United Nations A/C.6/56/SR.19

General Assembly
Fifty-sixth session

Official Records

Distr.: General
10 November 2001

Original: English

Sixth Committee

Summary record of the 19th meeting
Held at Headquarters, New York, on Monday, 5 November 2001, at 3 p.m.

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

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01-61972 (E)

The meeting was called to order at 3.15 p.m.

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

1. **Mr. Kabatsi** (Chairman, International Law Commission), introducing chapter VI of the report of the International Law Commission (A/56/10), entitled "Reservations to treaties", said that at its fifty-third session the Commission had considered the second part of the fifth report of the Special Rapporteur and had adopted 12 draft guidelines on the formulation of reservations and interpretative declarations, accompanied by commentaries. It had also considered the sixth report of the Special Rapporteur and had referred to the Drafting Committee 13 draft guidelines dealing with the matters covered in that report.

2. Draft guidelines 2.2.1, 2.2.2 and 2.2.3 related to the confirmation of reservations formulated when signing a treaty. Draft guideline 2.2.1 ("Formal confirmation of reservations formulated when signing a treaty") reproduced the exact wording of article 23, paragraph 2, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It established the principle of the obligation to confirm a reservation formulated when signing a treaty; that obligation had become part of positive international law. The Commission had also considered the effect of State succession on the implementation of that principle, the list of cases in which a reservation formulated when signing must be confirmed and the question of "embryo reservations".

3. Draft guideline 2.2.2 ("Instances of non-requirement of confirmation of reservations formulated when signing a treaty") addressed the case of treaties not requiring any post-signing formalities in order to enter into force; it was self-evident that, if formulated when the treaty was signed, a reservation became effective immediately, without any formal confirmation being necessary.

4. Draft guideline 2.2.3 ("Reservations formulated upon signature when a treaty expressly so provides") addressed the case where the treaty itself provided expressly for the possibility of formulating reservations upon signature without the need for confirmation. Although different views had been expressed in the Commission on that guideline, the majority of the members felt that such reservations were sufficient in and of themselves, it being understood that nothing prevented reserving States from confirming them.

5. Draft guidelines 2.3.1, 2.3.2 and 2.3.3 dealt with the problem of late formulation of reservations, a particularly sensitive and difficult issue. The expression "late formulation of a reservation" was used rather than "late reservations" in order to indicate that what was meant was not a new category of reservations, but declarations which were presented as reservations although they were not formulated at the specified time.

6. Draft guideline 2.3.1 ("Late formulation of a reservation") established the principle that a reservation could not be formulated after the expression of consent to be bound; the principle followed established practice, as indicated by the many examples mentioned in the commentary, but was not absolute and applied only if the contracting States did not authorize by agreement the formulation of new reservations. It was also apparent from current practice that the other contracting parties could unanimously accept a late reservation, and that consent could be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations. However, the Commission had been cautious about sanctioning a practice which ought to remain exceptional and narrowly circumscribed, hence the requirement of unanimity, whether passive or tacit, for such an exceptional act. The Commission wished to receive comments from Governments on that draft guideline and on the more specific issues raised in paragraphs 23 and 24 of the report.

7. Draft guideline 2.3.2 ("Acceptance of late formulation of a reservation") was in line with the practice followed by the Secretary-General, as recently modified, despite some concerns that a 12-month time limit might prolong uncertainty as to the fate of a reservation that had been formulated. At the same time, the wording of the draft guideline did not call into question the practice followed by other depositaries.

8. Draft guideline 2.3.3 ("Objection to late formulation of a reservation") addressed the consequences of an objection made to the late formulation of a reservation, and followed from draft guideline 2.3.1. It ensured that conventional relations would remain unaffected by the late formulation of a reservation.

9. Draft guideline 2.3.4 (“Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations”) dealt with the problem of a subsequent interpretation of a reservation made earlier or of a unilateral statement made subsequently under an optional clause; those two means of circumvention had both been used in practice, and that use had given rise to jurisprudence that was accepted as authoritative, especially in the context of the Inter-American Court of Human Rights and the European Court of Human Rights. It should be noted that the reasoning which justified the prohibitions enunciated in draft guideline 2.3.4 should be applied mutatis mutandis to other means of trying to circumvent the principle of prohibition of late reservations.

10. Draft guideline 2.4.3 (“Time at which an interpretative declaration may be formulated”) stated the general principle that an interpretative declaration could be formulated at any time. That principle would not apply if a treaty provided otherwise, in the case of a previous interpretative declaration which had been the basis of an estoppel, or in the case of conditional interpretative declarations.

11. Draft guideline 2.4.4 (“Non-requirement of confirmation of interpretative declarations made when signing a treaty”) established the rule that it was not necessary to confirm simple interpretative declarations made when signing a treaty. It derived logically from draft guideline 2.4.3; however, if States or international organizations wished to confirm such declarations, they should be free to do so.

12. Draft guideline 2.4.5 (“Formal confirmation of conditional interpretative declarations formulated when signing a treaty”) made an important exception to the principle set out in draft guideline 2.4.4 in the case of conditional interpretative declarations. It reflected current practice in which States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirmed their interpretation at the time of expression of their consent to be bound.

13. Draft guideline 2.4.6 (“Late formulation of an interpretative declaration”) was the counterpart of draft guideline 2.3.1 and followed current practice.

14. Draft guideline 2.4.7 (“Late formulation of a conditional interpretative declaration”) established a principle which derived from the very definition of a conditional interpretative declaration, which could be made only at certain times and not subsequent to the definitive expression of consent to be bound by the treaty. That consent, even tacit, was a necessary condition for the valid formulation of a conditional interpretative declaration; the conditions taken into account for draft guideline 2.3.1 would also apply.

