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Summary record of the 2916th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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36. Mr. HASSOUNA asked whether, in view of the hope that the important and complex topic of reservations to treaties would be finalized by the end of the current quinquennium, the Special Rapporteur could give some indication of what could be achieved and within what time frame. Such a “road map” would be preferable to an open-ended agenda. He also wished to know how State practice or legal opinion relating to the formulation of objections to reservations had evolved over recent years. It would be useful to learn whether the procedure had become stricter or more flexible over the long term. Lastly, draft guideline 2.6.5 raised an interesting question regarding the rationale for giving the same legal rights to a State that had only signed a given treaty as to a State that had both signed and ratified it. He could identify no conclusive trend in State practice in that regard: some but not all States that had merely signed a treaty occasionally made objections to reservations.

37. The CHAIRPERSON, responding to proposals by Mr. PELLET (Special Rapporteur), said he would take it that the Special Rapporteur’s response to the points raised and his presentation of the next group of draft guidelines would be deferred to the next meeting.

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

[Agenda item 1]

38. Mr. YAMADA (Chairperson of the Drafting Committee) said that the following members had expressed their willingness to serve on the Drafting Committee on the topic of reservations to treaties: Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Singh and Ms. Xue. Mr. Petrič would participate *ex officio* in his capacity as Rapporteur. Mr. Yamada would welcome more volunteers, especially from the African and the Latin American and Caribbean States. All members of the Commission, however, were of course entitled to attend meetings of the Drafting Committee.

The meeting rose at 11.25 a.m.

2916th MEETING

9 May 2007, at 10.07 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume consideration of the topic of reservations to treaties, and in particular draft guidelines 2.6.3 to 2.6.6 in the eleventh report of the Special Rapporteur.⁷⁸

2. Ms. ESCARAMEIA welcomed the eleventh report on reservations to treaties, which was well researched and highly analytical. The summary of past work and recent developments was very useful. She wondered, however, whether the reference to the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* really supported draft guideline 3.1.13, as was stated in paragraph 48, because the reservation in question had referred only to dispute settlement mechanisms and not to treaty monitoring bodies, whereas draft guideline 3.1.13 covered both. Moreover, several judges of the ICJ had expressed the opinion that a reservation to dispute settlement clauses could be incompatible with the object and purpose of the treaty [see paragraph 21 of the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma]. In general, a reservation concerning the very existence of a treaty body was also contrary to the object and purpose of the treaty. Draft guideline 3.1.13 should therefore be reconsidered in the light of those points.

3. She then drew the Commission’s attention to recommendation No. 5 of the Working Group on Reservations set up at the request of the Fourth Inter-Committee Meeting of Human Rights Treaty Bodies to study the practice of treaty bodies in that area.⁷⁹ According to that recommendation, the treaty bodies were competent to assess the validity of reservations and the implications of a finding of invalidity of a reservation. Recommendation No. 7 gave the impression that the consequences of invalidity—that the State could be considered as not being a party to the treaty, or as a party to the treaty but that the provision to which the reservation had been made would not apply, or as a party to the treaty without the benefit of the reservation—could be determined by the treaty bodies (besides judicial organs). It would be useful to know whether the Special Rapporteur agreed with her interpretation of that recommendation.

4. Turning to the new draft guidelines presented in the eleventh report, she said that the word “freedom” in the title of draft guideline 2.6.3 (Freedom to make objections) seemed inappropriate. The Special Rapporteur justified his choice by saying that freedom was not unlimited, but a right was also subject to restrictions. The Special Rapporteur himself also used the word “right” several times, for example in paragraphs 63 and 66. Nor did the

⁷⁸ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁷⁹ Report of the meeting of the Working Group on Reservations (HRI/MC/2006/5), para. 16.

argument that a State could not object to a reservation which it had previously accepted transform a “right” into a “freedom”, it was merely a consequence of the principle of good faith. She also thought that the phrase “for any reason whatsoever” in the text itself needed to be qualified, at least by a reference to the 1969 and 1986 Vienna Conventions, if not to general international law, because the Guide to Practice could not include objections that were incompatible with the principle of good faith or *jus cogens*. That would also respond to the question raised by Mr. McRae on the subject of objections to an expressly authorized reservation, which were also contrary to the principle of good faith.

5. The same problems arose with regard to draft guideline 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation). There again, the word “right” seemed more appropriate than “freedom”. The phrase “for any reason whatsoever” not only opened the door to all objections, even those contrary to *jus cogens*, but also gave the impression that the State *must* give a reason. It would be preferable to say “without any justification, in accordance with international law and the provisions of the present Guide to Practice”.

6. Mr. Gaja’s proposal to distinguish between “major” objections (made on grounds of incompatibility of the reservation with the object and purpose of the treaty) and “minor” objections (made for political or other reasons) would certainly be useful when the Commission came to address the effects of objections, but at the present juncture she did not see the point of that distinction, another disadvantage of which was that it gave prominence to “major” objections, although an objection made for political reasons might be much more important for the objecting State.

7. With regard to draft guideline 2.6.5 (Author of an objection), she wondered whether it was really possible to speak of an “objection” by a potential party, because that was merely a unilateral act which did not produce any effects if the State in question did not become a party to the treaty. Draft guideline 2.6.6 (Joint formulation of an objection), for its part, seemed satisfactory.

