rapporteur also indicated that section 3 would deal with the withdrawal of objections to reservations, whereas the entire part II, to consist of four sections, was entitled “Formulation of objections”. The Special Rapporteur should pay more attention to the coherent systematization of his reports in order to make them more transparent and accessible.

3. Those remarks did not in any way diminish a positive evaluation of the substantial work done by the Special Rapporteur. His consideration of the enlargement of the scope of reservations was based on well-chosen examples of State practice. He agreed with him that, based on that practice, “enlarging modifications” should be treated in the same way as late reservations. Consequently, new draft guideline 2.3.5, which confirmed that analogy, seemed acceptable, perhaps with one exception. It seemed that draft guideline 2.3.3, which dealt with an objection to the late formulation of a reservation, was not to apply to the enlargement of the scope of a reservation that had already been made. An objection to such enlargement should not lead to the results provided for in that guideline, namely, that the treaty remained in force “without the reservation being established”. Although such a result might derive from an objection to the late formulation of a reservation, in the case of an objection to the enlargement of the scope of a reservation, it seemed more appropriate to retain the reservation in its original form. Its total elimination might be contrary to the intentions of both the reserving State and the objecting State.

4. With regard to “objections” to the late formulation of a reservation and, as a consequence of the proposed analogy, of the enlargement of the scope of a reservation, he fully shared the Special Rapporteur’s doubts, expressed in paragraph 45 of the report, “as to the advisability of using the term ‘objection’ to refer to the opposition of States to the late modification of reservations” and, consequently, to opposition to “enlarging modifications”. He shared his opinion that the Commission’s earlier decision to retain the word “objection” to refer to the opposition of States to the late formulation of reservations in draft guidelines 2.3.2 and 2.3.3 was not the best of its decisions. It was never too late to make appropriate corrections to the text of the guidelines in question, where the word “objection” could be replaced by the word “opposition”, for example. The definition of objections proposed by the Special Rapporteur made that correction all the more desirable.

5. Turning to objections to reservations, the proposed definition contained in draft guideline 2.6.1 seemed acceptable and reflected the practice of States in that field. It should exclude “quasi-objections”, namely, various forms of opposition to the late formulation or modification of reservations. On the other hand, it might be considered whether the definition should be limited, as it concerned the purpose of objections, to the prevention of the application of the provisions of the treaty to which the reservation related or of the treaty as a whole. It seemed possible to include the possibility of a “modifying effect” in the definition when an objection might suggest changes in the reservation without requiring its total withdrawal or making it fully inoperative.

6. State practice showed that the institution of objections to reservations was of rather limited application and that a majority of States had no means to use it in their everyday treaty practice. Even when they were made, objections did not always follow the rules laid down in the 1969 Vienna Convention, in particular with regard to the purpose for which they should be made and the effects they could cause. As a result, as the Special Rapporteur correctly showed, there were numerous examples of uncertain situations relating to the validity of such objections and their real meaning and extent. In many cases, moreover, objections were used not for the purposes set out in their definition, but simply to force the reserving State to withdraw its reservations.

7. It therefore seemed appropriate to adopt a rather narrow definition of “objections to reservations” in order to avoid misinterpretations. It would, however, be important and helpful to identify and analyse the various forms of the “reservations dialogue”, which, as the Special Rapporteur stated in paragraph 70 of his report, “is probably the most striking innovation of modern procedure for the formulation of reservations”. He looked forward with interest to the Special Rapporteur’s next report, which was to be devoted to that subject.

8. Mr. FOMBÀ, referring to chapter I, section A, of the Special Rapporteur’s eighth report on “Enlargement of the scope of reservations”, said that, as was logical, he agreed with the premise stated by the Special Rapporteur in paragraph 34 that, if the effect of the modification was to strengthen an existing reservation, it would seem logical to start from the notion that one was dealing with is the late formulation of a reservation and to apply to it the rules applicable in this regard, namely, those contained in draft guidelines 2.3.1 to 2.3.3, which the Commission had adopted at its fifty-third session, in 2001.4 The reasons

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4 Ibid., footnote 8.
for that position, which were given in paragraphs 36 et seq., were correct and acceptable, despite the scantness of practice, which should be further investigated.

9. The doubts the Special Rapporteur expressed in paragraph 45 of his report with regard to the advisability of using the term “object” to refer to opposition to the late modification of reservations prompted reflection about the definition and scope of that term. Since the Commission had, however, already retained the words “objections” or “objects” in draft guidelines 2.3.2 and 2.3.3, the Special Rapporteur had wisely refrained from suggesting different terminology.

10. As to the Special Rapporteur’s conclusions and proposals contained in paragraphs 46 to 48, he agreed with the conclusion in paragraph 46 that, since enlargement of the scope of a reservation could be viewed as late formulation of a reservation, it seems inevitable that the same rules should apply. Accordingly, the Special Rapporteur suggested that reference should be made to the relevant guidelines already adopted by the Commission, hence draft guideline 2.3.5, whose wording seemed acceptable.

The explanation in square brackets would not be essential if the draft guideline in question was placed in section 2.3 of the Guide to Practice, entitled “Late formulation of a reservation”. The term “enlargement” needed to be defined for at least two reasons: first, because it played an important role in the general context of reservations and, second, because of the practical and utilitarian nature of the Guide to Practice. There were two methods or options for doing so. Either the meaning of “enlargement” could be explained in the commentary or a second paragraph providing a definition could be added to draft guideline 2.3.5. The latter solution was preferable and, if it was chosen, the draft guideline should be referred to the Drafting Committee for critical analysis and possibly improvement.

