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Summary record of the 2820th meeting

Topic:
Law and practice relating to reservations to treaties

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To set up a working group—which was in any case quite unnecessary, since the working paper contained all the information required—would protract the proceedings still further. It would, on the other hand, be perfectly practicable for the Special Rapporteur to draft a brief summary of the issues involved, to be discussed in the context of the adoption of the Commission's report.

39. Mr. KABATSI concurred. The Special Rapporteur was best placed to formulate an appropriate note, which could then be considered when the Commission came to adopt its report.

40. Mr. KATEKA said that what was most important was to keep the Sixth Committee informed of the Commission's deliberations.

41. Mr. ECONOMIDES suggested that the Commission's report should contain a paragraph explaining the precise course of events, namely that the Special Rapporteur had not covered the issue of "clean hands" in the draft articles; that the Commission had questioned that omission; that the Special Rapporteur had prepared a conference room paper on the issue in which he concluded that such a provision was unnecessary; and that the Commission had not taken up the issue for lack of time.

42. The CHAIRPERSON, summarizing the discussion, suggested that the report of the Commission should contain an account of the proceedings, as proposed by Mr. Economides; a request for the views of States; and an explanatory note to be prepared by the Special Rapporteur. At the close of its fifty-seventh session, the Commission would report to the Sixth Committee on the final outcome of its deliberations on the issue of "clean hands".

It was so decided.

The meeting rose at 11.35 a.m.

2820th MEETING

Wednesday, 21 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*)* (A/CN.4/537, sect. E, A/CN.4/544,² A/CN.4/L.649 and Corr.1)

[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. PELLET (Special Rapporteur), introducing his ninth report on reservations to treaties (A/CN.4/544), recalled that, at the preceding session, he had put forward proposals for the definition of objections to reservations that had taken the form of three draft guidelines, 2.6.1, 2.6.1 *bis* and 2.6.1 *ter*. Those provisions had met with a certain amount of criticism from members of the Commission, some of which appeared to him to be well founded. His original premise had been that the meaning to be given to "objections", which were not defined in the 1969 and 1986 Vienna Conventions, had to be specified in the Guide to Practice. The case was thus one of the progressive development of the law and it had seemed to him that the definition should be based on the definition of reservations themselves. Draft guideline 2.6.1 therefore focused on the intention of the State or international organization that had formulated the objection, just like reservations, which were defined in draft guideline 1.1 and article 2, paragraph 2, of the Vienna Convention on the basis of the author's objective. During the discussion that had taken place within the Commission at the previous session, a number of members had indicated that that premise was artificial and debatable. They had considered that the effects of objections on article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the Vienna Conventions were vague and ambiguous and that, in a great many instances, States wanted their objections to have effects other than those provided for by those texts. Such was the case with what was known as the "super-maximum" effect, objections by which States claimed to have a binding relationship with the author of the reservation under the treaty as a whole, including the provisions to which the reservation related. He personally continued to believe that the validity of the effects that such objections were intended to have reservations and objections produce was open to question, since he was convinced that the entire law of reservations was dominated by the consensus principle and the idea that States could not be bound against their will: in formulating an objection, a State could not oblige another State to be bound against its will.

2. Nonetheless, some States intended their objections to produce such effects. Moreover, States sometimes wanted their objections to produce effects which gave rise to less criticism than those of "super-maximum" objections, but which were not provided for by the 1969 and 1986 Vienna Conventions. For example, a State might indicate that it did not intend to be bound *vis-à-vis* the reserving State, not only by the provisions to which the reservation related, but also by a set of provisions which were not expressly covered by the reservation.

* Resumed from the 2810th meeting.

¹ For the text of the draft guidelines provisionally adopted by the Commission to date, see *Yearbook ... 2003*, vol. II (Part Two), pp. 65–70, para. 367.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

The fact remained, however, that those particular objections went beyond what the Vienna Conventions provided with regard to the effects of objections. One of the criticisms levelled against him at the previous session in relation to the definition that he proposed in draft guideline 2.6.1, and the one that had most affected him, had been that that definition prejudged the validity of objections, as well as of their effects. He admitted that he had been all the more in the wrong in that he had long battled with certain members of the Commission about the definition of reservations themselves in an attempt to explain that it must in no way prejudge the validity either of reservations or of their effects. It had thus been to take account of that criticism that he had proposed not referring the draft guideline in question to the Drafting Committee. The Commission had, moreover, asked States about that and it was on the basis of the discussion that had taken place the year before, comments made in the Sixth Committee and his own thinking that he was proposing a new definition of objections, which was contained in paragraph 22 of the report (A/CN.4/544) and which he read out.