8. In conclusion, she recommended that all the draft guidelines should be referred to the Drafting Committee.

9. Mr. FOMBA said he agreed with the Special Rapporteur’s line of reasoning, which was based on a critical analysis of the relevant provisions of the Vienna Conventions and a rigorous analysis of the practice of States and international organizations and the jurisprudence of the ICJ.

10. With regard to draft guideline 2.6.3, he endorsed the Special Rapporteur’s interpretation of the scope of the reason for the objection in paragraph 68 of his eleventh report. The reminder of the difficult gestation of the relevant provisions of the Vienna Conventions (para. 69) was useful, as was the description of State practice (para. 74). The Special Rapporteur’s conclusions (para. 75) were important, logical and acceptable.

11. With regard to draft guideline 2.6.4, he subscribed to the conclusions which the Special Rapporteur had

formulated in paragraph 77 on the basis of a broad interpretation of the relevant provisions of the Vienna Conventions. The distinction which the Special Rapporteur made between the freedom to react of States that were entitled to become parties to the treaty and the specific effects of those reactions (para. 78) was pertinent.

12. Draft guideline 2.6.5 did not pose any particular problem. Its justification (para. 82) was logical, coherent and relevant. The proposed distinction between “objections formulated” and “objections made” (para. 83) was also appropriate. However, in paragraph 84, the word “and” at the end of subparagraph (a) should perhaps be replaced by “as well as” or “but also” to show that, despite appearances, the door was not closed.

13. As to draft guideline 2.6.6, he also agreed with the Special Rapporteur’s conclusions (para. 86): technically, there was nothing to prevent the joint formulation of an objection, which, however, still maintained its unilateral nature. Yet it was unfortunate that the practice cited by the Special Rapporteur was essentially that of the member States of the Council of Europe (para. 85). In that connection, he wondered whether there was a difference between a joint objection formulated by a number of States and “objections formulated in identical terms” by a number of States (para. 85) and whether in such cases they were parallel, intersecting or joint objections. That said, he considered that the set of draft guidelines 2.6.3 to 2.6.6 was satisfactory and could be referred to the Drafting Committee.

14. Mr. KOLODKIN commended the Special Rapporteur’s outstanding report. With regard to draft guideline 2.6.3, he wondered, like Mr. McRae, why the Special Rapporteur employed the words “make objections” in the title and “formulate an objection” in the actual text of the draft guideline. He also subscribed to the comments by Ms. Escameia on the word “right”, which was more appropriate than “freedom”. However, that matter could be addressed at the second-reading stage. As to the phrase “for any reason whatsoever”, he was not opposed to it, as long as it expressed the key idea of the draft guideline, namely that an objection might be made not only on grounds of the incompatibility of the reservation with the object and purpose of the treaty, but also for other reasons.

15. Draft guideline 2.6.4 concerned the presumption of non-entry into force of a treaty as between the author of an objection to a reservation and the author of the reservation. As had been proposed by Mr. Gaja, a distinction could be drawn between the effects of objections, depending on whether they were “major” (because of incompatibility with the object and purpose of the treaty) or “minor” (for any other reason), the presumption being that the treaty would not enter into force as between the author of the objection and the author of the reservation in the first case but that it would do so in the second case. The latter case was the one envisaged in article 20, paragraph 4 (b), of the 1969 Vienna Convention. However, it was also possible to proceed from the principle that a reservation could not be formulated if it was incompatible with the object and purpose of the treaty; it was considered to be null and void and thus did not produce legal effects for the State that had opposed it. If that was so, the treaty entered into force between the two States, as in the second case.

Hence, there was no need to draw a distinction between the reasons for objections. It should, however, be noted that article 20, paragraph 4 (b), of the Vienna Convention also stated that the treaty entered into force as between the two States “unless a contrary intention is definitely expressed by the objecting State”. Draft guideline 2.6.4 developed that provision, because it provided that the author of the objection could oppose the entry into force of the treaty; that went further than a declaration of intention. But it was important to be more specific, particularly in a Guide to Practice. A more direct formulation might be to say that if the reserving State did not withdraw the reservation and if the objecting State did not withdraw the objection, the treaty would not enter into force.

16. Draft guideline 2.6.5 was formulated too broadly. It provided in its subparagraph (b) that an objection to a reservation could be formulated by “any State and any international organization that is entitled to become a party to the treaty”; that wording encompassed the States that had signed the treaty but had not ratified it, States that did not intend to become parties to the treaty and even those that had declared that they had no intention of becoming parties to it. It might be asked whether it was justifiable that those States should have the same right to formulate objections as did contracting parties. It was also unfortunate that the Special Rapporteur had made virtually no reference to practice in his comments. Only the practice of the Secretary-General was cited in paragraph 80, and that practice was not representative. It would be useful to analyse the practice of States, as well as that of regional organizations, whose treaties might be open to signature by non-member States. That analysis would enable draft guideline 2.6.5—and perhaps even draft guideline 2.1.5 adopted on first reading at the fifty-fourth session of the Commission⁸⁰—to be considered in a new light.

17. Draft guideline 2.6.6, which was the exact counterpart of draft guideline 1.1.7, did not seem necessary in a guide to practice. It would be necessary if its purpose was to specify that a number of States or organizations could formulate an objection jointly. However, in its present drafting, it stressed the unilateral nature of joint objections, a point that could more appropriately be made in the commentary.

