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Summary record of the 2883rd meeting

Topic:
Reservations to treaties

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wanted to maintain its standing in the international arena would think of neglecting them, and in that sense they represented considerable progress. Naturally, it would be extremely desirable for the principles to be strengthened and to take the form of a convention that could be universally adopted, but the current situation was far preferable to one involving a convention that attracted the participation of only a handful of States. The potential influence of a declaration of that type, formulated by a body such as the International Law Commission, should not be overlooked.

37. Mr. Sreenivasa RAO (Special Rapporteur) thanked the members of the Commission and especially the members of the Drafting Committee and the Chairperson of the Commission for having allowed him to conclude the “saga” that had grown out of the topic of international liability since it had been included on the Commission’s agenda in 1978.¹⁵⁷ The theoretical difficulties posed by the topic, together with the emotional charge resulting from incidents that had occurred over the years throughout the world had sometimes resulted in the resources implied by such a task being exceeded. During that time State practice had continued to evolve and different measures and instruments had been adopted. The topic had grown in complexity. That was why the adoption of the draft principles represented significant progress. Certainly the question of form was important, but it could be debated further in the Sixth Committee, and it was States, after all, that were best placed to settle the matter. As for the Commission, it had finally completed its task, which had essentially been to identify all the elements that would allow it to establish reasonable criteria for ensuring that the victims of transboundary harm did not have to bear by themselves any losses that such harm might occasion, which might have been the case had the issues involved not been clarified. The Commission should be proud of the work it had done, which would doubtless have a major influence on the conduct of States.

38. The CHAIRPERSON thanked the Special Rapporteur and commended him for his work, his pragmatism and his sense of duty. He was convinced that the international community would duly appreciate the outcome of that effort.

The meeting rose at 11.30 a.m.

2883rd MEETING

Tuesday, 6 June 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

¹⁵⁷ *Yearbook ... 1978*, vol. II (Part Two), document A/33/10, chap. VIII, sect. C, annex, p. 150.

Reservations to treaties¹⁵⁸ (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2,¹⁵⁹ A/CN.4/572, ¹⁶⁰A/CN.4/574,¹⁶¹ A/CN.4/L.685)

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MANSFIELD presented the report of the Drafting Committee on the topic “Reservations to treaties”, in the absence of the Chairperson of the Drafting Committee and of the Special Rapporteur on the topic, who had expressed his regret at being unable to attend the meeting. The report was to be found in document A/CN.4/L.685 and Corr.1. The Drafting Committee had held two meetings on the topic, on 23 and 24 May 2006, at which it had considered five draft guidelines referred to it by the plenary during the fifty-seventh session of the Commission.¹⁶² It had also reviewed two draft guidelines which had already been adopted with a view to reconsidering the terminology used therein in the light of the debate held on the issue in the Commission in 2005.¹⁶³ The five draft guidelines dealt with the substantive validity of reservations. The term “validity” was quite general, encompassing both the substantive and formal requirements and conditions necessary for the formulation of reservations. The guidelines belonged to the third part of the Guide to Practice, which would bear the general title “Validity of reservations”. To distinguish substantive validity from general validity, the Drafting Committee had decided to use the term “permissibility” (“*validité matérielle*”) to denote the former. The Drafting Committee had considered that the use of the terms “validity” and “permissibility” clarified a much debated question and contributed to greater consistency and precision in the draft guidelines. The commentary would analyse the terminological issues involved and the Commission’s selection of the term “validity”.

2. Draft guideline 3.1 read:

“3.1 *Permissible reservations*

“A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

“(a) The reservation is prohibited by the treaty;

“(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

¹⁵⁸ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2005*, vol. II (Part Two), para. 437.

¹⁵⁹ *Yearbook ... 2005*, vol. II (Part One). For the presentation and discussion of the tenth report of the Special Rapporteur, see *Yearbook ... 2005*, vol. I, 2854th and 2856th–2859th meetings, *Yearbook ... 2005*, vol. II (Part Two), pp. 63–71, paras. 333–436, and above, 2888th–2891st meetings.

¹⁶⁰ Reproduced in *Yearbook ... 2006*, vol. II (Part One).

