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Chair: Mr. Silva (Vice-Chair) . . . . . (Brazil)

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In the absence of Mr. Kohona (Sri Lanka) Mr. Silva (Brazil), Vice Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (*continued*) (A/66/10, A/66/10/Add.1 and A/68/10)

1. **The Chair** invited the Committee to resume its consideration of chapter IV (Reservations to treaties) of the report of the International Law Commission on the work of its sixty-third session (A/66/10 and Add.1).

2. **Ms. Farhani** (Malaysia) said that her delegation wished to express its appreciation to the International Law Commission for taking into consideration in its final version of the Guide to Practice on Reservations to Treaties (A/66/10 and Add.1) the comments made by States, including those of Malaysia in respect of guidelines 1.4.2, 2.1.8, 2.9.9, 3.4.1, 3.6, 3.6.1 and 3.6.2. Her delegation had commented extensively on the finalized guidelines at the sixty-sixth session of the Sixth Committee and hoped that its views would be taken into account in any future work related to the topic. For reference purposes, it had made available on the Committee's PaperSmart portal its detailed comments on chapter IV of the Commission's report on its sixth-third session.

3. Her delegation reiterated its view that a separate legal regime for international organizations should be developed, as opposed to being made a part of the Guide to Practice. Its position was premised on the understanding that the power to conclude treaties by international organizations largely depended on the terms of the international organization's constituent instrument and often on the mandate granted to the international organization by the States comprising it. Therefore, the references to international organizations in the Guide to Practice, in particular in guidelines 2.8.7, 2.8.8, 2.8.9, 2.8.10, 2.8.11 and 4.1.3, were inappropriate. Malaysia was open to future discussions to explore the development of a separate regime for international organizations and welcomed the views of other States on the possibility of another approach.

4. With regard to the question of a reservations dialogue, Malaysia noted from the Special Rapporteur's seventeenth report (A/CN.4/647 and Add.1) that it had never been intended to produce a legal effect, since the Commission should not endeavour to establish a specific legal regime for it. It was her delegation's understanding that the conclusions on the reservations dialogue annexed to the Guide to Practice were not intended to impair the flexibility of the modalities of the reservations dialogue by subjecting it to specific rules and procedures. The conclusions were acceptable insofar as they served as a guideline or as recommendations for the practice of reservations dialogue.

5. Her delegation agreed that the finalized guidelines together with their commentaries should be read together as a whole to ensure that all concerns were addressed. It would nevertheless like to reserve the right to provide further comments on all guidelines and commentaries in future discussions.

6. **Ms. Song** Mi Young (Republic of Korea) said that the topic of reservations to treaties was one of the most important parts of the law of treaties, serving as a tool to maintain a balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein.

7. Her delegation highly valued the Commission's work and its concrete results. Considerable State practice concerning reservations had accumulated, but States faced practical difficulties because the provisions on reservations in the Vienna Convention on the Law of Treaties remained unclear. The work of the Commission elucidated the meaning of relevant provisions on reservations and provided good guidance for practitioners. The Guide to Practice would provide a wide range of information for State officials who encountered difficulties associated with the formulation and interpretation of reservations, interpretative declarations and objections to reservations. States had initially expected that the final result on the topic would be a compact guide for daily practical use; in fact, however, the Guide to Practice and commentaries thereto contained voluminous material.

8. The assessment of the validity of reservations to treaties had raised many difficulties, and the Guide facilitated that assessment by specifying conditions for formal validity and permissibility of reservations. However, as indicated in section 3.2 (Assessment of the permissibility of reservations), the primary entity entitled to assess reservations to treaties was the State which made the reservation. Therefore, the explicit or implied consent of a reserving State was required for

other entities to become involved in assessing the validity of its reservations. Thus, treaty-monitoring bodies would not be able to assess that validity without a clear mandate.

9. With regard to the conclusions on the reservations dialogue presented in annex to the Guide, such a mechanism was interesting but was purely a reflection of progressive development of international law. In principle, an exchange of information and opinions on reservations with other States might be a good way to ensure the integrity of multilateral treaties, because it could encourage States to modify or withdraw reservations which had become unnecessary over time. However, such an exchange should not be used to put pressure on States, hindering them in the exercise of their right to make reservations under a treaty. More discussions were needed on whether the reservations dialogue was to be institutionalized and what role it should play.

10. The recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties, which could be composed of experts working in their personal capacity, required further discussion. Since reservations to treaties concerned relations among the States parties to a specific treaty, the interference of such mechanisms could modify the core characteristic of the law of treaties. Hence, the possible form of such assistance mechanisms and their functions and limits needed to be clarified. The Commission's suggestion in the annex to the recommendation that such a mechanism could make proposals in order to settle differences of opinion concerning reservations might be interpreted as implying that such mechanisms could play the role of a dispute settlement body. Her delegation had concerns about such an interpretation. If assistance mechanisms were to be established, their main function should be limited to providing States with technical assistance, on request, in formulating reservations to a treaty or objections to reservations formulated by other States.