18. With regard to the example cited in paragraph 56 of the eleventh report, on an initiative by the Council of Europe to encourage its member States to adopt a common approach to reservations, he pointed out that the Russian Federation had not made a reservation to the International Convention for the Suppression of the Financing of Terrorism. What the Council of Europe had regarded as a problematic reservation was a general statement of policy, of the sort referred to in draft guideline 1.4.4. That example showed that the depositaries of treaties must exercise the greatest caution with regard to reservations.

19. Mr. SABOIA congratulated the Special Rapporteur on the enormous task he had accomplished and said he would begin by making a number of general comments on the eleventh report.

20. The Special Rapporteur had indicated that the Commission’s task was not to modify the 1969 and 1986 Vienna Conventions, but to prepare a non-binding Guide to Practice to fill the gaps and address the ambiguities of those instruments in the area of reservations. Although he endorsed that approach, he pointed out that, when they made reservations or formulated objections, States were quite often guided by a logic that was more political than legal in nature, hoping thereby to reap the benefits of becoming parties to a given instrument while avoiding its inconveniences. Sometimes their actions were motivated by domestic political factors. It should also be borne in mind that the gaps and ambiguities in the Vienna Conventions had perhaps been intentional, the aim being to facilitate the adoption of those instruments. He agreed, however, that the obligations entered into by States when they became parties to international treaties must be as clear as possible, and must be implemented with due regard for the principle of good faith. Moreover, some of the reasons that had underlain the ambiguities and gaps in the Vienna Conventions might no longer be valid. Nevertheless, to try to fill those gaps completely would perhaps go beyond what was expected of a Guide to Practice.

21. Turning to the draft guidelines proposed, he endorsed the distinction drawn by Mr. Gaja between reservations which were not valid because they fell under the general prohibitions set forth in article 19 of the 1969 Vienna Convention, and other reservations. The point needed to be examined further. The same applied to the comment by Mr. McRae on draft guideline 2.6.3 and the phrase “in accordance with the provisions of the present Guide to Practice”. He wondered whether it might not be useful, as suggested by Ms. Escameia, to insert a reference to the Vienna Conventions and to general international law. He also agreed with Ms. Escameia’s comment on paragraph 48 concerning treaty monitoring bodies. Human rights treaties did not establish reciprocal relations between contracting States; rather, they committed them to comply with and promote the rights of individuals or groups. That characteristic explained the special impact of reservations, particularly as States would rarely formulate objections to them.

22. On draft guideline 2.6.4, he said that the objections likely to be formulated by States or international organizations which were not parties to a treaty would produce legal effects only when those States or organizations became parties to the treaty in question.

23. Ms. XUE said that the definition of objections to reservations, which was the subject of draft guideline 2.6.1, was, in the opinion of the Special Rapporteur himself, deliberately incomplete, in that it did not specify who could formulate an objection, or when. Thus, at the procedural level, the draft guideline was not very useful in its current version. Perhaps the Drafting Committee might consider the question.

24. Draft guideline 2.6.3 focused on the freedom of States to make objections to reservations. According to paragraph 65 of the Special Rapporteur’s eleventh report, a State was “never bound by treaty obligations that are not in its interests”. In her view, what mattered was not whether the reservation was in the interests of a State

⁸⁰ See the text of this draft guideline and the commentary thereto in *Yearbook ... 2002*, vol. II (Part Two), pp. 34–38.

party, but when it consented to accept the obligation. With regard to the question of authorized or permitted reservations, if the reservation authorized was clear-cut, for instance concerning acceptance of the compulsory jurisdiction of the ICJ, the answer was relatively simple. If a State (or an international organization) formulated such a reservation, other States did not have the freedom to formulate an objection. If, on the other hand, the reservation related to the discretionary power to choose the manner in which treaty obligations were implemented, could other States object to such a reservation if they disapproved of the choice? In her opinion, in such a case the criterion of the object and purpose of the treaty should not come into play, because once the treaty allowed such reservations, the presumption was that they were not incompatible with the object and purpose of the treaty, and thus other States did not have the freedom to make objections. As she understood it, that was also the Special Rapporteur's position.

25. Another important issue was the limits on the freedom to make objections. If the Special Rapporteur's proposition was correct, namely that "a State or international organization that has accepted a reservation loses its right to formulate an objection later to the same reservation", must the act of acceptance be explicit and formal, or could it also be implicit, through acquiescence? The Guide to Practice should also shed some light on other forms of acceptance, because it was important for the reserving State to ascertain its treaty relations precisely. The Special Rapporteur had placed rather too much emphasis on the freedom to make objections, with a view to restricting reservations, and had paid less attention to the importance of maintaining the certainty of treaty relations.

26. Draft guideline 2.6.4 was acceptable because it was in conformity with the provisions of the 1969 and 1986 Vienna Conventions, but it lacked the reference to the criterion of object and purpose of the treaty. The words "for any reason whatsoever" might well lead to a situation in which a State would have the unconditional freedom to oppose the entry into force of a treaty as between itself and the reserving State; that was not in line either with the Vienna Conventions or with the general principles of treaty law. Thus, objections with "minimum effect" might well become objections with "maximum effect".