3. The definition was a response to the criticism of the previous text: it was entirely neutral and thus in no way prejudged the effects that an objection might have and left open the question as to whether objections that aimed to produce effects other than those provided for by the 1969 and 1986 Vienna Conventions were lawful. At the same time, it in no way undermined the provisions of articles 20 to 23 of the Vienna Conventions, meaning that when the Commission discussed the effects of objections to reservations, it could either confine itself to the provisions of the Vienna Conventions or supplement or clarify them, as it seemed to intend to do. The definition, like that of the previous year, was based on the intention of the objecting State, but it did not indicate which category of States or international organizations could formulate objections or on what date the objections could or should be formulated, those being two extremely difficult issues to which separate guidelines must be devoted.

4. Aside from the definition of objections found in draft guideline 2.6.1, the eighth report on reservations to treaties³ had contained two other draft guidelines, 2.6.1 *bis* and 2.6.1 *ter*, the latter relating to the object of objections and, in a way, echoing draft guideline 1.1.1, according to which a reservation could purport to modify the effect not only of certain provisions of a treaty in relations between the reserving State or international organization and other States and international organizations, but also of the treaty as a whole with respect to certain specific aspects (across-the-board reservations). Draft guideline 2.6.1 *ter* no longer seemed necessary in view of the new definition proposed in draft guideline 2.6.1 and he accordingly requested the members of the Commission to disregard it.

5. On the other hand, there was no reason to change draft guideline 2.6.1 *bis*, which was reproduced in paragraph 29 of the report as draft guideline 2.6.2. The members of the Commission who had referred to the text had been in favour of it and he himself thought that it was absolutely essential. Despite his own strong objections,

the Commission had taken the view that statements in which a State or an international organization opposed the late formulation of a reservation could be called "objections". Such "objections" were in fact statements of a very different nature than objections to reservations, since they in a sense vetoed the late formulation of the reservation. They were thus an entirely different institution, one that operated differently, and, since the Commission had seen fit to use the same word to refer to different institutions, it would seem essential to define the two meanings of the word "objection", as explained in draft guideline 2.6.2, entitled "Objection to the late formulation or widening of the scope of a reservation".

6. He proposed that the two draft guidelines contained in his ninth report should be referred to the Drafting Committee.

7. Mr. GAJA said that he welcomed the Special Rapporteur's flexibility and readiness to go back to a topic that had already been considered in order to take account of the criticism expressed by certain members, including himself, during the discussion at the previous session. The definition of an objection proposed by the Special Rapporteur in his ninth report seemed to take account of the criticism of the definition contained in the preceding report, according to which the objecting State could aim at only one of the effects that an objection could produce under the 1969 Vienna Convention. While there was no question of opening a discussion on the effects that objections could have under the 1969 and 1986 Vienna Conventions, it was a fairly common occurrence in practice, as the Special Rapporteur acknowledged, for the objecting State not to aim to produce the effects provided for by the 1969 Vienna Convention, since those effects were, according to article 21, paragraph 3, generally no different from those of the acceptance of a reservation.

8. According to the new definition proposed by the Special Rapporteur, an objection "purports to modify the effects expected of the reservation". The problem, it seemed to him, was that the usual consequences of an objection were not "to modify the effects expected of the reservation". It seemed strange to say in the definition of the objection that States purported to modify the effects expected of the reservation when they were well aware that, in general, no such modification of those effects would occur. It might be said that, normally, the objecting State did not purport to modify the effects expected of the reservation.

9. It would therefore be better, in the definition of objections, not to insist on the various intentions of objecting States with regard to the effects of objections and to say that, in formulating an objection, a State purported to indicate that it did not accept the reservation or that it considered the reservation not to be valid. Such a definition would make it possible to differentiate the attitude of an objecting State from that of a State that was making a "mere comment", to use the wording employed by the court of arbitration in the *English Channel* case referred to in paragraph 3 of the report.