11. **Ms. Zabolotskaya** (Russian Federation) said that practical problems arose at all stages of a reservation: when formulating a reservation, when expressing consent to be bound by a treaty, when objecting to a reservation and when applying reservations and objections. The broad use of reservations, particularly of a general and vague nature, could jeopardize the integrity of the treaty regime and the possibility of attaining the object and purpose of a treaty. Her delegation therefore welcomed the adoption of the long-awaited final version of the Guide to Practice; it would be difficult to overestimate its practical value. The Guide would be widely used by States and international organizations, including depositories of treaties, during the formulation of reservations or of objections to them, and it would improve the juridical techniques used in connection with reservations and ensure greater clarity and precision for the formulations employed.

12. With regard to the reservations dialogue, her delegation believed that discussions between the authors of reservations and other parties to the treaties to resolve issues arising in connection with reservations, for example unclear wording or references to national legislation, would be of great use.

13. **Ms. Telalian** (Greece) said that the Guide to Practice provided useful clarification of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. In addition, several guidelines moved in the direction of progressive development of international law, rather than codification, thus filling existing gaps in the Vienna system on reservations without detracting from the object and purpose of that system and remaining fully in line with it. The Guide would become an important reference for States, international organizations, scholars and treaty bodies for dealing with the sensitive issue of reservations to treaties.

14. Her delegation welcomed the effort made by the Special Rapporteur to decrease the number of the guidelines and to restructure them further in order to meet the concerns expressed by several delegations that a less extensive Guide to Practice would better serve its purpose. That was particularly true for the guidelines contained in part 1 (Definitions), which had been further streamlined and refined. With regard to part 2 (Procedure), the current wording of guideline 2.9.9 (Silence with respect to an interpretative declaration), and more specifically the deletion of the second paragraph, was an improvement and better reflected the position expressed by many delegations that mere silence in response to an interpretative declaration could not be considered to be acquiescence to that declaration and that acquiescence must be ascertained by reference to international law. Any other

solution would put a huge administrative burden on States by placing them under the obligation to react to every interpretative declaration made in order to safeguard their position.

15. With regard to late reservations, her delegation recognized the Commission's pragmatic approach to the issue and the improvements made in the wording of the relevant guidelines 2.3 (Late formulation of reservations) and 2.3.1 (Acceptance of the late formulation of a reservation). However, such practices should be used only in exceptional cases, given the risk of endangering the smooth operation of treaty relations because of the legal uncertainty that they entailed. In that connection, the commentary to guideline 2.3 rightly emphasized that the cases involved had almost always been fairly borderline ones. Greece also continued to be concerned about guideline 2.3.4 (Widening of the scope of a reservation), an issue which was conceptually very different from that of late reservations. The Guide should give greater emphasis to the need for discipline on the part of States with respect to formulating reservations and should discourage such practices.

16. With respect to guideline 2.6.13 (Objections formulated late), pursuant to which such an objection did not produce all the legal effects of one formulated within a period of twelve months, her delegation would like to have a clearer idea as to what legal effects (if any) it would produce.

17. With regard to part 3 (Permissibility of reservations and interpretative declarations), her delegation welcomed the refinement of the guidelines regarding the competence of treaty monitoring bodies to assess the permissibility of reservations. It was pleased that former guideline 3.3.3 [3.3.4] (Effect of collective acceptance of an impermissible reservation) as it appeared in the Commission’s report on the work of its sixty-second session (A/65/10) had been deleted, since lack of objection in respect of an impermissible reservation did not make it legal. That conclusion also followed from current guideline 3.3.3, according to which acceptance of an impermissible reservation did not affect the impermissibility of the reservation.

18. Guideline 4.5.3 (Reaction to an invalid reservation), the provisions of which, as the Commission itself stressed, formed part of the cautious progressive development of international law, dealt with one of the most contentious issues in the practice of reservations to treaties and had been debated at length within the Sixth Committee. In the previous formulation of that guideline, the presumption had been that a State formulating an invalid reservation would nevertheless become a party to a treaty without the benefit of the reservation. Her delegation had supported that approach as reflecting the practice developed by some States according to which reservations incompatible with the object and purpose of the treaty were severable, meaning that their author was bound by the treaty without the benefit of the reservation. The severability principle had also been applied by the human rights monitoring bodies in relation to reservations to human rights treaties in order to preserve the integrity of those instruments while allowing the reserving State to be bound by its provisions.

19. In its current formulation, guideline 4.5.3 had been modified, and the presumption as to the status of the author of an invalid reservation in relation to the treaty was now based on the intention of that State. That was a serious departure from the severability practice developed by States in their treaty relations over the past years. Furthermore, paragraph 3 of guideline 4.5.3, by stating that the reserving State could express at any time its intention not to be bound by the treaty without the benefit of the reservation, introduced legal uncertainty, as it was not clear when that intention would produce its effects. Uncertainty was also introduced by new paragraph 4, which allowed the reserving State to express its wish not to be bound by the treaty after a treaty monitoring body had assessed the invalidity of a given reservation.

20. It was her delegation’s understanding that the above modifications to draft guideline 4.5.3 had been suggested by the Commission as a compromise solution, given the divergent views of delegations in the Sixth Committee on that legally complex and politically sensitive issue. She failed to see how the guideline would be implemented in the future by those States that consistently applied the practice of severability in their treaty relations. The same concern also applied in relation to human rights treaty monitoring bodies.