27. She shared the concern expressed by some members of the Commission with regard to subparagraph (b) of draft guideline 2.6.5, according to which a reservation could be formulated by "any State and any international organization that is entitled to become a party to the treaty". First, that did not reflect the settled practice of States, in accordance with which only States parties were notified of the reservation. Secondly, the practice of the member States of the European Union, referred to in paragraph 85, did not represent universal practice, and thus the example was not convincing. Thirdly, the words "entitled to become" were also problematic in the case where a State made it very clear that it had no intention of becoming a party to a treaty. Admittedly, a change of government might lead to a change in policy, but intention would still have to be expressed. Moreover, if there was no possibility for a State to enter into contractual treaty relations with other States, why should it have the right to

question the contractual intention of other States by making an objection to a reservation? That totally contradicted the principle of consent and good faith. It was desirable to maintain the integrity of treaty regimes by restricting reservations, but such restrictions must be reasonable if treaty regimes were to be preserved.

28. Subject to those comments, she had no objection to referring draft guidelines 2.6.1 to 2.6.6 to the Drafting Committee.

29. Mr. NOLTE said he agreed with the general thrust of the eleventh report, but had doubts about the phrase "for any reason whatsoever" in draft guidelines 2.6.3 and 2.6.4, which seemed to open the door to arbitrariness. Although he understood why the Special Rapporteur had chosen it and agreed with him that the principle of free consent underlay the whole reservations regime, he nevertheless wondered whether there were substantive limits to the formulation of reservations. Perhaps it would be possible to find a formulation that echoed draft guideline 3.1.9 (Reservations to provisions setting forth a rule of *jus cogens*), which excluded objections that would have the effect of creating treaty relations that violated peremptory norms of general international law. While not easy to imagine, such a situation was nevertheless possible. Suppose, for example, that a reservation to a treaty excluded a certain part of the territory of a State from the scope of the treaty. It was unclear whether that reservation was incompatible with the object and purpose of the treaty and whether the reserving State was bound by the entire treaty, regardless of the reservation. Another State formulated an objection to the reservation, whereby it did not accept the territorial limitation, but only where the exclusion of a certain racial group was concerned. At first glance, the effect of such an objection would be to produce a treaty relation which violated a peremptory norm of international law, namely the prohibition of racial discrimination. Such a possibility, albeit theoretical, should not be excluded.

30. The first sentence of paragraph 65 of the report was misleading and could be misquoted for illegitimate purposes. Sometimes States failed to properly identify their own interests, and those interests could change; thus, it was perfectly possible for a State to be bound by treaty obligations that were not in its interests. What the Special Rapporteur probably intended to say was that a State could never be forced to enter into a treaty relation which it did not consider to be in its interests.

31. With regard to the freedom to make objections, he thought, like other members of the Commission, that it would be preferable to speak of a "right" rather than a "freedom". The nuance could largely be explained by differences in the respective legal systems.

32. As to draft guideline 2.6.5, he agreed with Mr. Saboia, who drew a distinction between two types of objections: objections in the strict sense, which only contracting parties could make, and conditional objections, which could be formulated by States that were entitled to become parties to the treaty. Like Ms. Xue, he was of the view that States parties to a treaty and non-States parties could not be treated in the same way. He therefore suggested that the

Drafting Committee come up with a formulation to distinguish between those two types of objections, depending on the status of the State concerned.

33. Mr. WISNUMURTI said that the formulation proposed by the Special Rapporteur for draft guideline 2.6.3 clearly reflected the principle of consent embodied in the 1951 advisory opinion of the ICJ on *Reservations to the Convention on Genocide*.

34. The Special Rapporteur had examined the link between objections to reservations to a treaty and reservations incompatible with the object and purpose of the treaty by referring to the *travaux préparatoires* of the 1969 Vienna Convention.⁸¹ The reference to that link had been omitted from draft guideline 2.6.3, and the Commission should consider including it for the sake of clarity and adding that the discretionary right to formulate an objection existed irrespective of whether a reservation was or was not compatible with the object and purpose of the treaty.

35. While the phrase “for any reason whatsoever” was essential as a subjective criterion, the criterion of compatibility was equally essential as an objective criterion; they were mutually complementary. Moreover, a reference to the compatibility criterion in the draft guideline would highlight the importance of the principle of consent.

36. He fully shared the views of other members of the Commission on the terms “freedom” and “right” and was in favour of employing the latter term in draft guidelines 2.6.3 and 2.6.4. He did not have any specific comments on draft guidelines 2.6.4 to 2.6.6, except to say that the Commission should adopt the approach which he had described, with a view to strengthening the principle of consent in draft guideline 2.6.4.

37. Mr. GAJA said that Mr. Nolte’s point with regard to peremptory norms seemed to imply that the objection helped to shape the contents of the rights and obligations under the treaty, so that, in the bilateral relations between the reserving State and the objecting State, account should be taken not only of the reservation, but also of the objection. The objection might indicate that the reservation was acceptable up to a certain point, beyond which the treaty should be applicable as adopted, as though there were a sort of agreement between the parties to modify the treaty to that effect. That was not the way he understood the effects of objections. The Vienna Conventions did not give any definition of an objection, while the Commission had adopted one, which was based on the idea that the objecting State usually tried to persuade the reserving State to withdraw or modify its reservation. Pursuant to article 21, paragraph 3, of the Vienna Convention, either the objection ruled out bilateral relations, or the treaty did not apply between the two States to the extent of the reservation.

38. Mr. PELLET (Special Rapporteur), referring to Mr. Wisnumurti’s comment that the link with the object and purpose of the treaty should be reintroduced, wondered whether he envisaged a wording such as: “A State

or an international organization may formulate an objection to a reservation even if it does not invoke the incompatibility of the reservation with the object and purpose of the treaty.”