10. It would also be better to stipulate in the definition of objections itself which States could formulate an

³ See 2816th meeting, footnote 8.

objection and at what moment they could do so. The corresponding information for reservations was contained in article 2 of the 1969 Vienna Convention: it was States which were entitled to sign, ratify, accept, approve or accede to a treaty and the reservation could be made when signing, ratifying, accepting, approving or acceding to a treaty. At the preceding session, he had maintained that a State had the power to formulate an objection only if it was entitled to become party to the treaty. That point deserved to be developed. According to article 23, paragraph 1, of the Vienna Conventions, reservations must be communicated to the contracting States and other States entitled to become parties to the treaty. All of those States could formulate an objection, since according to article 20, paragraph 5, they were deemed to have accepted a reservation if they “shall have raised no objection to the reservation by the end of a period of twelve months after [they were] notified of the reservation or by the date on which [they] expressed [their] consent to be bound by the treaty, whichever is later”. It seemed clear that a State was entitled to formulate an objection as soon as it was notified of the reservation, even before it had expressed its consent to be bound by the treaty. Accordingly, a State to which a reservation was communicated, as provided in article 23—in other words, any contracting State or any other State entitled to become party to the treaty—could formulate an objection and that could be stipulated in the definition. Those comments relating to States applied to international organizations as well.

11. Mr. PAMBOU-TCHIVOUNDA said that he had not been convinced by Mr. Gaja’s interpretation of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. Mr. Gaja contended that any State that was entitled to become party to a treaty was empowered to make objections. He himself considered, however, that a State had to be one of the contracting States in order to be able to formulate an objection.

12. Mr. GAJA noted that, in practice, States that were not parties to a treaty often had no particular reason to take a position. In general, it was contracting States that formulated objections. The fact remained, however, that the text of the provision cited earlier extended that option to all States that were entitled to become parties to a treaty. In addition, since the purpose of an objection could be to persuade the reserving State to withdraw or modify its reservation, States had an interest in reacting immediately, even before becoming parties to the treaty in question.

13. The CHAIRPERSON, speaking as a member of the Commission, congratulated the Special Rapporteur on having presented new ideas in his ninth report while taking account of the comments of other members of the Commission. Having compared the three definitions of the term “objection” contained in paragraphs 2, 15 and 22 of the report, he had noted that the verb “to prevent”, which appeared in the first two versions, was not used in the third. It was, however, the most important word in the definition, since the prime objective of an objection was precisely to prevent a reservation from producing effects. The words “to prevent” could be retained, perhaps with the addition of the idea of “to modify”.

14. His second comment related to the words “expected of”, which were found in the third version and were too subjective to be included in a definition. A more precise term should be used, such as “aimed at”.

15. Lastly, he wondered whether the only relationship that should be taken into account was that between the reserving State and the objecting State. After all, the other States parties, which were not formulating an objection, agreed that the reservation should produce effects and the question was thus no longer of any concern to them.

16. Mr. KATEKA said that he endorsed the comments made by the Chairperson and would prefer the definition to include the concepts of both prevention and modification of the effects of a reservation.

17. Mr. ECONOMIDES, referring to the components of the definition contained in the new draft guideline 2.6.1, pointed out that the first related to the unilateral nature of the objection, on which everyone agreed. The second (“however phrased or named”) was superfluous. While the phrase was useful in the context of reservations, that was not the case with objections, which usually had the same wording. The third (“in response to a reservation to a treaty”) was too weak, since a State could respond to a reservation without objecting to it. The fourth (“purports to modify the effects expected of the reservation [by the author of the reservation]”) gave rise to a substantive problem. According to the 1969 Vienna Convention, an objection could have two different effects: firstly, to exclude the provisions on which the corresponding reservation was made; and, secondly, to exclude the treaty in its entirety, when the reservation related to an essential portion of it. The wording proposed by the Special Rapporteur introduced a third possibility: the objecting State excluded provisions of the treaty other than those to which the reservation related. The objection thus became a sort of “enhanced” reservation; in such situations, the objecting State formulated a broader reservation, in a spirit of “reprisals”. He was categorically opposed to any departure from the Vienna regime.

18. He believed that the definition of objections should be based on the effects of objections. It would therefore be premature to try to establish a definition before having given in-depth consideration to the effects of objections.

19. With regard to draft guideline 2.6.2, he recalled that he disagreed with the use of the term “widening” and saw no reason for having a separate provision on objection to the late formulation or widening of the scope of a reservation, which must remain the exception to the rule.

20. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on having taken account of the trend within the Commission towards the rewriting of the definition of objections to reservations, which had been too broad and too weak and failed to convey the essence of objections. The Special Rapporteur had now changed his mind and abandoned the old definition contained in paragraph 15 of his report in favour of the one contained in paragraph 22. He himself feared, however, that the essence had become blurred between the two definitions, as it was based not on the effects of an objection but on

its object. In the present instance, the objection had the object not of modifying, but of opposing; it was thus a blocking manoeuvre. An objecting State was a State that did not wish to see the reservation operate in its relations with the reserving State.