21. Greece welcomed the conclusions on the reservations dialogue. The process suggested by the Commission was flexible and might be conducive to better treaty relations and legal certainty, since it could help States to have a better understanding of the basis

of a reservation and to make an assessment as to its validity. Such a dialogue had been developed in other forums, such as the Council of Europe and the European Union, and had proved to be useful to member States.

22. **Mr. Czapliński** (Poland) said that the final version of the Guide to Practice on Reservations to Treaties filled a number of lacunae and clarified certain ambiguities in the 1969 and 1986 Vienna Conventions, and it also cleared up many substantive and procedural issues arising from State practice.

23. His delegation was pleased that the Commission had made a number of modifications to the text, bringing the guidelines closer to the views expressed by States. It particularly welcomed the removal of a number of controversial guidelines, including former guideline 3.3.3 [3.3.4], according to which an impermissible reservation could become permissible if all contracting parties abstained from objecting, and former guideline 2.1.8, which concerned the assessment of the permissibility of a reservation by the depositary.

24. With regard to the problem of "late reservations", his delegation welcomed the replacement of that expression by "late formulation of a reservation" or "a reservation formulated late" in order to indicate clearly that what was meant was not a new or separate category of reservations, but, rather, declarations which were presented as reservations but which were not in keeping with the time periods during which they might, in principle, be considered as such, since the times at which reservations might be formulated were specified in the definition of reservations itself. Although such declarations still seemed to be contrary to the very concept of reservations, the conditions under which they could be formulated effectively were adequate to safeguard the basic principle of *pacta sunt servanda* (which meant that a State could not unilaterally reduce the scope of its obligations after it expressed its consent to be bound by the treaty). According to guideline 2.3, a State might not formulate a reservation after that time unless the treaty otherwise provided or none of the other contracting States and contracting organizations opposed the late formulation of the reservation. The requirement of unanimity, even passive or tacit, made the exception to the principle acceptable and limited the risk of abuse. That element of derogation was observable in current practice and consistent with the role of "guardian" of the treaty that State Parties might collectively assume.

25. For the same reasons, Poland found acceptable the rules regarding widening of the scope of reservations — which, according to the guideline 2.3.4, were generally the same as those applicable to the late formulation of a reservation. The modification of an existing reservation by one of the State Parties for the purpose of widening its scope without opposition by any of other contracting States should be treated as an "agreement between the parties" within the meaning of article 39 of the Vienna Convention on the Law of Treaties. In sum, acceptance of the rules regarding late formulation of a reservation and widening the scope of a reservation would not undermine the principle of *pacta sunt servanda*, since an indissociable condition for its effectiveness was the unanimous consent of the States parties to the treaty.

26. His delegation reiterated its position on the objective character of the invalidity of reservations, which was probably the most important issue in the Guide. The Commission rightly assumed that reservations which did not meet the conditions of formal validity and permissibility were null and void, independently of the reactions of other contracting States. Thus, Poland supported in principle the wording of the guideline 4.5.1. The objective character of invalidity of reservations appeared to be in conformity with the wording of article 19 and article 20, paragraph 4, the Vienna Convention.

27. As there was no objective mechanism to assess the objective invalidity of reservations, the guidelines constituted an attempt to solve that problem, but it was unlikely that they would work properly in practice: more than one entity was competent to assess the permissibility (and thus the validity) of reservations. States, treaty bodies and dispute settlement bodies acting within their respective competences might disagree on whether a particular reservation was permissible.

28. The most difficult issue connected with invalidity of reservations was the status of the author of an invalid reservation in relation to a treaty. According to guideline 4.5.3, that status depended on the intention expressed by the reserving State. That solution was well-balanced and theoretically reasonable, although there were some ambiguities concerning the effect of the statement by which the author of an invalid

reservation expressed its intention not to be bound by the treaty without the benefit of the reservation (especially the fact that it could make such a statement "at any time").The Commission had made significant efforts to find a compromise between the different positions and practices of States and treaty bodies concerning invalid reservations. Poland agreed that it would seem expedient to let practice evolve.

29. **Ms. Lee** (Singapore) said that her delegation welcomed the overall approach to reservations to treaties that the Guide to Practice sought to encourage, and in particular the greater transparency which it sought to bring to the process. Her delegation had no doubts that extensive reference would be made to the Guide to Practice by practitioners of international law and academics alike, as its wide scope of coverage and broad references to State practice and judicial decisions was a well of knowledge from which everyone could draw.

30. Concerning guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty), her delegation welcomed Commission's decision to emphasize the importance of the intention of the reserving State in cases of invalid reservations. It agreed with the Commission that the key to the problem was the will of the author of the reservation: whether its intention was to be bound by the treaty even if its reservation was invalid — without benefit of the reservation — or whether it considered its reservation a *sine qua non* for its commitment to be bound by the treaty. Singapore noted that the positive presumption in the guideline was not intended to undermine the principle of State consent. Rather, the positive presumption could be rebutted when the intention of the author was examined. Importantly, Singapore agreed with the Commission that the positive presumption adopted in the guideline was not intended to authorize objections with "super-maximum" effect. As indicated in the commentary, guideline 4.5.3 was part of cautious progressive development of the law which should go some way towards clarifying an area of the reservations regime that had been left unclear by the Vienna Conventions on the law of treaties.