39. Mr. WISNUMURTI said the point he had been making was that if the words “for any reason whatsoever” were used in draft guideline 2.6.3, the phrase “irrespective of the validity of the reservation” should be added in order to place even greater emphasis on the principle of consent.

40. Mr. CANDIOTI, referring to a number of comments made on draft guideline 2.6.3, said that the word “*facultad*” in the Spanish version did not mean the same thing as “freedom” in the English version. The confusion was probably due to a translation problem. Referring to subparagraph (b) of draft guideline 2.6.5, he said he did not see why a State that was entitled to become a party to the treaty and that had been notified of the reservation, the express acceptance of a reservation or the objection to a reservation, in conformity with article 23, paragraph 1, of the 1969 Vienna Convention, could not have the freedom to make an objection. For that reason, he fully endorsed the draft guideline.

41. Mr. HASSOUNA, referring to the problem of translation raised with regard to draft guideline 2.6.3, proposed using the word “option” in English to render the idea of “*faculté*” and “*facultad*”.

42. Mr. YAMADA said that, generally speaking, he supported the Special Rapporteur’s approach in draft guidelines 2.6.3 to 2.6.6, which were based on a logical interpretation of the 1969 and 1986 Vienna Conventions, and that consequently he was in favour of referring those draft guidelines to the Drafting Committee. He would merely like to have some clarification on paragraph 67, which, referring to the discretionary right of States and international organizations to make objections to reservations, began with the following words: “However, ‘discretionary’ does not mean ‘arbitrary’ and, even though this right undoubtedly stems from the power of a State to exercise its own judgement, it is not absolute. Above all, it must be exercised within the limits arising from the procedural and form-related constraints that are developed in greater detail later in this report.” At the beginning of the second sentence, the words “above all” did not seem to be a correct translation of “*notamment*”. Was he to understand that there were no constraints on the freedom to formulate objections apart from those of a procedural and form-related nature? In his introduction to the report, the Special Rapporteur had said that objections based on political motivation were permissible. Moreover, in paragraph 106 of the report, he even spoke of “purely political” reasons, and his intention seemed to be very clear. He therefore wondered whether a State could take advantage of a reservation formulated by another State to refuse the treaty relation *vis-à-vis* the reserving State by formulating an objection based on purely political reasons.

43. Mr. PELLET (Special Rapporteur) drew attention to an error in the text at the end of paragraph 106: it should read: “without any gain to the reserving State” (not “without any gain to the objecting State”).

⁸¹ See footnote 46 above.

44. Mr. VÁZQUEZ-BERMÚDEZ, after congratulating the Special Rapporteur on the quality of his eleventh report, said that on the whole he endorsed the content of draft guidelines 2.6.3 to 2.6.5. With regard to the title of draft guideline 2.6.3, he thought, like Mr. Candioti, that there was a translation problem in the English version, whereas the Spanish word “*facultad*” was perfectly appropriate. With regard to the freedom to make objections, it should be noted that it was discretionary, but not arbitrary, because it must be exercised within the limits of international law and the provisions of the Vienna Conventions, and not only with reference to the guidelines in the Guide to Practice to be adopted by the Commission. Hence the need to insert in draft guideline 2.6.3 an explicit reference to the provisions of the Vienna Conventions or perhaps a more general reference to international law, as suggested by Ms. Escameia. The freedom to make objections could be exercised for any reason whatsoever, without any need for an explanation. Of course, that left open the possibility of opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, as was indicated in draft guideline 2.6.4. There again, a reference to the provisions of the Vienna Conventions or to international law should perhaps be added.

45. As to draft guideline 2.6.5, the Drafting Committee should insert—at any rate, when the time came to consider the effects of objections—a few words in subparagraph (b) to make it clear that an objection formulated by a State or international organization that was entitled to become a party to the treaty would produce legal effects only once the State or organization in question had actually become a party to the treaty. In concluding, he said he was in favour of referring draft guidelines 2.6.3 to 2.6.5 to the Drafting Committee.

46. Mr. HMOUD said he could go along with either the term “freedom” or the term “right” (to make objections): whether a freedom or a right was concerned, the authors could not misuse it. On the other hand, the phrase “for any reason whatsoever” should be deleted, because it might well complicate the implementation of draft guideline 2.6.3. He was opposed to the idea of giving a State that was not a party to a treaty the right to formulate objections. The idea was not to be found anywhere in the 1969 and 1986 Vienna Conventions, which the Guide to Practice was not meant to amend; furthermore, nothing was gained thereby. He was in favour of referring draft guidelines 2.6.1 and 2.6.3 to 2.6.6 to the Drafting Committee.

47. Mr. PELLET (Special Rapporteur) said he was pleased that a considerable number of members had spoken, and he thanked them for confining their remarks strictly to draft guidelines 2.6.3 to 2.6.6, as he had requested: that made it easier to have a well-ordered discussion.