¹⁶¹ *Idem*.

¹⁶² *Yearbook ... 2005*, vol. II (Part Two), p. 71, para. 435.

¹⁶³ *Ibid*.

“(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

The draft guideline had originally been entitled “Freedom to formulate reservations”. There had been a lengthy discussion in the plenary on both its title and its content, which faithfully reproduced article 19 of the 1986 Vienna Convention.¹⁶⁴ The Committee had considered the text in great detail, and although there had initially been a suggestion that the temporal factor should be omitted, since that was to be found in the definition in draft guideline 1.1, it had finally been decided to retain it. Indeed, it also appeared in the text of article 19 of the 1986 Vienna Convention.

3. The title of the draft guideline now read “Permissible reservations” (“*Validité matérielle d’une réserve*”). The Drafting Committee had considered various alternatives for the title, inspired both by proposals that had been made in the plenary and by the wish to align the title with that of article 19 of the 1986 Vienna Convention, entitled “Formulation of reservations”. It had been pointed out, however, that a similar title had already been used for draft guideline 2.1.3 (Formulation of a reservation at the international level). In the end, the Drafting Committee had opted for the present title, bearing in mind that the guideline was to be the first in the third part, which dealt with validity of reservations. The term “permissible reservation” pertained to the substantive aspect of valid reservations, while the term “valid” was more generic, encompassing both substantive and formal conditions of validity. It was understood that that distinction was also to form part of the commentary to the guideline.

4. Draft guideline 3.1.1 read:

“3.1.1 *Reservations expressly prohibited by the treaty*

“A reservation is expressly prohibited by the treaty if it contains a particular provision:

“—Prohibiting all reservations;

“—Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions;

“—Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.”

During the debate in the plenary, a discrepancy between the chapeau of the guideline and its main text had been identified: the general term “prohibited by the treaty” in the chapeau was not quite in conformity with the second and third subparagraphs (“prohibiting reservations to specified provisions”; “prohibiting certain categories of reservations”).¹⁶⁵ The Drafting Committee had felt that the addition of the phrases “and a reservation in question is formulated to one of such provisions” and

“and a reservation in question falls within one of such categories”, respectively, would establish consistency between the chapeau and the text.

5. The Drafting Committee had held a long discussion on the use of the word “expressly” in the title and text of the guideline. The question of “implicit” prohibition of reservations had been raised and the view had been expressed that such an implicit prohibition was characteristic of some types of treaty such as constituent acts of international organizations and ILO conventions, although it had also been pointed out with respect to the latter that the prohibition derived from practice rather than from the conventions themselves. It had been pointed out that the “object and purpose” test was adequate for all possible categories of prohibition of reservations, whether explicit or implicit. The Drafting Committee had also considered whether a separate guideline on reservations to constituent acts of international organizations would be useful. It had decided, however, that the commentary to draft guideline 3.1.1 could cover that category, but that it would be desirable for the Special Rapporteur to draft a guideline to that effect which could be presented to the plenary.

6. The Committee had been of the view that the term “expressly” should be retained in the title and included in the introductory part of the draft guideline. Its significance should be explained in the commentary, as should the possibility of implicit prohibition of reservations. In cases where reservations were made despite their implicit prohibition, they should be subject to the “object and purpose” test.

7. Draft guideline 3.1.2 read:

“3.1.2 *Definition of specified reservations*

“For the purposes of guideline 3.1, the expression ‘specified reservations’ means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.”

The guideline gave a general definition of the term “specified reservations” contained in article 19 (b) of the 1986 Vienna Convention. The wording of the guideline as initially proposed had attempted to combine a definition of specified reservations with that of “authorized reservations” as described in article 20, paragraph 1, of the 1986 Vienna Convention. Bearing in mind the debate in the plenary, which had pointed to the need to determine whether the treaty permitted only specific reservations—and if that was so, whether a reservation that was formulated fell into that category¹⁶⁶—the Drafting Committee had opted for a more general and comprehensive approach. Thus the words “authorized by the treaty” had been replaced by the words “envisaged in the treaty”.

8. It had also been observed that specified reservations could be made, not only to specific provisions, but also to the treaty as a whole with regard to certain categories.