11. The Special Rapporteur rightly emphasized in paragraph 49 of his report that the questions which arose in connection with the withdrawal of interpretative declarations had to be framed differently depending on whether the declaration in question was “conditional” or “simple”. As far as the latter was concerned, draft guideline 2.5.12 did not give rise to any particular problems. The words in square brackets could be retained in the article or moved to the commentary, provided that care was taken to harmonize the whole text and ensure that it was not unwieldy. The Special Rapporteur seemed to conclude, at least provisionally, that, pending a final decision on conditional interpretative declarations, a parallel should be drawn between those declarations and reservations and it should be assumed that the same legal regime applied. That might be so, but caution was required until such time as that “intuition” had been scientifically corroborated. Draft guideline 2.5.13 therefore seemed to be acceptable as a provisional draft guideline.

12. In paragraph 57, the Special Rapporteur commented that there would be little point in extending to interpretative declarations the rules applying to the partial withdrawal of reservations and that, by definition, an interpretative declaration could not be partially withdrawn; the author could, at the very most, modify it or cease to make it a condition for the entry into force of the treaty. As the question of partial withdrawal might give rise to some doubts or even be somewhat baffling, it should be given further thought. That being so, everything in fact depended on the actual, rather than the theoretical, deciphering of the purpose of the interpretative declaration—the process of specifying or clarifying the meaning or scope of all or part of the treaty. Practice alone could enlighten the Commission on that point. In that connection, the academic hypothesis mentioned by the Special Rapporteur in paragraph 58 of his report was interesting and showed how subtle the question was. In paragraph 59, the Special Rapporteur noted that an interpretative declaration, whether conditional or not, might be modified, but that it was virtually impossible to ascertain if such modification constituted a partial withdrawal or the enlargement of the scope of the declaration. At the same time, the Special Rapporteur acknowledged that some declarations might be deemed more restrictive than others, but he emphasized that that was a very subjective assessment and concluded that it would be inappropriate to adopt a draft guideline which would transpose to interpretative declarations draft guideline 2.3.5 concerning the enlargement of the scope of reservations. While it was not necessarily a contradiction, that choice obviously reflected the problems and doubts involved in the conclusions to be drawn.

13. As for the moment, or rather the date, on which a modification could be made, the Special Rapporteur drew a distinction between conditional interpretative declarations and “simple” interpretative declarations. With regard to the former, he supported the arguments contained in paragraph 61 of the report; in that respect, draft guideline 2.4.10 did not give rise to any difficulties. As for the solution which the Special Rapporteur considered more elegant—that of amalgamating draft guidelines 2.5.10 and 2.4.8—that seemed, on the face of it, more logical and rational. With regard to “simple” interpretative declarations, draft guideline 2.4.9 also presented no difficulties. As far as the words in square brackets were concerned, of which the Special Rapporteur had given an explanation in paragraph 64 of the report, concern for the sovereignty and free will of States clearly called for caution, but, to the extent that the scenario envisaged was highly unlikely, a mention in the commentary should be sufficient. As for the option of recasting draft guidelines 2.4.3 and 2.4.6 [2.4.7], so as to accommodate modification alongside the formulation of interpretative declarations, that seemed simpler, more logical and more rational.

14. Paragraph 66 of the report stated that there were few clear examples illustrating the draft guidelines in question and that, despite the paucity of convincing examples, the proposed draft guidelines seemed to flow logically from the very definition of interpretative declarations. Despite that acknowledgement and the difficulty itself, he believed that the Special Rapporteur’s approach and the results obtained had considerable merit. He therefore considered that the draft guidelines proposed in the first part of the eighth report should be referred to the Drafting Committee.

15. Turning to chapter II of the eighth report, which was concerned with the formulation of objections to reservations and interpretative declarations—the “reservations dialogue”, he said that the order of priority in presenting the questions of acceptance of reservations and objections
to reservations proposed by the Special Rapporteur was acceptable because it was logical. The same applied to the overall scientific approach outlined by the Special Rapporteur in paragraphs 70 to 72. With regard to the second footnote corresponding to the second subparagraph of paragraph 71, even if the Special Rapporteur claimed to have resigned himself to proceeding in a less exhaustive manner than previously, overall his approach remained satisfactory, because it was cautious and reasonable.

16. With regard to the formulation of objections to reservations, it was worth bearing in mind, as the Special Rapporteur had done, the applicable positive international law, namely, the regime of the 1969 and 1986 Vienna Conventions. In paragraph 74, the Special Rapporteur pointed out—and rightly emphasized—the significant gap in the Conventions and, so far, the Guide to Practice: the fact that, unlike reservations, objections as such were not defined. It was therefore perfectly logical that he should propose to fill the gap, and extensively so, by including comments on the author and the content of objections. In paragraph 75, the Special Rapporteur listed the elements making up a reservation, reproduced in the Guide to Practice, and signalled his intention to adopt a similar approach to the definition of objections, although there was no mention of the time at which an objection could be made, a matter that might form the subject of a separate guideline. In that regard, he fully supported the Special Rapporteur, who believed that, in elaborating the definition of an objection, two elements of the definition of a reservation—the nature of the act and its name—should be reproduced, rightly, in his own view. He also supported the Special Rapporteur’s proposal that the possibility of the joint formulation of an objection should be considered at the same time as the more general question of the author of the objection, as well as his idea that the question of the nature of the intention and its author should be considered at a later stage.