48. Introducing draft guidelines 2.6.7 to 2.6.15, on the form and procedure for formulating objections (paragraphs 87 to 144 of the eleventh report), he said that, as to the form, article 23, paragraph 1, of the Vienna Conventions was very clear, because it specified that objections “must be formulated in writing”. In the event of a counter-claim, for example regarding the time period in which the objection had been formulated, the written form was

a very useful element of clarification, as in the case of reservations. Thus, draft guideline 2.6.7 reproduced that wording. He pointed out for the benefit of new members that the Commission had decided systematically to incorporate the provisions of the Vienna Conventions in the Guide to Practice so that the Guide constituted a self-sufficient whole, obviating the need to refer to the Convention. With the benefit of hindsight, he considered that the order he had adopted in the eleventh report was not very logical and that the Drafting Committee should renumber the draft guidelines. Beginning with the question of the time at which an objection might or must be made, he recalled that draft guideline 2.6.1, which defined objections, made no mention of that time, as had been noted by Ms. Xue. That omission contrasted with the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions, which was used in draft guideline 1.1 of the Guide to Practice. He had always been of the view that it was completely illogical to make reference to the time at which a reservation could be formulated in the definition, because the time was unrelated to the definition and had to do instead with the reservation’s formal validity. However, he had used the provisions of the Vienna Convention with regard to reservations. That said, the Commission, for its part, had not made the same mistake in its definition of objections in draft guideline 2.6.1 adopted by the Commission at its fifty-seventh session in 2005, the commentary to which (para. (4)) expressly referred to a later guideline the question of the time at which an objection could be made or formulated.⁸²

49. Since he had just referred to that commentary, he wished to say parenthetically that he was very dissatisfied with the French version of the report of the Commission to the General Assembly on the work of its fifty-seventh session, in which the Secretariat had systematically replaced the present indicative by a ridiculous and unacceptable imperfect tense.

50. Returning to substantive questions, he observed that while, in giving the definition of objections, the Commission had not made the same mistake as the one to be found in the definition of reservations, since it had not referred to the time at which the objection could or must be formulated or made, it had made another mistake by including, in the circumstances recounted in paragraph 127 of the eleventh report, a partial indication of that time in the third paragraph of draft guideline 2.1.6 (Procedure for communication of reservations). Although that draft guideline concerned reservations and not objections, the third paragraph stated that “[t]he period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation”. The confusion was particularly unfortunate in that he did not see why, in the context of the procedure for the formulation of reservations, one should suddenly come upon a provision concerning the procedure for the formulation of an objection and the time at which the objection could be formulated. The two should not have been lumped together; furthermore, the third paragraph of draft guideline 2.1.6 by no means exhausted the question of the time at which an objection

⁸² See the text of this draft guideline and the commentary thereto in *Yearbook ... 2005*, vol. II (Part Two), pp. 76–82, para. 438.

could or must be formulated, because it established the *dies a quo* but not the *dies ad quem*, which was just as important for States in determining when they could formulate or make an objection. As to the *dies a quo*, he had no substantive criticism of the third paragraph: in setting the *dies a quo* at the date at which the objecting State had received notification of the reservation, it drew the necessary conclusion from article 20, paragraph 5, of the 1986 Vienna Convention, pursuant to which “a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation”. However, although the paragraph did not pose substantive problems as to the principle, its wording had the disadvantage of not mentioning the other possibility envisaged in article 20, paragraph 5, of the 1986 Vienna Convention, which specified that an objection was also possible until the date on which the State or international organization wishing to make an objection had expressed its consent to be bound by the treaty, if that date was subsequent to the notification of the reservation. It would therefore be easiest to follow the wording of the relevant part of that provision as closely as possible, which would result, for draft guideline 2.6.13, in the wording proposed in paragraph 128 of the report. If, as he hoped, the Commission agreed to his suggestion, if need be with drafting improvements, a problem of duplication with the third paragraph of draft guideline 2.1.6 would inevitably arise. As he had noted in paragraph 129 of the report, the Commission could either decide to delete the third paragraph of draft guideline 2.1.6, which would have the advantage of consistency but would present the difficulty of reverting to a provision in principle already definitively adopted on first reading, or else it could leave matters as they stood and perform the necessary tidying up during the second reading. It would be useful if the members of the Commission could indicate which solution they preferred.

51. The question of the *dies a quo* posed another problem. A practice had developed whereby States indicated in advance that they would object to certain categories of reservations even before those reservations were actually formulated. Many examples of that practice, which was “extra-treaty” in the sense that it had no basis in the Vienna Conventions (although it was not ruled out either), were cited in paragraphs 131 to 133 of the eleventh report. The Guide to Practice should confirm that practice for at least two reasons. First, strong arguments would be needed to condemn or at least disregard a widespread practice that had never posed any particular problem, even though the conduct of States which resorted to such pre-emptive objections was not always consistent, because some confirmed objections of that type when the reservations contemplated by the pre-emptive objections were actually formulated. Secondly, pre-emptive objections were a perfect response to one of the most important functions of objections—perhaps their main function—which, as the ICJ had observed in its 1951 advisory opinion on *Reservations to the Convention on Genocide*, cited in paragraph 122 of the report, was to serve as a warning to the author of the reservation. That opinion was the beginnings of a reply to the objections raised by members of the Commission to subparagraph (b) of draft guideline 2.6.5. Warnings could be issued without

the objection producing its full effects: to formulate an objection, even if it could not yet produce its full effects, was to give such a warning. Of course, the warning would not produce concrete effects until a reservation that was the subject of the pre-emptive objection had actually been formulated. That was why, as an exception to the general rule, a pre-emptive objection was “formulated” and not “made”, a point rightly made by Mr. McRae. It was clear that pre-emptive objections were only “formulated”: they would not be “made” and would not produce effects until the reservations envisaged had actually been formulated. That was why he had proposed draft guideline 2.6.14 on pre-emptive objections (paragraph 135 of the report).