21. In his view, the Special Rapporteur was not wrong to try to base the definition of the objection on its object, but, by substituting the term “modify” for the word he had initially intended to use, “prevent”, he had slightly weakened the function of the objection. In that connection, he himself endorsed the proposal made earlier by the Chairperson to retain both terms, since they could work well in a draft definition.

22. He also asked the Special Rapporteur whether there was a need for draft guideline 2.6.1 *bis*, since draft guideline 2.6.2 covered both formulation and widening.

23. Mr. PELLET (Special Rapporteur) explained that draft guidelines 2.6.2 *bis* and 2.6.2 were identical and that, when he was not sure whether a provision should be included in the Guide to Practice, he gave it a *bis* number which pointed to its uncertain fate. On the other hand, when he was convinced that the provision should become part of the Guide to Practice, the *bis* disappeared.

24. Mr. KOSKENNIEMI said that he had difficulty in understanding why the Special Rapporteur had moved away from the old definition of objections to reservations contained in paragraph 15 of his report to the one contained in paragraph 22. As clearly stated in paragraph 19 of the report, instead of providing that the objection “purports to prevent the reservation having any or some of its effects”, it should be stated that it “purports to modify the effects expected of the reservation [by the author of the reservation]”. In paragraph 18, the Special Rapporteur justified that change in the following manner: “It is possible that the author of the objection intends to oppose the application, in its relations with the author of the reservation, not only of ‘the provisions to which the reservation relates’, but of a whole part of the treaty ... even though the reservation relates only to a particular provision of that part.” It was hard to see how that reasoning justified the proposed change and he would like the Special Rapporteur to explain his thinking.

25. Mr. PELLET (Special Rapporteur) said that, when one said that a State wished to prevent a reservation having its effects, one was speaking from the standpoint of the reserving State and saying that the objecting State wanted to say no to the reserving State. In the present instance, the case was not one of “super-maximum” objections, but one of objections that did not prevent reservations from having effects but which made them have other effects. To take an example: State A made a reservation to article 21 of a treaty and State B replied that, under those circumstances, it did not wish to apply articles 25, 26, and 27 of the treaty in its relations with State A. That attitude did not prevent the reservations from having effects, but the effects went beyond what the reserving State had wished. In other words, the objecting State said to the reserving State that it accepted its reservation, but that it entailed consequences going beyond those that the reserving

State would have wished. That was thus truly a case of modification rather than of prevention.

26. Regarding Mr. Economides’s question as to whether such objections could be made, he pointed out that objections with super-maximum effects went beyond the treaty framework. Reference was made to a super-maximum objection when a State opposed a reservation while saying to the reserving State that both were bound by the treaty as a whole. In his view, however, that was completely contrary to the principle of mutual agreement: a treaty was the reciprocal expression of consent to be bound and he did not see why a State should arrogate to itself the right to prevent another State from refusing to be bound by a given article of a treaty. Such conduct was contrary to the principle of the sovereign equality of States. There was thus a certain arrogance in States which made super-maximum objections and he was not prepared to agree that, within the framework of the law of treaties, there could be a departure from the system of mutual agreement. Indeed, he did not see how two States could bind themselves by the same treaty if they were not in agreement.

27. The situation was different with objections that had a modifying effect, in that the objecting State countered the reserving State with nothing more than its will. In a sense, it confronted the reserving State with a super-reservation, but imposed nothing on it: it simply removed something from the treaty that was in force between them. Such an approach was possible because the act of removal was not an act of arrogance contrary to sovereign equality, but the exercise by States of the right freely to express their consent. Such objections were therefore acceptable and were not contrary to the principle of mutual agreement. The definition that he had tried to formulate in no way prejudged his position on whether that type of objection was valid or not. Mr. Economides had been wrong to reproach him for departing from the 1969 Vienna Convention. His constant concern had been to preserve that Convention, but that did not mean that situations not provided for in it should not be provided for at all. In practice, States made objections with super-maximum effects and objections with “modifying” effects. The Commission must therefore not overlook that practice, for which it must draft rules. The proposed definition was an attempt not to modify the Convention, but simply to fill the gaps that it contained.