17. With regard to the content of objections, paragraph 80 of the report contained a useful reminder of the common meaning of the word “objection” and its meaning in terms of the 1969 and 1986 Vienna Conventions, according to the Dictionnaire de droit international public. The Special Rapporteur then, in paragraph 82, characterized the “generic” object of objections as comprising two elements, namely, opposition and intention, pointing out, on the basis of case law and State practice, that any negative reaction was not necessarily an objection. Paragraph 87 drew attention to the growing proliferation of what the Special Rapporteur called “quasi-objections”, which would be considered in the chapters relating to the “reservations dialogue”. He looked forward to hearing more about such developments. The Special Rapporteur also used other expressions, such as “waiting stance” or “notifications of provisional non-acceptance”, and even “other reactions”, about which he expressed both certainty and doubt: the certainty was that such reactions were not objections in the sense of the Conventions, while the doubt was that he was uncertain about their imprimissibility and their legal effects. Such a position was not surprising in a Special Rapporteur who always sought to establish scientific truth. By the same token, paragraph 92 of the report emphasized the need for precise and unambiguous terminology in describing the reactions to a reservation and the wording and scope of the objection. With regard to the reactions, the Special Rapporteur believed that the most cautious solution was to use the noun “objection” or the verb “object”; and that seemed the right approach. At the same time, however, he mentioned a whole range of other terms or expressions, which should also be carefully considered. The “Model response clauses to reservations” annexed to Recommendation No. R (99) 13 of the Council of Europe were extremely interesting in that regard.

18. With regard to the reasons for objections, paragraph 94 of the report pointed out that there was no rule of international law requiring the author to state such reasons. That point of view could be argued, but the Special Rapporteur himself noted a recent tendency—a positive one, which should be encouraged in the context of the “reservations dialogue”—to explain and justify objections. As to the effect of an objection, paragraph 95 indicated that it was apparent from established practice that there was an intermediate stage between the “minimum” effect and the “maximum” effect and that it was important to indicate those effects clearly in the text of the objection itself; that proposal seemed to be along the right lines.

19. With regard to the definition of an objection, it was logical that the relevant draft guideline should be placed at the head of section 2.6 of the Guide to Practice. The definition proposed was modelled on the definition of reservations and reproduced all its elements, with the exception of the time element. The Special Rapporteur was not suggesting the inclusion of a detail found in the 1986 Vienna Convention, which referred to a “contracting State” and a “contracting international organization”. There were two reasons for that: first, the Convention did not deal with the question whether it was possible for a State or an international organization which was not a contracting party to make an objection; and, second, there was no information in the definition of the reservation itself regarding the status of the State or the international organization empowered to do so. In his view, it would be a mistake and even a serious one for the proper functioning of treaties to eliminate that category of States or international organizations.

20. In paragraph 101 of his report, the Special Rapporteur underlined the need to clarify the expression “in response to a reservation” or, more precisely, the distinction between the two meanings of the word “objection”, particularly since he persisted in his view that the word “objection” should be replaced by the word “opposition” in draft guidelines 2.3.1 to 2.3.3. He accepted the reasoning and logic of that proposal. As for the two alternative methods proposed, he was in favour of a separate draft guideline or, failing that, the addition of a second paragraph to draft guideline 2.6.1. He shared the view expressed by the Special Rapporteur in paragraph 102 that the objective sought by the author of an objection was at the very heart of the definition of objections proposed and that the objective could be “maximum” or “minimum”. Also important was the comment made by the Special Rapporteur in paragraph 104 that the proposed definition should only take into account the usual objective of reservations, which related to certain provisions of the treaty, and that there was thus a problem concerning “across-the-board”
reservations, which were also open to objection. It was therefore logical for the Special Rapporteur to suggest the clarification of the point, whether in the commentary to draft guideline 2.6.1 or in a separate draft guideline 2.6.1 ter or else in draft guideline 2.6.1 itself—a solution which the Special Rapporteur considered the most “economical”, but which had the disadvantage of being very unwieldy. For that reason, he preferred the second solution proposed—in other words, a separate draft guideline 2.6.1 ter.

21. The last problem taken up by the Special Rapporteur in paragraph 106 of his report was that of giving reasons for an objection, in connection with which he made two points: firstly, it was purely a question of judgement; second, it was not a legal obligation, at least not at present. However, he counterbalanced his comments by saying that it was probably advisable for the reasons motivating the objection to be communicated to the author of the reservation, especially if the author of the objection wished to persuade it to review its position, and also by asking whether the Commission should make a recommendation to that effect to States and international organizations, suggesting further that the matter be revisited in connection with the “reservations dialogue”. That dialogue was very important and should be encouraged by all appropriate means, including legal ones.

22. In conclusion, he considered that the current text for the definition of objections was a good basis for discussion and that it was rather too early to say whether it should be made narrow or broad in scope. However, one general comment must be made: it was necessary to strike a balance between strictness and flexibility and not to sacrifice one to the other. A marked imbalance between the study of reservations and that of objections must also be avoided. The draft guidelines contained in chapter II of the eighth report should be referred to the Drafting Committee.

23. Mr. ADDO commended the Special Rapporteur on the excellent quality of his work. However, he was troubled by the idea in paragraph 36 of the Special Rapporteur’s report that, after expressing its consent to be bound, along with a reservation, a State or international organization had the possibility of “enlarging” the reservation or, in other words, modifying in its favour the legal effect of the provisions of the treaty to which the reservation referred. He doubted whether such an “enlarged reservation” had any legal validity. A reservation could be made by a State only when it expressed its consent to be bound. Article 2, paragraph 1 (d), and article 19 of the 1969 Vienna Convention were very clear on that point. Consequently, a reservation made outside the regime provided for in the Convention was not acceptable. It had been said that the Commission must show flexibility; that was true, but on condition that it did not derogate from what was laid down by the Vienna.