52. That led him to ask whether, just as it was possible to formulate an objection in advance, it could also be formulated late—even though the word irritated some members of the Commission, who grew indignant at the very thought that the period of time specified either in the Vienna Conventions or in the Guide to Practice might not be respected. That was an unduly rigid approach, because it was hardly wise to oppose realistic practices which imparted some flexibility to the law and which States readily accepted. Although widespread, as was noted in paragraph 137 of the report, the practice of late objections could not run counter to the provisions of the Vienna Conventions; in particular, late objections could not produce effects which the Conventions subordinated to their timely formulation, for the Commission was not mandated to amend the Vienna Conventions. It also followed from article 20, paragraph 5, of the Vienna Conventions that if a State had raised no objection within one year after the formulation of the reservation or at the time at which it became a party, the reservation was considered to have been tacitly accepted by the State, and one could not, and must not, go back on that provision. Consequently, a late reservation could not obliterate an implicit acceptance. Why, then, make provision for the possibility of a late objection if it was not the equivalent of a refusal of acceptance? In a strictly positivist perspective, that would not serve any purpose, but it was a different matter when seen from a pragmatic standpoint. As indicated earlier, one (if not *the*) main function of an objection was to warn, and there was no reason why a State or international organization which had allowed the period of time to lapse should not want to warn the author of the reservation that in its view, the reservation could not or should not have been formulated. That way, the author of the objection set a date, and if a dispute subsequently arose either between it and the reserving State or between the reserving State and a third party, the judge or arbitrator could take account of the opinion thus expressed. Such late objections were perhaps not unilateral acts, but they were declarations which, although maybe falling more within the regime of interpretative declarations than that of reservations, nevertheless fell within the framework of the draft guidelines. That *faculté*—a word perhaps incorrectly translated in the English version as “freedom”—to formulate objections, even if too late for them to produce normal effects, was particularly important for small States that did not have a legal service large enough to monitor all the reservations formulated by their partners and that were often unable to keep to the time periods, since it did at least allow them to voice their opinion.

53. For those reasons, he asked the Commission to confirm that useful practice, without tying its hands with regard to the potential effects of late objections, the main point being not to discourage the latter. He therefore suggested for draft guideline 2.6.15 the wording to be found in paragraph 143 of the report, which could certainly be improved, in particular by deleting the word “*cependant*” in the French version, which was superfluous. That formulation would probably give rise to criticism, but the principle of the guideline was indispensable if the law and States were to be left a little “breathing space”.

54. There was one case in which the time when the objection was formulated was of particular importance: namely, when the State or international organization intended its objection to prevent the treaty from entering into force as between it and the author of the reservation. Article 20, paragraph 4 (b), of the Vienna Conventions specified that such an intention must be “definitely expressed by the objecting State [or international organization]”, which was very much in the spirit of the reversal of the presumption that had taken place at the United Nations Conference on the Law of Treaties in 1968. The practice described in paragraphs 100 and 101 of the report showed that this was not always the case. However, little could be derived from such practice in drafting the Guide to Practice, which should do no more than repeat article 20, paragraph 4 (b). Moreover, it seemed more or less clear, although the Vienna Conventions were silent on the point, that such intention must be expressed in the objection itself and within the period of time in which the objection could produce its full effects. As he would try to explain in greater detail when introducing draft guideline 2.7.9, and as could be seen from paragraphs 176 to 179 of the report, once an objection was *made*, its author could no longer widen its scope. In other words, the effect of a simple objection which did not give rise to the non-entry into force of the treaty in the relations between the two partners was to allow the entry into force of the treaty, minus the reservations, in the relations between the two States. It would probably be disastrous for legal certainty if the objecting State were able to go back on its position once it had indicated that the treaty had in fact entered into force as between it and the reserving State. That was all the more true if the objecting State sought to formulate an objection once the period of time under article 20, paragraph 5, of the Vienna Conventions had lapsed, because to admit that a State could put an end to treaty relations after the period of one year specified in that provision would be tantamount to opening the door to arbitrariness and denying the simple rule of *pacta sunt servanda*.

55. Those considerations had led him to propose draft guideline 2.6.8, although, on rereading the text, which appeared in paragraph 104 of the report, he had had the impression that the wording had not fully attained its objective. It would need to be specified that the intention must be clearly expressed “when [the State or the international organization] formulates the objection”, provided that the formulation was made within the period of time provided in article 20, paragraph 5, of the Vienna Conventions and in draft guideline 2.6.13. Thus, the central idea in draft guideline 2.6.8 must be retained, but a phrase along the lines of “in conformity with draft guideline 2.6.13” should be inserted to deal with that minor problem.

56. For the rest, the procedure with regard to objections differed little, if at all, from that relating to reservations themselves, and it was certainly no accident that it was described in part in article 23 of the Vienna Conventions, entitled “Procedure regarding reservations”. That stemmed from a parallel treatment intentionally chosen by the Commission during its *travaux préparatoires*, as was noted in paragraphs 89 and 90 of the report. Thus, the Commission might consider systematically replacing the word “reservations” by “objections” in all the draft guidelines it had already adopted on the procedure for the formulation of reservations (cited in paragraph 94 and reproduced in footnotes 190 to 194 of the report). However, it would be sufficient and much more economical to proceed by simple reference, as the Commission had already done on many occasions, as was indicated in footnote 195. Draft guideline 2.6.9 could thus read: “Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.”