31. Her delegation also noted that guidelines 3.2.1 to 3.2.4 on the assessment of the permissibility of reservations by treaty monitoring bodies were not intended to undermine the traditional role of States in that area. Such bodies might in certain circumstances be competent to make such an assessment, but they might do so only to the extent required to carry out the functions assigned to them. Singapore urged circumspection when it came to identifying the role of such bodies in arriving at such assessments, as they would in essence be operating in an area which touched upon the sovereign rights of States, namely, deciding how and on what basis they consented to be bound by treaties.

32. In recommending that the General Assembly should consider establishing a reservations assistance mechanism, the Commission had suggested that States might undertake to accept as compulsory the mechanism's proposals to resolve differences in opinions concerning reservations. The Commission had also suggested the establishment of an "observatory" on reservations to treaties within the Sixth Committee. As the Commission itself had observed, parts of the Guide constituted progressive development of international law. While there was some State practice supporting the reservations dialogue, her delegation believed that it was preferable for practice to develop around the Guide before the establishment of a mechanism was considered.

33. **Ms. Belliard** (France) said that the Guide to Practice would be of enormous value to both States and judges in dealing with the many questions that arose in connection with reservations. However, the French word "*directive*", which could have a imperative connotation, did not seem best suited to reflect the object and purpose of the Guide; "*ligne directive*" was preferable, since it was perfectly neutral, bearing in mind that the Guide was compiling rules followed in practice and not creating new legal obligations *ex nihilo*.

34. One of the main problems with the text had to do with its underlying logic. Her delegation had already stressed in the past that reservations to treaties could not be dealt with by reference to the concept of validity. In the current legal order, it was the State itself, through the unilateral expression of its will, that accepted, or did not accept, the effects that the State that was the author of a disputed act intended that act to have. A State could decide to formulate a reservation, whatever it might be, and another State could decide on its own initiative that the reservation did not produce any effect, or that its relations with the author of the reservation were modified and governed in the manner foreseen by the reservation. A State

could very well agree, for example, to be bound by a reservation which, in the view of the other States, was contrary to the object and purpose of the treaty, provided that it was its own choice and only affected its relations with the reserving State. Equally, it could refuse to allow a reservation that was accepted by most other States parties to the treaty concerned to produce any effect in its relations with the author of the reservation.

35. Consequently, there could be no question of the "validity" of a reservation, but simply the "opposability" of a reservation formulated by a State, in other words, the question of whether that unilateral act would encounter the unilateral act of another State through which the latter accepted that the reservation produced an effect in their legal relations. To place reservations under the concept of "validity" would also necessarily presuppose that the sanction that derived from failure to respect a rule of validity applied, namely the nullity of the act. However, that was not the case with reservations. To claim the contrary would be to assume that it was possible to proceed with an objective determination of the validity of such a unilateral act, whereas the international legal order was characterized by the relativism of inter-State relations, which was inextricably linked to the principle of State consent.

36. Thus, the various elements of State practice, although usefully compiled, should not be presented by the Guide as participating in the determination of the validity of reservations, but as reflecting criteria which must be assessed to decide on the opposability of a reservation. Accordingly, France could not support the proposed guidelines when they were presented as participating in the determination of the validity or permissibility of reservations, as was basically the case in part 3 of the Guide.

37. The same applied to the guidelines that envisaged the possibility of having a body assess the permissibility of a treaty. That could only be allowed through the consent of States, a fundamental point which should have been made explicit. That was also the basis for her delegation's doubts about the permissibility of the acceptance of a reservation or the validity of an objection to a reservation (guidelines 3.4 and 4.3). France had the similar difficulties with guideline 4.2.1, which drew conclusions about the entry into force of a treaty for the author of the reservation on the basis of the validity of a reservation. That was not the issue, since the effect of a reservation could only concern the applicability of the treaty or some of its provisions as between the reserving State and the objecting State. For the above reasons, her delegation disagreed with most of the guidelines under section 4.5, which could not concern nullity, but simply opposability.

38. The cardinal principle of consent also compelled her delegation not to endorse several aspects of guideline 4.5.3. It was difficult to imagine that an entity other than the reserving State could assess the degree of its consent in order to determine whether the author of a so-called invalid reservation was bound by the treaty without the benefit of the reservation. The new wording was better than the previous one. Nevertheless, a presumption was being made, and the conditions under which it could be rebutted sometimes remained unclear. It was, after all, for the author of the reservation to decide whether to be bound by the treaty from the moment the author's will encountered the will of another State.

39. Guideline 4.5.3 also posed another problem, one also raised by other guidelines: that of legal certainty. Well after the expression of consent to be bound, it would be possible to express the intention not to be bound by the treaty without the benefit of the reservation under paragraph 3 of guideline 4.5.3, or to formulate an interpretative declaration (guideline 2.4.4) or to react to such a declaration (guideline 2.9.4).