24. He also did not believe that the rules governing the late formulation of a reservation could apply to an enlarged reservation. The late formulation of a reservation was a situation in which a State had the sovereign right to express a reservation, but had neglected to do so when expressing its consent to be bound. Such a situation was excusable, but, in the case of an enlarged reservation, the State concerned had expressed an initial reservation and wished to go back on it to modify it to its advantage. That was an abuse of rights which should not be permitted.

25. The Special Rapporteur rightly said in paragraph 36 of his report that it was essential not to encourage the late formulation of limitations on the application of the treaty. He nonetheless added that there might be legitimate reasons why a State or an international organization would wish to modify an earlier reservation. He could not see what those legitimate reasons might be, although that did not mean they did not exist, but the Special Rapporteur himself had not given any and had recognized that such cases were rare. In that connection, he had cited only two examples, those of Finland and Maldives. The practice in those two States could not serve as a basis for developing a rule. Similarly, all the doctrine cited by the Special Rapporteur considered that a modification of a reservation with a view to enlarging its scope was not lawful. That Commission should follow the example of the Treaty Office of the Council of Europe, which averred that extending the scope of an existing reservation was not acceptable. Allowing such modifications would create a dangerous precedent, which might jeopardize legal certainty and impair the uniform implementation of European treaties.

26. For the Special Rapporteur, that position was too rigid on the international plane, but he himself would prefer rigidity in order to maintain the integrity of the treaty rather than too much flexibility that would lead to nothing but a fragmentation of the treaty relationship. As it stood, the regime of reservations could give rise to a great many bilateral relationships that might negate the very object and purpose of the convention or treaty in question. Like Ms. Escarameia, he thought that guideline 2.3.5 should be deleted. The best solution would be to indicate in the commentary that only a few States had followed that practice, that its legal validity was doubtful and that it must not be encouraged. His question for the Special Rapporteur was how many times a State could be allowed to enlarge a reservation. If a State was allowed to enlarge an existing reservation, what would prevent it from asking, 10 or 20 years later, when the treaty was in force, for an enlargement of an already enlarged reservation? Where should the line be drawn?

27. With regard to addendum 1 to the eighth report, he was in agreement with much of what Mr. Koskenniemi, Mr. Kolodkin and Mr. Matheson had said with regard to objections and the definition of objections.

Mr. Melescanu (Vice-Chair) took the Chair.

28. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on breaking steep new ground by taking up the question of objections, or reservations to reservations. He also welcomed the Special Rapporteur’s caution in deciphering the term “objections”, which the 1969 Vienna Convention had not defined.

29. Referring to the enlargement of the scope of reservations to treaties, he said that he agreed with some of the

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6 See 2781st meeting, footnote 12.
7 Ibid., footnote 13.
proposals contained in paragraphs 46 and 47 of the report. He endorsed the Special Rapporteur’s idea that a definition of what was meant by “enlargement” should come before the draft rule on the enlargement of the scope of a reservation based on “the rules applicable to the late formulation of a reservation.” In order to show how relevant that definition was, it should be included in the first paragraph of draft guideline 2.3.5 rather than in the second. Although he agreed with the proposed definition that enlargement meant the modification of the treaty “in a broader manner than the initial reservation” (para. 48), a key element was missing, namely, an indication of the time when the enlarging declaration was made. That time could be guessed at: it followed the time of the expression of the consent of the State or international organization to be bound. The relevant criterion of the concept of a reservation and, in particular, a late reservation was the exception to the Vienna regime rule. However, the absence of any criterion concerning the time of the formulation of the enlarging reservation made the reservation meaningless.

30. With regard to the regime, he was aware that the Special Rapporteur had wanted to include State practice in his draft and that might explain why he had deliberately tried to avoid such an indication. He nevertheless considered that, unless the Special Rapporteur had included a specific indication of the time of the enlarging declaration, he could not propose an enlargement regime based on that of late reservations, as he suggested in paragraph 46 of his report. That was a question that the Commission would not be able to dispatch quickly by referring draft guideline 2.3.5 to the Drafting Committee.

31. As to the question of objections to reservations and their definition, in particular, he said that the Special Rapporteur was right to use the Vienna regime, if only to point out that it did not define the concept of an objection and that it was Janus’s other face. Everything should therefore be based on Janus’s visible face, namely the reservation, something the Special Rapporteur was determined to do when he stated that it seemed reasonable to start with these elements in developing a definition of objections to reservations.

32. He personally was not convinced that the game was worth the candle. In his opinion, the Commission had to avoid two wrong tracks so that it would not get trapped. The first was that of quasi-objections, even though they had been on the increase in the last few years. In that connection, he was of the opinion that the fact of informing the author of a reservation of the reasons why the reservation should be withdrawn, explained or modified was definitely part of the reservations dialogue, but it was never an objection to a reservation. The second wrong track was that of a waiting stance. There was a close connection between that type of stance and an objection, since, according to paragraph 89 of the report, a State or an international organization “reserve[d] its position” regarding the validity of a reservation made by another party. He opposed the reservations dialogue to a road network in which the roads were not the same, but all led to the same place. Distinctions therefore had to be drawn according to the size of the roads, their role, their functions and their levels. The purpose of an objection to the validity of a reservation was not the same as that of an objection to a reservation, even though those two types of objections could both create a relationship of dependency or conditionality.

