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Chairman: Mr. Lelong . . . . . (Haiti)

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The meeting was called to order at 10.15 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Fomba** (Mali) said that the mechanism for the formulation of reservations offered an opportunity for broad consensual participation by States in the development of international law. The Guide to Practice on reservations to treaties proposed by the International Law Commission would be useful, especially for small States. The distinction between conditional and "simple" interpretative declarations was helpful. With regard to the possibility of not including in the draft Guide to Practice draft guidelines specifically relating to conditional interpretative declarations, his delegation felt that if it was confirmed that such declarations were subject, mutatis mutandis, to the same legal regime as reservations, it would be necessary to continue looking at actual practice in order to corroborate that conclusion, and to that end States and international organizations must provide more specific information as promptly as possible. If, however, the hypothesis was confirmed, his delegation would concur that specific guidelines need not be included, although some problems might remain, such as how to distinguish between reservations and interpretative declarations.

2. With regard to the late formulation of reservations, States must be allowed some flexibility in order to ensure the broadest possible participation in treaties, but freedom in that regard should not be unlimited or unconditional, and that question had therefore been dealt with in the 1969 Vienna Convention on the Law of Treaties. What the Commission was suggesting was an exceptional practice, which departed from the provisions of the Vienna Convention by taking into account the practice followed by depositaries and in particular by the Secretary-General of the United Nations. Since that approach might encourage States to abuse the practice, it would be advisable to limit the scope *ratione temporis* of the right to formulate reservations to that of the process of exhausting the means of expressing consent. The Commission's suggestion that reservations formulated late should be admitted if the treaty did not provide otherwise and there were no objections to their formulation would eliminate the risk of abuse. However, the use of the term "objection" to signify opposition to the late formulation rather than to the content of the reservation, while useful in harmonizing terminology, might lead to confusion. He proposed that the word "objection" should be replaced by the terms "objection to the right to formulate a late reservation", "denial" of that right or "opposition" to that right.

3. With regard to the functions of depositaries, his delegation was not opposed to reproducing in the guide to practice the provisions of articles 77 and 78 of the 1969 Vienna Convention and adapting them to the particular case of reservations. However, the problem arose of whether it lay with the depositary to refuse to communicate to the States concerned a reservation that was manifestly inadmissible, particularly when it was prohibited by a provision of the treaty. Article 76, paragraph 2, of the Convention set forth the international and impartial character of the functions of the depositary; article 77, paragraph 1 (d), established the right of the depositary to examine whether a communication relating to the treaty was in due and proper form; and article 77, paragraph 2, stipulated that the depositary should bring to the attention of States any difference as to the performance of its functions. Altogether, it was clear that the aim was not to confer full powers on the depositary in that regard. Article 19 of the Convention denied a State the right to formulate a reservation when it was prohibited by the treaty, was not included among those that could be made in accordance with the provisions of the treaty or was incompatible with the object and purpose of the treaty. Thus, to confer on the depositary the power to refuse to communicate a manifestly inadmissible reservation would appear to be a logical consequence of the application of article 19. In any event, it would be useful for the formal validity of the reservation to be examined, before or after communication, although an examination ex ante clearly had practical advantages.

Mr. Florent (France) reiterated his view that, in the French version, the term "*directive*" was not appropriate, and should be replaced by "*ligne directrice*". Draft guideline 2.1.1, on the written form of reservations, reflected the rule in article 23 of the 1969 Vienna Convention on the Law of Treaties. It raised no problems, but what the Special Rapporteur called "oral reservations" could not exist, since for both the expression of consent and the reservations themselves, the written form was the only means of guaranteeing stability and security in contractual

relations. Draft guideline 2.4.2 (Formulation of conditional interpretative declarations) was acceptable, but the procedure could be simplified by making it clear that the "guidelines" in relation to reservations would apply, mutatis mutandis, to conditional interpretative declarations. However, the longer version of draft guideline 2.1.3 (Competence to formulate a reservation at the international level), which reproduced article 7 of the Vienna Convention, did raise some difficulties, and the same was true of draft guideline 2.4.1, on the formulation of interpretative declarations. The word "competence" might give rise to confusion, and it was necessary to draw a distinction between the authorities competent to "make" or "formulate" a reservation and those competent to "express" or "present" the reservation at the international level. The latter question was not so much one of competence as of representative capacity; for example, the head of a permanent mission to an international organization might be considered competent to formulate a reservation on behalf of the State which he represented, without having to produce full powers when communicating the text of the reservation.

Draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations) was based on article 46 of the Vienna Convention, and it should perhaps be admitted, as the article did, that if the violation was clear-cut and affected a rule of fundamental importance in the internal law of a State, that State might argue that the reservation was defective. However, since the State could always withdraw the reservation, the rule would be of little practical interest. Draft guideline 2.1.5, on the communication of reservations, supplemented article 23 of the Vienna Convention by referring to reservations to constituent instruments of international organizations. The wording proposed by the Special Rapporteur was acceptable on the whole, but he would like to know what exactly was meant in the second paragraph by "a deliberative organ that has the capacity to accept a reservation". The same was true of draft guideline 2.4.9, on the communication of conditional interpretative declarations. France also took the view that neither reservations nor interpretative declarations could be made by electronic mail, which was not an appropriate medium and did not offer any guarantees of security.

Draft guidelines 2.1.6 and 2.1.7, which dealt with the functions of depositaries of treaties, did not present any difficulties and emphasized the purely "administrative" role of the depositary. However, it would be interesting to contemplate the possibility that the depositary might reject a prohibited reservation, in accordance with article 19 (a) and (b) of the Vienna Convention. It would be important to know whether that prerogative could be conferred on the depositary, or whether it would be necessary to abide by the provision in article 77, paragraph 2, of the Vienna Convention, which stated that, in the event of any discrepancy appearing between the State presenting a reservation and the depositary as to the performance of the latter's functions, the depositary must bring the question to the attention of the other signatory and contracting States. The whole question should be studied in greater depth, since current practice appeared to show that depositaries were rejecting reservations prohibited by the treaty itself. Lastly, according to draft guideline 2.1.8 (Effective date of communications relating to reservations), a communication relating to a reservation would only be considered as having been made by the State which was the author of the reservation "upon its receipt by the State or organization to which it was transmitted". That proposal was similar to the provision in article 78, subparagraph (b) of the Vienna Convention, and was quite acceptable.

Ms. Wyrozumska (Poland) said that since exactly the same legal regime was proposed for reservations and for conditional interpretative declarations, there was no need to draw a distinction, especially as guideline 1.3 made it clear that "the character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce". For that reason, the Guide to Practice should not perhaps include draft guidelines specifically relating to conditional interpretative declarations, since such declarations were rightly included within the concept of reservations.

As to the question of late formulation of reservations, her delegation took the view that the practice should be exceptional and remain subject to strict conditions, and was in favour of the negative formula used in guideline 2.3.1. A period of 12 months following the date on which notification of the reservation was received was a reasonable time limit

for the tacit acceptance of late formulation of reservations, and to require express unanimous consent would rob of any substance the rule that late reservations could be made under certain conditions. Poland supported the formula proposed by the Commission in guidelines 2.3.2 and 2.3.3 concerning acceptance of or objection to the late formulation of a reservation, and not to a reservation itself. However, the distinction might create doubts as to the legal effects of acceptance. It could be presumed from guideline 2.3.3 that acceptance of the late formulation of a reservation signified acceptance of the reservation itself.