40. The general reference to peremptory norms of international law (*jus cogens*) in the Guide posed the question of the scope and identification of that concept, which was too vague and imprecise for such a general reference to be effective. In that regard, she noted that a reference to the concept had been deleted from guideline 3.5.

41. With regard to the proposal for the establishment of an observatory on reservations to treaties, her delegation did not think that such an undertaking was feasible in the context of the United Nations, chiefly because of the monitoring that would be required. The experiment had been successful within the Council of Europe primarily owing to the dialogue instituted among its member States, but thanks also to the resources allocated, which enabled the secretariat to monitor the issuance of reservations on a daily basis

within a framework deliberately restricted to human rights treaties.

42. In addition, for constructive discussions to take place, the physical conditions for a technical dialogue between States were required. That would be difficult to achieve in the United Nations, given the large number of States in the Organization and the great diversity of subjects to be considered. It would probably be difficult to identify the reservations that should be the subject of such an assessment from among all the reservations formulated on all the treaties for which the Secretary-General was the depositary. Furthermore, it was a matter for each State to decide whether to formulate an objection or a declaration in reaction to a reservation, and it was difficult to see the point of entrusting a group of experts with the task. On the other hand, encouraging a reservations dialogue between the States parties to a treaty, which was already known to State practice, would be of great benefit.

43. Notwithstanding those real difficulties with the text, the distinctions which the Guide had finally made clear between acts which were too often confused, the identification of the various reactions to reservations and the exact definitions which had been elaborated were valuable for all practitioners in the field of reservations to treaties. Her delegation was also pleased that many of the comments by States had been taken into account during the drafting of the Guide.

44. **Mr. Martín y Pérez de Nanclares** (Spain) said that the Commission had dealt with a topic which terrified academics because of its complexity and frightened legal practitioners because of its opacity. Speaking as a university professor, he could say confidently that the Guide to Practice would be of immense value to academics. The guidelines, and even more the commentaries, were destined to become the benchmark for future study on the matter.

45. For Spain, the Guide had already proved its usefulness. On 25 October, the Government of Spain had introduced a bill on international treaties and other international agreements which not only made explicit reference to the definition of a reservation to a treaty contained in the Vienna Conventions on the law of treaties, but also defined interpretative declarations in a manner similar to the definition in guideline 1.2 of the Guide, which filled a gap in the Conventions; an effort had also been made to distinguish clearly between reservations and interpretative declarations on the basis of the legal effects that each produced. Moreover, it was important to Spain that guideline 1.5.1 (Statements of non-recognition), while explaining that such statements were considered to be outside the scope of the Guide, clearly accepted the notion that participation in an international treaty by an entity did not imply recognition of that entity by a State party.

46. His delegation continued to have concerns about the late formulation of reservations (section 2.3), the effects of the acceptance of an impermissible reservation (guideline 3.3.3) and the status of the author of an invalid reservation (guideline 4.5.3), and it had doubts about the utility of the guidelines regarding State succession when it was not obvious that the regime underpinning the Vienna Convention really reflected customary law. On the other hand, recent practice had shown that the difference between a conditional interpretative declaration and a reservation was far from clear, of which the interpretative declaration of States parties to the Treaty establishing the European Stability Mechanism of 2 February 2012 was an example.

47. The reservations dialogue was an important initiative, and his delegation welcomed all attempts to encourage it, given the number of reservations which would appear to be incompatible with international law and the increasing difficulties associated with assessing the validity of reservations. Mechanisms existed in Europe for that purpose, such as the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI) and the European Union's Council Working Group on Public International Law, and had proved very useful. However, his delegation was not convinced that those models could be directly transposed to the United Nations, given its universal vocation. Experiments should first be carried out, with a format tailored as appropriate, in other regions. There could still be room for more informal transitional arrangements, which would make it possible to test a possible design for a future formalized mechanism. Any attempt must bear in mind the technical nature and budgetary impact of such mechanisms

48. **Mr. Sharifi** (Islamic Republic of Iran) said that the Commission's recommendation to the General Assembly to take note of the Guide to Practice and the reservations assistance mechanism would ensure the widest dissemination of the Guide. That should not, however, be interpreted as an endorsement of each and

every part of the Guide, as many delegations, including his own, had voiced their concerns and reservations on a number of the guidelines or the commentaries thereto. As rightly noted in the Guide to Practice itself, the Guide was by no means binding. Rather, it aimed to offer the reader a guide to past practice and to direct the user towards solutions that were consistent with the framework of the 1969 and 1986 Vienna Conventions or to the solutions that seemed most appropriate for the progressive development of that framework. However, it was advisable to be vigilant in the area of progressive development, as new rules might cause practical problems by contradicting already existing ones or by going too far beyond longstanding State practice.

49. The institution of reservations to treaties in international law was intended to fulfil a key purpose, that of ensuring maximum participation in treaties while maintaining the overall integrity of the treaty in question. Reservations were an effective tool for propagating and enriching the body of international law. The Commission's proposed Guide to Practice should therefore be considered and reviewed in a way that did not compromise the practical *raison d'être* of that important institution.