33. Distinctions could be drawn, as in the case of reservations, between conditional objections and ordinary objections or between permissible and impermissible objections, but they shed much more light on the regime than on the nature of objections. As far as the nature of objections was concerned, the discussions should focus on what the Special Rapporteur called “the generic object of the objection”: the author of the objection was opposed to the fact that a reservation by the other party excluded or modified the legal effects of some provisions of the treaty in respect of it. An objection was thus a means of preventing the application of a reservation. However, an objection was applicable because it was admissible—in other words, permissible. The way in which an objection to a reservation was characterized thus depended less on whether it was permissible than on whether it was opposable. In those conditions, the relevant criterion for the characterization of the objection was its objective, which derived from the purpose clearly expressed by the author of the objection, and not just from the intention behind it. The claim by the author of the objection that the reservation was impermissible might well be a ground for the objection, but it would at most be a preliminary issue that would not have much of an impact on the nature of the objection and would thus never be anything more than one ground among many. He therefore agreed with the view expressed by Imbert, referred to in paragraph 97 of the report, which read: “Unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State.”

34. In conclusion, he supported the draft definition of objections to reservations proposed by the Special Rapporteur in paragraph 105 of the report and was in favour of referring it to the Drafting Committee.

35. Mr. RODRIGUEZ CEDEÑO thanked the Special Rapporteur for his excellent eighth report on reservations to treaties. The very interesting first part drew attention to the positions adopted in 2002 by Governments and international human rights treaty bodies, with which a very useful dialogue could be established, and thus shed light on the report as a whole. With regard to the modification of reservations and interpretative declarations, it should be borne in mind that States could modify their treaty relations at any time. Provided that the parties to the treaty so agreed in advance and that it was in keeping with international law, the treaty could be modified by various means and not only by formal revision during new negotiations. It could also be modified by the acceptance of the formulation of a reservation or the acceptance of the modification of a reservation, even if that was likely to enlarge the scope of the reservation. A modification of a reservation that lessened its scope did not require the consent of the other contracting parties, but those parties might have to complete some formalities. However, if the modification went beyond the initial reservation, the prior consent of the contracting parties was necessary, unless the treaty provided otherwise or the parties so agreed after

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8 Imbert, op. cit. (2781st meeting, footnote 15), p. 419.
the fact or remained silent. If “enlargement of the scope of the reservation” was understood according to the meaning indicated by the Special Rapporteur in paragraph 48 of the report, it could be equated with a late reservation, and it was quite normal for the applicable rules to be similar. Draft guideline 2.3.5, which had been submitted by the Special Rapporteur and which equated the enlargement of the scope of a reservation with late formulation, was thus acceptable, although the reference to draft guidelines 2.3.1, 2.3.2 and 2.3.3 was not necessary. It was also not certain that a specific guideline on the definition of enlargement was necessary; perhaps it could simply be referred to in the commentary to draft guideline 2.3.5.

36. With regard to the withdrawal and modification of interpretative declarations, a simple declaration could be formulated at any time and so could its withdrawal, which did not require any particular formality. It did not impose obligations on the other parties to the treaty, but it was designed to harmonize legal relations among them, and it must therefore be accepted. Draft guideline 2.5.12 proposed in paragraph 52 was acceptable, except that the words “Unless the treaty provides otherwise” were superfluous, but that was only a drafting question. Conditional interpretative declarations must be treated in the same way as reservations. They could be made when the State expressed its consent to be bound by the treaty, and their withdrawal must be done in the same conditions as reservations—in other words, in accordance with guidelines 2.5.1 to 2.5.9. That was why draft guideline 2.5.13, submitted in paragraph 56, was also acceptable. Diverging views had been expressed in the Commission on the partial withdrawal of an interpretative declaration, which could apparently not be partially withdrawn because that would be contrary to its very nature. Conditional interpretative declarations could, in principle, not be modified, but that, of course, depended on the will of the other parties, which was reflected in the treaty, as indicated in draft guideline 2.4.10, which was also acceptable. Interpretative declarations could be formulated at any time, unless the parties to the treaties decided otherwise.

37. As to the formulation and acceptance of objections to reservations and interpretative declarations, the meaning of the objection must be understood very broadly so that it related not only to the applicability of the treaties to the parties but also to the possibility of preserving its integrity. The purpose of the objection was simply that all or part of a treaty should enter into force as between the parties. By means of its objection, the objecting State’s aim was the withdrawal or modification of the reservation primarily in order to preserve the integrity of the treaty. As the Special Rapporteur had done, a distinction must be drawn between the objection itself and any reaction that might have other purposes. The intention was what counted in qualifying the act in a particular case and determining whether its purpose was the entry into force of part of the treaty in respect of the parties concerned. Not every reaction led to the same result as an objection stricto sensu, and it could be a declaration interpreting the reservation. Many terms could be used, such as rejection, challenge, opposition, and the like. Quite apart from terminology, the context determined whether what was involved was an objection stricto sensu or a reaction of another kind to ensure that the reserving State withdrew its reservation for the sake of the integrity of the treaty and not only to prohibit its application in whole or in part in respect of the parties concerned. Even though there was little or no practice of arguments in respect of objections, the objecting State should be encouraged to justify its position as the only way of opening the “reservations dialogue” to which the Special Rapporteur drew attention and which was a key element of relations between the parties to the treaty, particularly with a view to maintaining the integrity of human rights instruments.

Mr. Candioti resumed the Chair.