57. Paragraphs 105 to 111 of the report were devoted to the very sensitive question of the statement of reasons for an objection, for which he suggested that the Commission, rather than fixing a rule, which would not have any basis either in the Vienna Conventions or in State practice, should instead adopt the text for draft guideline 2.6.10 set out in paragraph 111 of the report, and perhaps replace the word “*faite*” by “*formulée*” in the French version. That would not be the first time that the Commission had included in the Guide a recommended practice with an intentionally soft wording—a “soft law” provision was appropriate, because it would be difficult in the present case to go much further. As pointed out, the freedom to “formulate” objections and, in most cases, to “make” objections, was discretionary and could be based on political reasons which the objecting State did not necessarily wish to make public, *inter alia*, so as not to make its relations with the author of the reservation more difficult. Nonetheless, it was useful to make the reasons known, both for the reserving State and for third parties called upon to assess the validity of the reservation, at least when the objection was based, for example, on compatibility with the object and purpose of the treaty. Paragraph 108 of the report thus gave several examples of cases in which human rights bodies had taken account of the objections of States when deciding on the validity of reservations. It would be all the more reasonable to include in the Guide to Practice a guideline modelled on draft guideline 2.6.10 since, in practice, States often explained the reasons for their objection and increasingly sought to justify their assertion of incompatibility with the object and purpose of the treaty.

58. He was convinced of the need to appeal to States for transparency and truth, but he had asked himself, when drafting the report, why the Commission had not included some such recommendation in the corresponding provisions on reservations, and he had not come up with an answer. It seemed to him that the question of the reasons for reservations arose in more or less the same terms as that of the reasons for objections: the freedom of States and international organizations to formulate reservations, although not unlimited, was great and was restricted only by the provisions of article 19 of the 1969 and 1986 Vienna Conventions, which were reproduced in draft guideline 3.1.

Although it would be out of the question to oblige States to give reasons for the reservations which they formulated, even if they did so relatively often, nothing prevented the Commission from recommending that they should indicate the reasons for their reservations, out of a concern for transparency which would be to their credit. He acknowledged that he had not given any thought to that point during the consideration of the question of the formulation of reservations, and he would be pleased if the members of the Commission expressed their views on the matter during the debate and indicated whether they deemed it useful to add a draft guideline along those lines. If that suggestion met with support, he would submit a formal note so that the omission could be addressed.

The meeting rose at 1.05 p.m.

2917th MEETING

Thursday, 10 May 2007, at 10.10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPOREUR (*continued*)

1. Mr. PELLET (Special Rapporteur), introducing draft guidelines 2.6.11 and 2.6.12 presented in his eleventh report,⁸³ said that, with respect to the confirmation of reservations, according to article 23, paragraph 2, of the 1986 Vienna Convention, a reservation formulated at the time of the signature of a treaty subject to ratification, in other words, one that would enter into force only after that ratification, had to be formally confirmed when the State or international organization in question expressed its consent to be bound by the treaty. Conversely, paragraph 3 of the same article stated that confirmation was not required in the case of objections to a reservation made prior to confirmation of the reservation.

2. The report of the Commission to the General Assembly on the work of its eighteenth session did not explain the obvious reasons for the difference in treatment of

objections and reservations,⁸⁴ namely, as he had indicated in paragraph 114 of his eleventh report, that the formulation of a reservation concerned all contracting States or contracting international organizations, or those entitled to become parties to the treaty, whereas objections mainly or exclusively affected bilateral relations between the reserving State and the objecting State. Once the reserving State had been notified of the objecting State's intention, which happened as soon as the objection had been formulated and communicated in accordance with article 23, paragraph 1, of the Vienna Convention, the reserving State knew that an objection had been, or would be, entered to its reservation which displeased the objecting State. The commonsensical rule set forth in article 23, paragraph 3, should be incorporated as it stood in the Guide to Practice, but should be confined to objections, as acceptance would be dealt with at a later date. Draft guideline 2.6.11 would thus read:

“2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation

“An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.”

3. Although the Commission had always hitherto incorporated the pertinent provisions of the 1986 Vienna Convention in the Guide to Practice, draft guideline 2.6.11, which was unlikely to give rise to any difficulties, called for two comments. First it was self-evident that, while an objection made before the formal confirmation of a reservation did not require confirmation, that formality, albeit superfluous, was not prohibited. In fact, there were instances in which States had confirmed such objections even though that confirmation was unnecessary. The wording he proposed for draft guideline 2.6.11, which was calqued on article 23, paragraph 3, of the Vienna Convention, allowed full scope for that possibility.

4. His second comment was that, while the draft guideline concerned solely the non-requirement of confirmation of an objection made prior to formal confirmation of a reservation, neither the draft guideline nor article 23, paragraph 3, of the Vienna Convention answered the question whether a State which had formulated an objection before becoming a party to the treaty in question had to confirm that objection on acceding to that treaty. The Vienna Convention was silent on that issue despite the fact that, during the United Nations Conference on the Law of Treaties, the delegation of Poland had put forward a proposal with a view to filling that gap.⁸⁵ State practice was all but non-existent, although, as he pointed out in paragraph 118, the United States, which was not a party to the Vienna Convention, had announced its intention

⁸⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 208, para. (5) of the commentary to article 18.

⁸⁵ Comments and amendments to the final draft articles on the law of treaties submitted in 1968 in advance of the Conference in accordance with General Assembly resolution 2287 (XXII) (A/CONF.39/6/Add.1), mimeographed, pp. 17–18.

⁸³ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.