50. With regard to the conclusions on the reservations dialogue, his delegation saw no harm in encouraging States to engage in such a dialogue as long as it remained a voluntary, non-binding consultative exchange of views between and among parties, both existing and potential, to a treaty. As indicated by the Special Rapporteur himself, any legal formalism that might make it inflexible or destroy its spontaneity and effectiveness should be avoided. Since reservations were made by the legislative power of States, the executive branch had no, or at most very little, leeway to forego or even modify them. The designated depositary of each treaty was well placed to play an important role in facilitating consultations between States parties on reservations. That should not in any way be misinterpreted as entrusting the depositary with a special competence or granting the depositary a privileged status as a filtering focal point in conducting such consultations.

51. Flexibility was the key to evaluating the usefulness of the provisions of the Guide. State consent should remain the primary consideration both in assessing the validity of reservations and in determining the effects of objections to reservations. Any legal formalism, whether in the form of a reservations dialogue, an observatory on reservations to treaties or a reservations assistance mechanism, which might interfere with that flexibility or undermine that consent would hardly serve the cause of international treaty law. The premature establishment of such mechanisms might jeopardize the element of flexibility as an intrinsic feature of reservations and prejudice the sovereign right of States to make reservations when acceding to a treaty.

52. Similarly, his delegation could not accept that an objection by a State party to a treaty could produce a "super-maximum" effect on a reservation made by another State party. The concept of an objection to a reservation should be considered in the light of the established principles of international law, including the principle of sovereign equality of States, which also constituted the core of the consensual framework of the Vienna Conventions and ensured that States were only bound to a treaty once they expressed their consent and that no State could bind another State against its will. Objections with "super-maximum" effect had no place in international law. To assume that such objections had the effect of creating a binding relationship between the author of a reservation and the objecting State covering the entirety of the treaty, including the provisions to which the reservation was made, would in fact impose treaty obligations on a State without its prior consent. It was tantamount to allowing one State's reservation to be undone by another State's objection, and as such it implied giving preferential treatment to the will of the objecting State over the reserving State, which was hardly acceptable.

53. The same logic applied to treaty monitoring bodies, which were normally composed of individual experts and could not be granted the power to provide an authoritative binding assessment as to the permissibility of reservations formulated by a sovereign State party. Moreover, a precedent set by a local or regional monitoring body could not simply be replicated for application at the international level.

54. With respect to interpretative declarations, it should be emphasized that in some cases they facilitated States' participation in international treaties. Introducing detailed guidelines on interpretative declarations could create problems for their practical applicability and might affect their usefulness.

55. On the question of which States or international organizations were entitled to formulate an objection, his delegation was of the view that a reservation and an objection thereto created bilateral legal relations between a reserving State and an objecting State in respect of their treaty relationship. Accordingly, only parties to a treaty were entitled to formulate an objection to reservations made to that treaty. That position was also based on the principle that there should be a balance between the rights and obligations of the parties to a treaty. Non-parties to a treaty were not entitled to formulate objections for the simple reason that they did not have obligations under the treaty.

56. **Ms. Chadha** (India) said that her delegation supported the Commission's conclusions on the reservations dialogue and its recommendation that the General Assembly should call upon States, international organizations and monitoring bodies to initiate and pursue such a dialogue in a pragmatic and transparent manner.

57. As to the reservations assistance mechanism, the suggestion to create a small group of experts within the Sixth Committee deserved further consideration. That group could make recommendations to States in order to resolve differences of opinion concerning reservations and provide States with technical assistance in formulating reservations or objections to reservations. However, a compulsory procedure would not be acceptable to States. With regard to observatories, different regional mechanisms had been suggested as templates; the suggestion needed to be discussed more fully in the Sixth Committee to determine whether such models could be replicated within the larger and more diverse context of the United Nations.

58. The Guide was not only the result of a careful examination of the various nuances involved but also the product of a general consensus within the Commission. Accordingly, her delegation accepted the guidelines as a useful contribution to the process of international law-making. They were likely to give rise to fewer problems from a policy and political angle as they were not intended to revise the reservations regime contained in the Vienna Convention. The legal offices of foreign ministries would undoubtedly draw heavily on the guidelines to find answers to difficult substantive and procedural issues.

59. **Mr. Polakiewicz** (Observer for the Council of Europe) said that, as a regional organization created in 1949, the Council of Europe had always attached great importance to its cooperation with the United Nations. The work of the International Law Commission on reservations was of particular relevance for the Council. The Council's secretariat had contributed to the Special Rapporteur's reports, and the resulting Guide to Practice was a very useful tool which contained a number of practical recommendations.

60. The issue of reservations had been on the Council of Europe's agenda in the context of a convention review exercise launched in 2011. More than 200 international treaties had been concluded within the Council of Europe, certainly the Council's most important contribution to international law. The convention review had aimed at critically assessing the relevance of that body of treaties with a view to enhancing their impact and effectiveness and had concluded in April 2013 with the adoption by the Committee of Ministers of a series of concrete and practical measures. The Committee of Ministers had agreed on the need, during the drafting process of each convention, to examine whether to include explicit provisions on reservations, which would determine on a case-by-case basis the regime applicable. It had also invited the bodies responsible for monitoring the conventions to raise with national authorities the question of whether already formulated reservations needed to be retained or might be withdrawn, a decision that echoed guideline 2.5.3 of the Commission's Guide to Practice.