38. Mr. CHEE congratulated the Special Rapporteur on his eighth report, which was just as remarkable as the preceding ones. In paragraph 36 the Special Rapporteur argued in favour of the possibility of modifying reservations, but in paragraph 37 he indicated that State practice was rare. In the third subparagraph of paragraph 36, the Special Rapporteur stated that it was always possible for the parties to a treaty to modify it anytime by unanimous agreement, and, in support of that statement, he referred to article 39 of the 1969 and 1986 Vienna Conventions. However, article 39 dealt with the amendment of treaties, not with their modification. When it had proposed articles 39 to 41 of the Conventions, the Commission had made a clear-cut distinction between the “amendment” of a treaty to alter its provisions with respect to all the parties and the “modification” of a treaty, which referred to an inter se agreement concluded between certain of the parties only and intended to vary provisions of the treaty between themselves alone. It was therefore questionable whether the reference in the footnote corresponding to paragraph 36 of the report in support of the modification of the reservation was warranted. The modification of a late reservation on a matter of substance or a matter relating to the existence of the treaty should not be permitted, for the reasons given by the Special Rapporteur in paragraphs 38 and 39, namely, that that would create a dangerous precedent that would jeopardize legal certainty and impair the uniform implementation of treaties. Article 19 of the Conventions did not refer to any late modification or enlargement of the scope of a reservation. However, if all the contracting parties expressed their consent to the enlargement of the scope of the treaty, such a modification might be permitted without affecting the substance of the treaty. That meant that, if a modification of a reservation was only of minor importance, it might be acceptable under the guidelines.

39. With regard to the modification or the late formulation of a conditional interpretative declaration, McRae had stated in an article published in 1978 in the British Year Book of International Law—and his wisdom had been adopted by the European Court of Human Rights in the Belilos case—that a conditional interpretative declaration which was a conditional interpretative declaration must be assimilated to a reservation. The legal consequences that attached to reservations should therefore apply to qualified interpretative declarations. In his standard work on the 1969 Vienna Convention, Sinclair had pointed out that most reservations were of a minor nature and that there had not been a startling increase in the number of

reservations in the post-war period, taking account of the
tremendous expansion and diversity of the international
community. 10 There thus did not seem to be any reason to
fear an enlargement of the scope of reservations.

40. He had difficulty understanding the distinction made in the Guide to Practice between “objections” and
“opposition” to reservations. In the example relating to
the United States given by the Special Rapporteur in para-
graph 86 of addendum 1 to his eighth report, the interpre-
tation of the word “objection” as a “conditional accept-
ance” rather than as an objection strictly speaking seemed
to be contrary to the dictum of IJC in the Temple of Preah
Vihear case that words were to be interpreted according to
their natural and ordinary meaning in the context in which
they occurred. In stressing the need to use unambiguous
terminology in the description of reactions to a reserva-
tion, the Special Rapporteur had suggested the use of the
words “objection” and “object to”, but he had interpreted
the words “object to” as a “conditional acceptance”.

41. He had three comments to make on the guidelines.
First, it should be recalled that reservations to treaties al-
ready restricted the scope of treaties. If a reservation was
modified, a reservation was made to a reservation. To
the extent that a reservation was modified, either to narrow
the commitment made by the State or to enlarge the scope
of the treaty, the integrity of the treaty as a whole was
jeopardized. The guidelines must therefore all be drafted
in such a way as to remain within the limits of the treaty
as a whole. Second, if the guidelines on the use of a reser-
vation conflicted with the treaty regime in force, such as
the 1969 Vienna Convention, there was a danger that the
treaty might become inoperative. That should be avoided.
Third, the technique of guidelines was frequently used
when States could not secure the necessary majority in
support of a treaty, in order to achieve certain objectives.
However, the guidelines should not, for the sake of con-
venience, depart too much from the fundamental prin-
ciples of treaty law.

42. Mr. AL-MARRI said he agreed with the members
who had said that the Commission should not move too
far away from the law of treaties, particularly the Vienna
Conventions. Provided that a signatory State was acting
in good faith, the law of treaties should be relied on, and
it should be ensured that negotiations on the reservation
could be held in order to find a solution. He was also in
favour of merging draft guidelines 2.5.4 and 2.5.11 bis
as a single draft guideline stating that the finding that a
reservation was impermissible did not constitute the with-
drawal of a reservation.

43. Mr. KEMICHA paid tribute to the Special Rap-
porteur for his excellent eighth report, in which he consid-
ered the assumption that the modification of a reserva-
tion had the effect of enlarging the reservation and then
proposed that the rules relating to the late formulation of
a reservation, as contained in draft guidelines 2.3.1 to
2.3.3, should apply to it. Not only was such an approach
logical, but it was also based on instructive examples of
practice. He therefore endorsed that approach and recom-
mented that draft guideline 2.3.5 should be referred to the
Drafting Committee. However, the addition of a second
subparagraph indicating what was meant by the “enlarge-
ment of the scope of a reservation” was superfluous. The
proposed provision could quite naturally be included in the
commentary.

44. With regard to the withdrawal of interpretative de-
clarations, the Special Rapporteur was proposing a separate
regime depending on whether such declarations were con-
ditional or not. The withdrawal of a simple interpretative
declararion could be done “at any time following the same
procedure as that applicable to its formulation”. That was
the meaning of draft guideline 2.5.12, which did not give
rise to any problem, and draft guideline 2.5.13, accord-
ing to which the withdrawal of a conditional interpretative
declararion followed the regime applicable to reservations
themselves.