¹⁶⁴ *Ibid.*, pp. 68–69, paras. 400–401.

¹⁶⁵ *Ibid.*, p. 69, para. 402.

¹⁶⁶ *Ibid.*, p. 69, para. 404.

It had thus been felt that the terminology used in draft guideline 1.1.1 (Object of reservations) could be usefully transferred to draft guideline 3.1.2. Moreover, the phrase “which meet conditions specified by the treaty”, inspired by the arbitral award in the *English Channel* case, had been deemed too limiting and, eventually, unnecessary. The definition was understood as being sufficiently wide to include both general reservations and also provisions specifying in detail the content of reservations envisaged in the treaty. The commentary should explain that aspect of the draft guideline.

9. Draft guideline 3.1.3, originally entitled “Reservations implicitly permitted by the treaty”, read:

“3.1.3 *Permissibility of reservations not prohibited by the treaty*

“Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.”

It had initially been proposed in an alternative version in which it was combined with draft guideline 3.1.4. The Drafting Committee had opted for two separate guidelines, for the sake of clarity. Draft guideline 3.1.3 covered the case of treaties prohibiting certain reservations. In such cases, a reservation that was not prohibited by the treaty could be formulated by a State or an international organization only if it was not incompatible with the object and purpose of the treaty. The wording of the final phrase of the guideline had been slightly modified to align it with draft guideline 3.1 and article 19 (c) of the 1986 Vienna Convention. The title had been changed to read “Permissibility of reservations not prohibited by the treaty” (“*Validité des réserves non-interdites par le traité*”). The term “permissibility”, as compared to the more general term “validity”, signified in the present instance the substantive requirements, as opposed to the formal ones, for the effective formulation of a reservation, in other words its compatibility with the object and purpose of the treaty.

10. Draft guideline 3.1.4 read:

“3.1.4 *Permissibility of specified reservations*

“Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.”

It covered the category of specified reservations which were not defined precisely—as opposed to specified reservations the content of which was defined exactly in the treaty. In such a case, the test of compatibility with the object and purpose of the treaty was again applied. The wording of the guideline had been modified to reflect the definition of specified reservations in draft guideline 3.1.2. However, whereas draft guideline 3.1.2 gave a general definition of specified reservations, draft guideline 3.1.4 referred to a category of specified

reservations whose content was not specified. It was understood that specified reservations whose content was exactly defined by the treaty would not have to be subject to the criterion of compatibility with the object and purpose of the treaty. The Drafting Committee had thought that, rather than formulating a specific guideline to that effect, that conclusion should figure in the commentary to draft guideline 3.1.4. The title of the draft guideline was rendered in French as “*Validité des réserves déterminées*”. In both guidelines 3.1.3 and 3.1.4, the French term “*validité*” should be understood as meaning “*validité matérielle*”. Since the latter term appeared in the title of draft guideline 3.1, the Drafting Committee had considered that it would be superfluous to repeat it in draft guidelines 3.1.3 and 3.1.4. In English, the word “permissibility” was used in both draft guidelines to denote the substantive requirements of the overall validity of reservations.

11. Draft guidelines 1.6 and 2.1.8 [2.1.7 *bis*] had been referred to the Drafting Committee, even though they had already been adopted, to enable it to review the term “permissibility” (“*licéité*”). The Special Rapporteur had advocated the use of the more neutral term “validity” (“*validité*”), and many members of the Commission had concurred with that approach. After a thorough discussion, the Drafting Committee had concluded that the term “validity” (“*validité*”) was the most appropriate to use in a general manner. That term encompassed both the formal and the substantive conditions for the formulation of reservations, presented in the second and third parts of the Guide to Practice respectively. Thus, in draft guideline 1.6, the term “*validity/validité*” had now replaced the term “*permissibility/licéité*”. The formal conditions related to questions of procedure, while the substantive ones focused mainly on compatibility with the object and purpose of the treaty. In order to distinguish the latter, the terms “*permissibility/validité matérielle*” should be used.

12. Draft guideline 1.6 read:

“1.6 *Scope of definitions*

“The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.”