61. Those decisions were of interest beyond the restricted circle of Council of Europe member States because most of the Council's 214 conventions were open to accession by States which were not Council members. The Council's most successful convention worldwide was its Convention on the Transfer of Sentenced Persons, which gave foreigners convicted of a criminal offence the possibility of serving their sentences in their own countries; it had been ratified by 18 non-member States and was in force in 64 countries. The Council of Europe was actively promoting accession by non-member States to its conventions on cybercrime, violence against women, counterfeit medicine and data protection. Against the background of a worldwide debate on privacy and its limits, the Council of Europe had launched the modernization of its Convention for the Protection of Individuals with

regard to Automatic Processing of Personal Data, the only existing international treaty in that field. The Committee of Ministers had invited an unprecedented number of non-member States to participate in the negotiations, which would start in two weeks in Strasbourg, France.

62. The Council of Europe was pleased that the Special Rapporteur's report made ample reference to the work of the Committee of Legal Advisers on Public International Law (CAHDI) as the European Observatory of Reservations to International Treaties. CAHDI brought together the legal advisers to the ministries of foreign affairs of the Council of Europe's member States and a number of observer States and organizations. Its strength was in the combination of high-level representation and the topicality of the issues of public international law on its agenda. Its activities as the European Observatory covered both Council of Europe conventions and treaties drawn up under the auspices of the United Nations. States were thus alerted to potential difficulties and encouraged to review reservations and declarations regularly. The mechanism allowed for coordination of reactions to inadmissible reservations and declarations, although the decision whether or not to react obviously remained an individual one for each State to take.

63. The process could also lead to real dialogue. If the State which had formulated the reservation was present during the CAHDI meeting, States had the possibility of interacting directly with the State and obtaining additional information to allow them to take an informed decision about possible reactions. The concerned State was made aware of other States' arguments and was able to give additional information or withdraw the reservation. The situation, of course, was different when the reserving State was not present at the meeting. In that respect, there might be scope for further development of the CAHDI mechanism. The European Observatory was a good example of a flexible cooperation mechanism that, without being compulsory, produced effective results.

64. All information relating to the activity of CAHDI as the European Observatory would soon be made available in a more comprehensive and user-friendly way on a new website. Whatever decision was taken on the proposal for a reservations and objections assistance mechanism, the Council of Europe stood ready to provide its expertise and support to other international organizations that might be interested in proceeding with a similar exercise.

65. **The Chair** invited Mr. Pellet, former member of the Commission and Special Rapporteur on reservations to treaties, to respond to the statements made in the course of the debate on the topic.

66. **Mr. Pellet** (Special Rapporteur on reservations to treaties) said that the sole purpose of the Guide to Practice was to serve as a sort of tool kit to help States resolve the many difficult technical and political problems that arose almost daily in connection with reservations to treaties. The Guide was merely one element of the evolving law of reservations, evolution being a characteristic of public international law. It would now be best to wait and see how practice unfolded, which would show what could or should be consolidated or made more specific. Moreover, despite the voluminous size of the Guide, there was still uncharted territory, and it might be necessary to make changes. Personally, he did not think that much would need to be abandoned, because the problems addressed were likely to arise. States continued to be free to take positions. The Guide was not scripture, but rather a tool to provide assistance.

67. Although he would not attempt to reply to the points raised one by one, since the Guide to Practice was no longer in the drafting stage, he nonetheless understood the necessity for delegations to state their positions on specific rules in the Guide on what might be the last public occasion. For a rule to become customary law, the real criterion was *opinio juris*, namely the sense that States had that the rule was obligatory.

68. In his view, however, international law was not merely the sum of the subjective will of States, taken individually or even bilaterally. One of the functions of an instrument such as the Guide to Practice was to try to limit the completely subjective character of assessments and to find common formulations, for example for the definition of the object and purpose of a treaty. It was not true, as one delegation had asserted, that there were no disagreements with regard to the reservations to treaties. Such disagreements existed, and States could consider that a reservation emptied a treaty of its object and purpose. That problem could not be resolved in a purely subjective manner, notwithstanding the assertion of some delegations.

69. Apart from the question of reservations relating to the territorial application of the treaty, on which a few States had concerns, three major stumbling blocks had prevented the Sixth Committee from reaching a consensus or from endorsing the solution proposed by the Commission. The first related to the question of the late formulation of reservations. The second arose in connection with the role of treaty bodies, concerning which the Commission had sought to find a reasonable middle solution, in constant consultation with human rights treaty monitoring bodies.

70. The third stumbling block concerned guideline 4.5.3, which had been the result of protracted debate and reflection. Delegations in the Sixth Committee maintained that the middle solution proposed by the Commission created uncertainty. In his view, international law was uncertain by definition. At times it was simply not possible to sanction a wrongful act, in other words, an act not in conformity with the law. That was how international law was constructed. International law was uncertain, because generally there was no one to decide. That was its very essence, and he failed to see why delegations criticized guideline 4.5.3 on that point. As long as no mechanism had been created to determine whether a reservation was valid or opposable, it would be necessary to accept the risk of uncertainty. To be sure, the delegations in the Sixth Committee themselves were at the origin of that uncertainty. The Commission would have liked to find a solution to dispel it, but had had the impression that if it had proposed a clear, radical solution, half of the States would have rejected it and the other half would have endorsed it. Therefore it had made an effort to find a middle way, which was far from perfect. It remained to be seen whether that middle way would be borne out in practice or whether States would stubbornly insist on taking inflexible, extreme positions.