45. Draft guidelines 2.4.9 and 2.4.10 on the modifica-
tion of interpretative declarations were acceptable as they
stood, despite the Special Rapporteur’s proposal that they
should be combined with the provisions relating to late
formulation; that proposal was appealing but, for the time
being, premature.

46. The approach taken by the Special Rapporteur in the
addendum to the eighth report for the preparation of a de-
finiion of objections to reservations, as contained in draft
guideline 2.6.1, was exemplary in more than one respect.
The Special Rapporteur had taken care to list the five rele-
vant provisions of the 1969 and 1986 Vienna Conventions
and then to include the five elements in the definition of
reservations contained in draft guideline 1.1 of the Guide
to Practice. The proposed definition had the advantage of
covering all the elements of which the objection was
composed and was a good starting point for a helpful dis-
cussion. He agreed with the Special Rapporteur on three
points. First, the author of an objection to a reservation
had to express its intention to prevent the reservation from
being opposable to it. The examples taken from practice
were significant. The inclusion of the element of intention
would show whether the objective of the author of the ob-
jection was to get the reserving State to waive its reserva-
tion (case where a State reserved its position) or whether
it was adopting a formal position intended to prevent the
application of the provisions to which the reservation re-
lated, in accordance with article 21, paragraph 3, of the
1986 Vienna Convention. Second, although the reasons
for an objection to a reservation were not required by any
rule of international law, they were desirable because they
promoted the “reservations dialogue”. Third, the “super-
maximum” effect, which was described in paragraph 96
and involved considering not only that the reservation was
not valid, but also that the treaty in question applied as a
whole, rendered “the reservation null and void without
the consent of its author”, as the Special Rapporteur stated
in paragraph 97, and that was entirely unacceptable. Con-
sequently, draft guideline 2.6.1, as submitted in its long
version in paragraph 105, appeared to be a working basis
that could be referred to the Drafting Committee.

47. Mr. MANSFIELD said that the part of the introduc-
tion to the eighth report on recent developments with re-
gard to reservations to treaties was very useful. In chap-
er I, the analysis of the question of the enlargement of the
scope of reservations was correct and the corresponding

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(Manchester University Press, 1984), pp. 77–78.
draft guideline 2.3.5 acceptable, provided that it was left to the Drafting Committee to decide whether what was meant by “enlargement of the scope” should be explained in the draft guideline itself or in the commentary. In the light of the comments by several members of the Commission, however, it might be wiser to delete the draft guideline if that turned out to be the best way of discouraging that practice. Draft guideline 2.5.12 on the withdrawal of simple interpretative declarations did not give rise to any problems. With regard to conditional interpretative declarations, which should be assimilated to reservations, draft guideline 2.5.13 was acceptable, but only provisionally, as the Special Rapporteur had proposed.

48. Chapter II on objections to reservations led straight to the interesting, difficult and important question of the effects of reservations. The introduction on the “reservations dialogue” was an interesting analysis of an important aspect of recent treaty practice, but its key element was that of the definition of objections to reservations. The Special Rapporteur gave many examples which showed that, in recent practice, a declaration could be made to a reservation without the legal effect expected of that declaration having been clearly expressed. From the viewpoint of the definition, however, if a declaration was expressly presented as an objection and intended as such, it could not be denied that qualification merely on the grounds that the expected effect went beyond that provided for in the 1969 and 1986 Vienna Conventions. Perhaps, as other members had suggested, the consideration of the definition should be postponed until after that of legal effects or the question whether a definition was necessary should be left open. In any event, the Special Rapporteur was right to think that States which formulated an objection should be encouraged to indicate the reasons for the objection, even if that could not be an obligation.

49. Mr. OPERTTI BADAN drew the Special Rapporteur’s attention to a particular problem relating to objections to interpretative declarations. At the preceding meeting, Ms. Xue had rightly pointed out that a distinction should be drawn between matters relating to the negotiation of the treaty and those relating to reservations to the treaty. An interpretative declaration could be formulated at any time, as the Special Rapporteur recalled in paragraph 50 of his report, and that included the time of the ratification of the treaty. In that case, the ratification and its content must then be considered not only from the point of view of international law but also from that of constitutional law. It could thus be asked whether some interpretative declarations were typical and others were atypical. The second question was what the procedure for objecting to those interpretative declarations was. In some cases the objection involved formulating observations, comments or explanations, and in other cases there was a much more categorical qualification equating the interpretative declaration with a reservation. That question was important in the light of section 2.6 of the Guide to Practice, in which objections to reservations were defined as unilateral statements, however phrased or named. Consequently, it could be asked whether objections related only to reservations or could also be made to interpretative declarations in general and to interpretative declarations forming part of the act of ratification in particular. If an objection was given the power to turn an interpretative declaration into a reservation, although the treaty in question did not allow reservations, the constitutional competence of the branch of government which adopted treaties would be severely restricted. It could be considered that practical problems involving conflicts between the executive and legislative branches were governed by a country’s constitution and that the 1969 and 1986 Vienna Conventions clearly provided that rules of internal law must take account of rules of international law, but the Commission must be careful not to adopt a very strict approach to the question of objections and their legal effects in order not to jeopardize the process of ratification of some conventions if a mere objection by one or more States to a legislative interpretation could invalidate the application of the treaty.