13. In draft guideline 2.1.8, the terms “impermissible/impermissibility” had been replaced by the terms “invalid/invalidity”. In French, the terms “*illicite/illicéité*” had been replaced by the terms “*non-valide/non-validité*”. The words “grounds for the invalidity of the reservations”, necessitated by the term “invalidity”, had been added. Draft guideline 2.1.8 [2.1.7 *bis*] read:

“2.1.8 [2.1.7 *bis*] *Procedure in case of manifestly invalid reservations*

“Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary’s view, constitutes the grounds for the invalidity of the reservation.

“If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.”

14. The Drafting Committee recommended to the Commission the adoption of the five draft guidelines before it and of the revisions to the two draft guidelines already adopted by the Commission.

15. The CHAIRPERSON invited the Commission to adopt the draft guidelines contained in document A/CN.4/L.685 and Corr.1.

Draft guideline 3.1

Draft guideline 3.1 was adopted.

Draft guideline 3.1.1

16. Mr. MOMTAZ proposed that the subparagraphs should be lettered (a), (b) and (c), to bring them into line with the format of draft guideline 3.1.

17. Mr. MANSFIELD endorsed the proposal.

Draft guideline 3.1.1, as amended, was adopted.

Draft guidelines 3.1.2, 3.1.3 and 3.1.4

Draft guidelines 3.1.2, 3.1.3 and 3.1.4 were adopted.

Draft guidelines 1.6 and 2.1.8 [2.1.7 bis]

Draft guidelines 1.6 and 2.1.8 [2.1.7 bis], as revised, were adopted.

The meeting rose at 10.35 a.m.

2884th MEETING

Thursday, 8 June 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued)* (A/CN.4/560, sect. C, A/CN.4/564 and Add.1-2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

* Resumed from the 2879th meeting.

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON, in the absence of Mr. Kolodkin, Chairperson of the Drafting Committee, invited Mr. Mansfield to present the Drafting Committee's report (A/CN.4/L.687 and Add.1 and Corr.1).

2. Mr. MANSFIELD reported that the Drafting Committee had spent three meetings considering draft articles 17 to 24 on circumstances precluding wrongfulness, which the Commission at its 2879th meeting had referred to the Drafting Committee. He wished to thank the Special Rapporteur, Mr. Gaja, for guiding the work of the Drafting Committee with his explanations and suggestions and the members of the Drafting Committee for their cooperation and valuable contributions.

3. Chapter V, entitled “Circumstances precluding wrongfulness”, of the draft articles on the responsibility of international organizations comprised draft articles 17 to 24, which had not raised serious concerns when considered in plenary session. Although some members had been of the view that certain provisions in the chapter should be deleted, since there was no corresponding practice on the part of international organizations to rely on and the exercise resembled legislation rather than codification, the Commission had agreed to retain the articles and the Drafting Committee had followed suit.

4. With regard to draft article 17 (Consent), which corresponded to article 20 of the draft articles on the responsibility of States for internationally wrongful acts,¹⁶⁷ the text proposed in the fourth report of the Special Rapporteur had been favourably received by the plenary Commission, and the Drafting Committee had therefore retained it without change. Two issues in particular had been raised in the plenary debate. The first related to the inclusion in the draft article of language to the effect that consent to any act contrary to *jus cogens* should not be considered valid. The second point raised was the need to take into account, in the case of international organizations, situations where consent might be given to an international organization not by a State but by another entity, such as a territory or autonomous region that had not attained the status of a State. In the Drafting Committee's view, the issue of validity of consent should be addressed in general terms in the commentary, including a reference to draft article 23 on compliance with peremptory norms. However, the commentary should avoid discussing the circumstances or conditions under which consent might be given by entities other than States or international organizations, and it should not deal with the issues of what should be considered State consent and how it should be expressed, since those were matters beyond the scope of the current exercise.

5. With regard to draft article 18 (Self-defence), which corresponded to article 21 of the draft articles on the responsibility of States,¹⁶⁸ a number of issues had been raised in the plenary debate, namely, whether a distinction should be made between self-defence for

¹⁶⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

¹⁶⁸ *Ibid.*