71. The point was not to have States or international organizations bring their practice into line with the recommendations in the Guide; instead, the Guide was meant to serve as a catalyst, and practitioners should take a position on it with an open mind. As matters currently stood the Guide could either be accepted or rejected; he did not think that the Commission would re-examine it or that there was a majority in the Committee in favour of referring it back to the Commission for a third reading. Universal agreement among all States on every guideline was likewise inconceivable.

72. He assumed that the Sixth Committee would now adopt a resolution taking note of the Commission's work. Coming from the General Assembly, that was already a positive element in itself. If the Sixth Committee called on States to take the fullest possible account of the Guide, that would be even more positive. However, he urged the Committee to make it clear that the Guide was to be taken as a unified whole, consisting not just of a set of guidelines, but of a set of guidelines with commentaries, and he encouraged it to annex the guidelines to its resolution.

73. Looking further ahead into the future, he noted that delegations were generally in favour of continuing a reservations dialogue. If the Sixth Committee launched a solemn appeal for the holding of a reservations dialogue, it would be a positive step. However, he personally would not advocate institutionalizing such a dialogue. If States could agree to conduct a dialogue individually or collectively; that would probably suffice.

74. Delegations had expressed very diverse views on the proposal for the establishment of an observatory. He would suggest that, as an experiment, a working group could be set up to monitor a small number of treaties. The working group could report to the Sixth Committee in 2014 on the results, and the Committee could then decide whether a more permanent structure could be established on that basis.

75. With regard to the recommendation on mechanisms of assistance, he admitted that the Commission had mingled the ideas of dispute settlement and technical assistance, and he agreed that there was no need to establish a special mechanism for the settlement of disputes concerning reservations to treaties. States with problems in that regard could turn to the International Court of Justice or to regional conciliation or dispute settlement bodies. Technical assistance was another matter. The United Nations should be in a position to provide technical assistance to States that had technical difficulties in understanding reservations or objections to reservations, because the need for such assistance existed.

76. Although he had on many occasions complained about the inflexible, formalistic and repetitive nature of the debates in the Sixth Committee, he wished to stress that the delegations had nonetheless played a major

role in the collective enterprise of drafting the Guide to Practice, and he had always taken the utmost account of their comments and proposals. Compromises had had to be found on many points, and that had resulted in certain weaknesses in the Guide, but that was the way interaction worked between the General Assembly and the International Law Commission. In closing, he wished to pay tribute to the Codification Division for its outstanding support in helping complete the work on the Guide.

Agenda item 170: Observer status for the International Institute for the Unification of Private Law in the General Assembly (*continued*) (A/C.6/68/L.5)

Draft resolution A/C.6/68/L.5: Observer status for the International Institute for the Unification of Private Law in the General Assembly (*continued*)

77. **Mr. Zappala** (Italy) said that Cuba, Indonesia, Montenegro, Tunisia and the United States of America had become sponsors of draft resolution A/C.6/68/L.5.

78. *Draft resolution A/C.6/68/L.5 was adopted.*

Agenda item 171: Observer status for the International Anti-Corruption Academy in the General Assembly (*continued*) (A/C.6/68/L.6)

Draft resolution A/C.6/68/L.6: Observer status for the International Anti-Corruption Academy in the General Assembly (*continued*)

79. *Draft resolution A/C.6/68/L.6 was adopted.*

Agenda item 172: Observer status for the Pan African Intergovernmental Agency for Water and Sanitation for Africa in the General Assembly (*continued*) (A/C.6/68/L.7)

Draft resolution A/C.6/68/L.7: Observer status for the Pan African Intergovernmental Agency for Water and Sanitation for Africa in the General Assembly (*continued*)

80. **Mr. Guibila** (Burkina Faso) said that Chile and Madagascar had become sponsors of draft resolution A/C.6/68/L.7.

81. **Ms. Onanga** (Gabon) said that her delegation wished to become a sponsor of the draft resolution.

82. *Draft resolution A/C.6/68/L.7 was adopted.*

Agenda item 173: Observer status for the Global Green Growth Institute in the General Assembly (*continued*) (A/C.6/68/L.8)

Draft resolution A/C.6/68/L.8: Observer status for the Global Green Growth Institute in the General Assembly (*continued*)

83. **Mr. Lee** Yongsoo (Republic of Korea) said that Cameroon, Croatia, France, Kazakhstan, Lao People's Democratic Republic and Uzbekistan had become sponsors of draft resolution A/C.6/68/L.8.

84. **Mr. Mulalap** (Federated States of Micronesia) said that his delegation wished to become a sponsor of the draft resolution.

85. *Draft resolution A/C.6/68/L.8 was adopted.*

The meeting rose at 5.05 p.m.