28. Mr. GAJA said that he did not believe that the Special Rapporteur had wished to rule out the possibility that an objection might concern the validity of a reservation. Certain comments made on his new definition were perhaps justified, however, in that, when referring to modifying the effects expected of a reservation, sufficient emphasis was probably not placed on the fact that making a reservation could lead to the absence of contractual relations with the objecting State. In his view, the problem concerned more the wording of the draft guideline than its actual meaning.

29. Mr. ECONOMIDES said that, contrary to what the Special Rapporteur had stated, new draft guideline 2.6.1 was incompatible with the 1969 Vienna Convention. To use the example that he had given, a State could make a reservation to article 21 and another State could make an

objection to that reservation, but it could certainly not add to it articles 25, 26 and 27. According to the Convention, a State had only two options: either it confined itself to rejecting a reservation or it opposed the entry into force of the treaty as a whole. There was no third option. If a State chose to use the third option, then it would be making new reservations against the reserving State, something which was unlawful under the Convention.

30. The Special Rapporteur had stated that his definition did not prejudice the issue of the validity of that type of objection. In his own view, however, the Commission had to start with the question of validity before adding a definition which must be precise and correct in a quintessentially legal text.

31. Mr. PELLET (Special Rapporteur), referring to what he had said about modifying objections, said that he did not share Mr. Economides's view. While it was true that super-maximum objections went beyond the 1969 Vienna Convention, modifying objections did not. The option to which Mr. Economides had referred represented the two outside boundaries of the Vienna Convention, within which he himself wished to stay. Modificatory objections were within those boundaries and simply represented an intermediate situation. That was, however, not the point; in his view, it was to find a definition and then to understand how the institution operated.

The meeting rose at 11.35 a.m.

2821st MEETING

Thursday, 22 July 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/537, sect. E, A/CN.4/544,² A/CN.4/L.649 and Corr.1)

[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN said that he wished to draw attention to the reactions of two States to Pakistan's statement concerning the International Convention for the

¹ For the text of the draft guidelines provisionally adopted by the Commission to date, see *Yearbook ... 2003*, vol. II (Part Two), pp. 65–70, para. 367.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

Suppression of Terrorist Bombings, which implied that the Convention did not apply to acts carried out as part of a national liberation struggle.³ Many States regarded that statement as a reservation. On 6 October 2003, the Republic of Moldova had objected to Pakistan's statement on the grounds that it conflicted with the object and purpose of the Convention, that the reservation was therefore inadmissible and that the Convention "enters into force in its entirety between the two States, without Pakistan benefiting from its reservation".⁴ On 22 September 2003, the Russian Federation had declared that the statement by Pakistan could "jeopardize the fulfilment of the provisions of the Convention in relations between the Islamic Republic of Pakistan and other States parties and thereby impede cooperation in combating acts of terrorist bombing".⁵ The Russian Federation had called upon Pakistan to review its position and withdraw its statement.⁶ Those two recent reactions revealed the growing range of possible responses to reservations and bore out the conclusions reached in the 1977 *English Channel* case.

2. Although the Republic of Moldova's statement had been made after the deadline prescribed by the 1969 Vienna Convention, it was clearly an objection, having been formulated in accordance with the model response to reservations contained in recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe.

3. The Russian Federation's statement had not been formulated as an objection, as the legal consequences of such action had been unclear to it and it had been unable to rule out the eventuality of an objection, placing it in the same situation as if it had tacitly accepted the reservation. The decision had therefore been taken to make a purely political statement which did not contain the verb "object". The Russian statement had not characterized Pakistan's statement as a reservation and it had deliberately been made more than 12 months after the date of notification of Pakistan's statement. Hence Russia's response belonged to the category of political reactions to a reservation analysed in paragraphs 85 to 89 of the eighth report on reservations to treaties.⁷

4. If the Commission wished to define objections to reservations (and he was not convinced that it should), any such definition would have to be flexible enough to include objections like those of the Republic of Moldova to Pakistan's reservation, and precise enough to exclude reactions like the Russian statement. Both the alternative wording put forward by the Special Rapporteur in 2003, reproduced in paragraph 15 of the ninth report (A/CN.4/544), and the new definition proposed in paragraph 22 of the report appeared to be steps in the right direction. In the light of the discussion, he would favour continuing work on the basis of the wording reproduced in paragraph 15 of the ninth report and adding the words "or to modify these effects" at the very end of the definition,

³ *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. II (United Nations publication, Sales No. E.04.V.2), document ST/LEG/SER.E/22, p. 126.

⁴ *Ibid.*, p. 136.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See 2816th meeting, footnote 8.