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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FIFTH SESSION

Rapporteur: Mr. William MANSFIELD

CHAPTER VIII

Reservations to treaties

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(b) Summary of the debate

1. Most of the draft guidelines proposed by the Special Rapporteur were endorsed, subject to some clarifications or minor amendments. Several members also expressed their satisfaction with the exchange of views between the Commission and the human rights treaty monitoring bodies. The debate focused primarily on draft guidelines 2.3.5 (Enlargement of the scope of a reservation) and 2.6.1 (Definition of objections to reservations).

2. Several members indicated that the definition of objections to reservations related to the substance of a number of interesting questions.

3. Some members were of the opinion that the Special Rapporteur's proposal was, quite rightly, entirely in line with the Vienna Conventions and was intended only to adapt the 1969 and 1986 definition of reservations to objections. They considered that the intention of the objecting State, a key element of the proposed definition, had to be in keeping with article 21, paragraph 3, and article 20, paragraph 4 (b), of the 1969 Vienna Convention on the Law of Treaties. The definition must not include "quasi-objections" or the expression of "wait-and-see" positions in relation to a reservation.

4. According to another point of view, the definition proposed by the Special Rapporteur was not entirely satisfactory.

5. It was pointed out that the legal effects of an objection to a reservation under the Vienna Conventions were uncertain and could even be compared to those of acceptance, in the sense that the provision to which the reservation relates does not apply. However, the objecting State's intention is obviously not to accept the reservation, but, rather, to encourage the reserving State to withdraw it. The definition of objections should therefore reflect the real intention of the objecting State and not tie that position to the effects attributed to objections under the Vienna Conventions.

6. The practice of States shows that objecting States sometimes have effects in mind that are different from those provided for in articles 20 and 21 of the Vienna Conventions. There can also be different types of objections: those purporting to exclude only the provision to which the reservation relates, but also an entire part of the treaty; those which state that a reservation is

contrary to the object and purpose of the treaty, but nevertheless allow for the establishment of treaty relations between the reserving State and the objecting State; and even objections to "across-the-board reservations" purporting to prevent the application of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation. (The latter category was covered by draft guideline 2.6.1 ter). The intention of the objecting State was usually to ensure that a reservation could not be opposable to it. According to that viewpoint, the definition of objections contained in draft guideline 2.6.1 should therefore be broadened. It was even asked whether the concept of an objection might also apply to interpretative declarations.

7. In that connection, it was recalled that the regime of objections was very incomplete. According to one point of view, the proposal that an objection applying the doctrine of severability ("super-maximum" effect) was not actually an objection was contrary to one of the basic principles of the Vienna Conventions, namely, that the intention of States took precedence over the terms used. Other members take the view that, although independent bodies (such as the European Court of Human Rights and the Inter-American Court of Human Rights) hand down rulings on the permissibility of reservations, the doctrine of severability is still controversial, especially if it is applied by States (in the case of human rights treaties, in particular). In this case, States want to preserve the integrity of the treaty, sometimes at the expense of the principle of consensus.

8. According to this point of view, even controversial objections should always be regarded as objections, despite uncertainty about their legal consequences. The definition of objections should therefore be much broader and include all types of unilateral responses to reservations, including those purporting to prevent the application of the treaty as a whole, and those known as "quasi-objections". The Commission should also reconsider the 1997 preliminary conclusions in the light of recent practice, which took account of the specific object and purpose of the treaty. A careful balance should be struck between the consent of sovereign States and the integrity of treaties.

9. Some members pointed out that only an analysis of the text of the objection would reveal the intention behind it. According to another point of view, an analysis of the context shows whether what is involved is an objection proper or some other kind of response to get the reserving State to withdraw its reservation. In that connection, however, reference was also

made to recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe on responses to inadmissible reservations to international treaties as a means of analysing the intention of the objecting State. That recommendation by a regional organization showed that there was an emerging practice in respect of objections.

10. It was also noted that the intention should not be limited, as it was in the Special Rapporteur's proposal, and that, if the intention was linked to the effects of the objection, the question of the definition should be postponed until the effects of reservations and objections had been considered. According to another point of view, the Special Rapporteur had followed the Vienna Conventions too slavishly and restrictively. The practice of States should also be taken into account. The definition of objections should be much more flexible. That very complex question was a matter of the progressive development of international law.

11. It was also considered that, while the definition of objections should take account of *intention*, it could be elaborated without reference to the *effects* of objections. In order to avoid a complex and cumbersome definition, a choice would have to be made between the elements to be included. In any event, a distinction should be made between objections to "impermissible" reservations and objections to "permissible" reservations. The effects of objections to those two categories of reservations should be dealt with separately. It was also considered that the case where the provision to which the reservation relates is a customary rule should be set aside.

12. The view was expressed that the definition of an objecting State should be based on article 23, paragraph 1, and include States or international organizations entitled to become parties to the treaty.

13. There was general support for the Special Rapporteur's proposal that a draft guideline should be prepared to encourage States to give the reasons for their objections.

14. With regard to draft guideline 2.3.5, some members said that they were surprised and concerned at the possibility of the enlargement of the scope of a reservation. In their opinion, there was a basic difference between the late formulation of a reservation and the enlargement of its scope. In the first case, the State forgot, in good faith, to append the reservation to its instrument of ratification, while, in the second, a dangerous course is being charted for treaties and international law in general. The reservation is in fact a new one which jeopardizes

international legal certainty and is contrary to the definition of reservations contained in the Vienna Conventions. It is thus an abuse of rights that must not be authorized. It was also questioned whether any legitimate reasons can justify the enlargement of a reservation. It was therefore not accurate to say that the draft guidelines on the late formulation of a reservation are applicable to the enlargement of reservations.