50. Mr. KATEKA, referring to the question of conditional interpretative declarations, said he hoped that the Commission would not have to give up provisions it had spent a great deal of time drafting because the consideration of the legal effects of reservations and interpretative declarations led to the conclusion that it should do so. He agreed with the Special Rapporteur’s reasonable point of view that the dialogue between reserving States and human rights treaty-monitoring bodies should be encouraged. It was to be hoped that the Special Rapporteur would prepare specific provisions to supplement the preliminary conclusions reached in that regard. With regard to the enlargement of the scope of reservations, he agreed with Mr. Addo that draft guideline 2.3.5 should be deleted. He would prefer more flexibility in the definition of objections contained in draft guideline 2.6.1.

51. Mr. DAOUDI said that the eighth report of the Special Rapporteur on reservations to treaties had led to an interesting discussion because it dealt with sensitive issues and also because the Special Rapporteur had requested the opinion of the members of the Commission on a number of points. With regard to the problem of the enlargement of the scope of reservations, State practice was not consistent and was even contradictory, as other members had pointed out. It was therefore surprising that it could form the basis of an established principle or rule. Since an objection by only one of the States to which the modification of a reservation was communicated could lead to the rejection of the modification, moreover, it could be asked whether the context was not an offer of new negotiations rather than the reservations regime. The Special Rapporteur nevertheless considered that that type of modification should be equated with the late formulation of a reservation and, to that end, proposed a draft guideline 2.3.5 referring to guidelines 2.3.1 to 2.3.3, as already adopted by the Commission. That provision would be entirely acceptable if the square brackets were removed.

52. With regard to the withdrawal of interpretative declarations, draft guideline 2.5.12 on simple interpretative declarations would also be acceptable if the square brackets were removed. As to conditional interpretative declarations, the Special Rapporteur proposed a draft guideline 2.5.13 pending a decision by the Commission on whether that second category of declarations should be mentioned in the Guide to Practice. In his own opinion, it should not be included, but he supported the Special

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11 See 2781st meeting, footnote 11.
Rapporteur’s proposal on that point for the reasons given in paragraph 55 of his report. With regard to the modification of interpretative declarations, since the modification of conditional interpretative declarations was equated with the late modification of reservations, draft guideline 2.4.10 proposed by the Special Rapporteur was practically based on draft guideline 2.4.8 adopted by the Commission at its fifty-third session, in 2001, and relating to the late formulation of those declarations. In paragraph 62 of his report, the Special Rapporteur submitted a revised text of guideline 2.4.8 which would obviate the need for the proposed new provision, which should perhaps be retained until the Commission had resumed its consideration of the draft Guide to Practice as a whole when it completed its work on the topic.

53. The addendum to the eighth report, in which the Special Rapporteur began to consider the formulation of objections to reservations and interpretative declarations, gave rise to three questions. First, the element of intention was essential and must therefore be included in a definition of objections, particularly as the 1969 Vienna Convention expressly referred to intention in article 20, paragraph 4 (b). Second, the definition of objections must reflect State practice, and, if the consideration of State practice showed that the definition contained in the Convention should be departed from, that could be done, provided that care was taken not to generalize a regional practice or the practice of a particular small political group of States. The “reservations dialogue” which the Special Rapporteur intended to study in greater depth in chapter II, section 2, was a useful tool because it would help make the position of the reserving State or the objecting State more flexible, but it would have no legal effect and might sometimes be a dialogue of the deaf, particularly when the reservation related to religion or ideology. The recommendation made by the Special Rapporteur in paragraph 106 of his report was intended to promote the reservations dialogue and could only be endorsed. The draft guideline could therefore be referred to the Drafting Committee, which would certainly ensure that the content of the discussion was taken into account.

The meeting rose at 12.30 p.m.

12 See 2780th meeting, footnote 8.

2783rd MEETING

Thursday, 31 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

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

Reservations to treaties

1. Mr. PELLET (Special Rapporteur), summing up the debate on his eighth report (A/CN.4/535 and Add.1), said that the discussion had been interesting and often fruitful; 22 members had participated, and he trusted that for the others silence indicated agreement.

2. Some speakers, including Mr. Kolodkin, Mr. Al-Baharna, Mr. Rodríguez Cedeño, and Mr. Matheson, had found fault with paragraphs 57 and 59 of the report—which he himself had come to consider clumsy—concerning the difficulty of determining whether, when a State returned to an interpretative declaration, whether conditional or not, it intended to lessen or enlarge its scope. He had therefore not pursued the suggested distinction between the partial withdrawal and the enlargement of an interpretative declaration. He had, however, called on his critics to provide examples of practice that would contradict his position, and, to his disappointment, none had been forthcoming. He therefore took it that his position, however hesitant, had been accepted: Mr. Chee, Mr. Al-Marri, Mr. Daoudi and Mr. Melescanu had all recommended that draft guidelines 2.4.9 and 2.4.10 should be referred to the Drafting Committee.

3. Of far greater importance was what had occurred following Mr. Economides’ statement at the 2780th meeting (paras. 24–26): Mr. Al-Baharna and, to a lesser extent, Ms. Escarameia, Mr. Pambou-Tchivounda and Mr. Chee had vigorously contested draft guideline 2.3.5. He had been astounded—not because the content was beyond dispute but because his colleagues had not conformed to the unwritten rule that, in discussing one guideline, another that had already been adopted should not be called into question. Yet that was what had happened in connection with draft guidelines 2.3.1 to 2.3.3, concerning late formulation of reservations. Mr. Economides, Ms. Escarameia and Mr. Addo had taken pains to stress the difference between such late reservations, which could be made in good faith, and late enlargement of the scope of reservations. When considering the draft guidelines on late formulation of reservations, however, the Commission had determined that a State might decide that circumstances had changed and that it could no longer accept a specific provision of a treaty that was not essential to the purpose