With regard to the functions of the depositary of a treaty, Poland shared the view that it was no part of the depositary's function to assume the role of an interpreter or to judge the nature of the reservation made by one of the parties. However, on receiving a reservation which was manifestly inadmissible, the depositary could draw the attention of the reserving State to that fact, or could refuse to circulate a communication if the reservation was expressly prohibited by the treaty. In those circumstances, if the reserving State did not withdraw it, or insisted on its being circulated, the depositary could not refuse to communicate it to the States and international organizations concerned, or to draw it to their attention. That practice seemed to be in line with the Vienna Convention, and specifically with article 77, paragraph 2. In any case, if the reservation was expressly prohibited by the treaty or was manifestly inadmissible under it, article 20, paragraph 5, of the Vienna Convention would not apply, so the lapse of 12 months would not make the reservation effective.

Mr. Lavalle-Valdés (Guatemala) said that every instance in which a guideline reproduced the text of a relevant provision of a Vienna Convention should be indicated in a footnote, as was done when the rules of procedure of the General Assembly reproduced a provision of the Charter of the United Nations.

Guideline 1.4.7 should be expanded to include cases in which a treaty, rather than requiring the parties to choose between two or more provisions of the treaty, merely allowed them to make such a choice. Guideline 2.2.2 would be improved if the words "in accordance with the relevant provisions of the treaty" were added between commas after "by its signature". There appeared to be an inconsistency between the title of guideline 2.2.3 and its content, which referred not to reservations formulated when a treaty expressly so provided, but rather to cases where the treaty "expressly provides that a State or an international organization may make such a reservation" when signing the instrument. The two situations were not the same. In order to harmonize the title and the text of the guideline, the latter should state: "Where the treaty expressly provides that a State or an international organization may make certain reservations when signing the treaty, a reservation made at that time does not require ...".

Guideline 2.3.2 should expressly permit any State or international organization which became a party to a treaty prior to the expiry of the 12-month period to formulate an objection to a reservation prior to the said expiry. Guideline 2.3.3 was unnecessary since guideline 2.3.1 stated that if even one State or international organization which was a party to the treaty objected to the late formulation of a reservation, the latter would not take effect. The situation existing between any party which had objected to the formulation of the reservation and the party which had formulated it was the same as that which would exist between any other party to the treaty and the party which had formulated the reservation.

Guideline 2.3.4 (a) was problematic since if a reservation to a treaty was valid and entered into force, it became part of the regime established by the treaty. Consequently, in accordance with guidelines 1.2 and 2.4.3, both the party to the treaty which had formulated the reservation and any other party thereto should be able to formulate a simple interpretative declaration concerning the reservation at any time unless to do so was prohibited by the treaty. The current text of paragraph (a) should therefore be replaced by: "A statement which appears to be a simple interpretative declaration concerning a reservation but which purports to exclude or modify the legal effect of the treaty". Furthermore, paragraph (b) of guideline 2.3.4 was not easily understood; a reader without the help of the commentary would have the impression that the paragraph referred to statements by which a State or an international organization merely availed itself of the optional clause in question. For example, in the case of an opting-in clause, a statement through which the State merely elected to opt in might be assumed to fall within the scope of paragraph (b), which was impossible. For those reasons, and on the basis of the statement made at the end of paragraph 5 of the

commentary on guideline 2.3.4, his delegation proposed that the text of paragraph (b) should be replaced by: “A unilateral statement made subsequently under an optional clause and accompanied by conditions or limitations with effects identical to those of a reservation, except in cases where the optional clause makes a corresponding provision”.

Lastly, guideline 2.4.6 could be improved by adding the words “or within specific time periods” after the word “times”.

Simple interpretative declarations (as opposed to conditional interpretative declarations) also called for comment. Such declarations produced legal effects in only two cases: when they gave rise to an estoppel and when they were really reservations “in disguise”. The first case clearly lay outside the scope of the guidelines; but the second did not. It should be noted, however, that in order for a simple interpretative declaration to constitute a reservation “in disguise” and, consequently, to fall within the scope of the guidelines, it must be formulated in writing. Therefore, the guidelines should deal only with simple interpretative declarations which were so formulated — in other words, which had been submitted to the depositary and which genuinely constituted, or were considered by a party to the treaty to constitute, a reservation.

The meeting rose at 10.55 a.m.