15. Consequently, according to this opinion, the practice of the Council of Europe should be followed and the enlargement of the scope of the reservation should be prohibited; this draft guideline should either not be included in the Guide to Practice or should lay down very strict requirements. Perhaps States should be requested to give their opinions on this practice. According to one point of view, the guideline contradicted draft guideline 2.3.4 ("Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations"). During the second reading of the draft guidelines, moreover, the Commission should restrict the possibility of formulating a late reservation.

16. The majority of members nevertheless agreed that the enlargement of the scope of a reservation should be treated as the late formulation of a reservation, since the restrictions applicable to the late formulation of a reservation should definitely be maintained. In that regard, it was noted that guideline 2.3.3 on objection to late formulation of a reservation had to be adapted to the case of the enlargement of a reservation because, in the case of an objection, the reservation is kept in its original form. Ruling out the possibility of the enlargement of reservations would be much too rigid an approach. It would also not be wise to impose a regional practice on the rest of the world.

17. Several members were of the opinion that a second paragraph should be added on the definition of enlargement.

18. As to the question of terminology, several members agreed with the Special Rapporteur that a distinction should be made between an objection to the reservation and opposition to the procedure for the formulation of a late reservation. At present, the Commission should not go back on decisions already adopted.

19. Several members supported the draft guidelines on the modification and withdrawal of interpretative declarations (simple and conditional), while stating that conditional interpretative declarations should be treated as reservations. According to one point of view, the Commission should prepare a draft guideline restricting modification in the sense of the enlargement of interpretative declarations.

20. The members were generally in favour of the exchange of views established between the Commission and the human rights treaty monitoring bodies. Several members also drew attention to the importance of the "reservations dialogue", on which the Special Rapporteur intended to submit draft guidelines at the next session.

(c) Conclusions of the Special Rapporteur

21. At the end of the debate, the Special Rapporteur said that the Commission should not go back on its own decisions and call into question draft guidelines that had already been adopted. The draft guidelines on the late formulation of reservations, already adopted in 2001, should not be called into question because some members were not convinced that the rules on the enlargement of a reservation could be brought into line with those applicable to late formulation. The draft guideline on the enlargement of a reservation accurately reflected the practice of which he had given examples in his eighth report. He was not sure that States necessarily enlarged a reservation in bad faith. There were cases where that could be justified by purely technical or legislative considerations. He also recalled that the opposition of a single State would prevent the reservation from being enlarged.

22. He did not understand why the strict practice of the Secretary-General of the Council of Europe as depositary (which was, incidentally, less strict than had been claimed) would be imposed on the rest of the world; in his opinion, the practice of the Secretary-General of the United Nations, which was more flexible, would be more suitable. In any event, as far as the enlargement of reservations was concerned, there was thus no reason to depart from the rules on the late formulation of reservations.

23. With regard to draft guideline 2.6.1 on the definition of objections, the Special Rapporteur had listened with great interest to the various opinions that had been expressed. He nevertheless wished to dispel some confusion about recommendation No. R (99) 13 of the

Committee of Ministers of the Council of Europe: those model responses to inadmissible reservations were quite clearly all *objections* and they used that term. However, that is not always the case of the responses of States to reservations and it must not be assumed that, when the author of a response to a reservation uses unclear or ambiguous terms, that response is an objection. As the 1977 Court of Arbitration stated, a response to a reservation is not necessarily an objection. The reservations dialogue must not be a pretext for uncertainties or misunderstandings. Reserving States and others, whether they object or not, must know where they stand and what the real objections are by comparison with responses to reservations which are not objections.

24. The Special Rapporteur considered that the *intention* of States or international organizations was a key element of the definition of objections, as the majority of the members seemed to agree. That intention was obviously to prevent any effects of a reservation from being opposable to the objecting State. In that connection, he found that objections with super-maximum effects took such an intention to its extreme limits because, for all practical purposes, it "destroyed" the reservation and he continued to have doubts about the validity of that practice. In any event, as reservations had been defined without taking account of their permissibility, the same should probably be done with the definition of objections, without worrying about their validity. He therefore proposed the following new wording for draft guideline 2.6.1:

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects."

25. The Special Rapporteur proposed either that the new wording of draft guideline 2.6.1 should be referred to the Drafting Committee or that the Commission should give it further consideration and come back to it next year. He noted that all of the members who had spoken on the other draft guidelines on the withdrawal and amendment of interpretative declarations had supported them, subject to some minor drafting improvements.

26. In conclusion, the Special Rapporteur recalled that the Commission would still have to be patient about the question of conditional interpretative declarations. Although they were not reservations (see guideline 1.2.1), they seemed to act like reservations. Further progress on the topic would have to be made in order to determine whether that separate category was subject to the same rules as reservations.

27. In view of the interest expressed by several members, the Special Rapporteur intended to submit a draft guideline that would encourage objecting States to state their reasons for formulating their objections.

28. At its 2783rd meeting on 31 July 2003, the Commission decided to refer draft guidelines 2.3.5 "Enlargement of the scope of a reservation",[1] 2.4.9 "Modification of interpretative declarations", 2.4.10 "Modification of a conditional interpretative declaration", 2.5.12 "Withdrawal of an interpretative declaration" and 2.5.13 "Withdrawal of a conditional interpretative declaration" to the Drafting Committee.

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[1] Draft guideline 2.3.5 was referred following a vote.