15. The Commission would welcome comments on the three issues included in chapter III of its report, as well as additional answers to the questionnaire on the topic “Reservations to treaties”, which had first been circulated to States in 1995.

16. **Mr. Al Baharna** (Bahrain) said that, while there was general agreement that the 1969 Vienna Convention on the Law of Treaties, the 1976 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had established the law governing reservations to treaties and that there should be no departure from that law, the articles on reservations of those conventions had some lacunae. The purpose of the 12 guidelines under consideration was therefore to remedy that situation by clarifying the concepts of reservations and determining the scope of the application of the reservations regime.

17. Draft guidelines 2.2.1, 2.2.2 and 2.2.3 rested on article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions. Although the Commission had taken the view that draft guideline 2.2.2 was superfluous, since there was no reason to depart from the principle laid down in draft guideline 2.2.1, his country disagreed and considered all three draft guidelines to be necessary.

18. Draft guideline 2.3.1 laid down stringent conditions for the acceptance of late reservations. Provided that a reservation formulated late was not contrary to the 1969 and 1986 Vienna Conventions, there was no reason why such a guideline should not be accepted in order to facilitate the adherence of States to treaties. Moreover, State practice seemed to have encouraged that trend, which had also been followed by the Secretary-General of the United Nations in his capacity as depositary of the treaties in question.

19. Draft guidelines 2.3.2 and 2.3.3 were directly related to draft guideline 2.3.1 and were consistent with article 20, paragraph 5, of the 1986Vienna Convention. The two conditions for accepting a reservation that had

been formulated late meant that if the text of a treaty did not expressly prohibit that reservation, the well-established practice of the depositary would be the guiding principle.

20. It would seem that the legal opinion of the Secretary-General of the United Nations expressed on 19 June 1984 would run counter to draft guidelines 2.3.1, 2.3.2 and 2.3.3 if they were to be adopted by the General Assembly, since, according to that opinion, the contracting parties could unanimously, at any time, accept a late reservation, even if it were contrary to the specific provisions in the treaty as to when reservations might be formulated.

21. As draft guidelines 2.3.1 and 2.3.2 began with the phrase "unless the treaty provides otherwise", it appeared that if a reservation formulated late, contrary to the express provision of the treaty, were accepted unanimously by the contracting parties, the treaty concerned should be formally amended by the parties in order to harmonize its provisions with accepted practice.

22. The idea behind draft guideline 2.3.4 was to prevent States and international organizations circumventing the principle established in draft guideline 2.3.1. His country agreed with the reasoning set out in the commentary to the draft guideline, to the effect that a reservation once made should not be utilized as a basis for formulating a new reservation in the guise of an interpretation of the existing reservation. Hence that guideline specifically prohibited a contracting party from modifying the legal effect of a treaty by means other than a proper reservation, as defined in guideline 1.1.2.

23. His delegation disagreed with the view that the guideline lacked precision and exactitude; on the contrary it believed that the draft guideline complemented and balanced the previous three draft guidelines. Furthermore, it appreciated the fact that the Commission had confirmed the meaning of "late formulation of a reservation" in section 2.3 of the Guide to Practice. In the opinion of his delegation, the acceptance of reservations formulated late in accordance with draft guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.4 would not be contrary to the provisions on reservations of the Vienna Conventions.

24. It would seem necessary to add at the beginning of draft guideline 2.4.3 the phrase "unless the treaty provides otherwise and without prejudice to", in the light of paragraph (1) of the commentary to the draft guideline, which referred to certain exceptions to the rule in cases where the text of the treaty itself expressly provided that an interpretative declaration could be formulated only at a specified time or times.

25. The principle set forth in draft guideline 2.4.4 was broad enough to apply to all categories of treaties, irrespective of whether they were treaties made in the formal or simplified form. Since draft guidelines 2.4.3 and 2.4.4 were connected, they could be shortened and merged into one.

26. The rule in draft guideline 2.2.1 had been transposed to draft guideline 2.4.5, and it was therefore questionable whether such repetition was necessary. Similarly the rule outlined in draft guideline 2.3.1 had been transposed to draft guideline 2.4.6, and draft guideline 2.4.7 incorporated the same principle as that found in draft guideline 2.4.6. Nevertheless, his delegation did not share the view that draft guidelines 2.4.4, 2.4.5 and 2.4.6 relating to interpretative declarations and conditional interpretative declarations, which appeared to create a separate legal category, were unnecessary and therefore unacceptable, because the purpose of the draft guidelines was to fill the gaps in the Vienna Conventions without modifying their provisions concerning reservations, while at the same time clarifying State practice.

27. On the whole the 12 draft guidelines did not conflict with the provisions of the Vienna Conventions, and Bahrain therefore supported them.

28. **Mr. Guan** Jian (China), having welcomed the progress made on the topic of reservations to treaties, said that, as conditional interpretative declarations differed from simple interpretative declarations, they limited or modified the effects of treaty articles on a particular State party and therefore played a role in reservations to treaties. For that reason, it was a good idea for the draft Guide to Practice to draw a distinction between those two kinds of interpretative declarations, without laying down separate rules for conditional interpretative declarations, and to make them subject to the same legal regime as reservations.

29. In order to maintain the stability and predictability of treaty relations, a State should usually express its reservations to certain articles of a treaty before it agreed to be bound by that treaty. In specific circumstances, however, a State might be allowed to formulate reservations after it had accepted the binding

force of a treaty. Consequently, the Guide to Practice should regulate the late formulation of reservations with a view to clarifying the conditions for that practice and the procedure to be followed. The content of the relevant draft guidelines was acceptable from that point of view.

30. The depositary, as the keeper of the text of a treaty, could, in pursuance of article 77, paragraph 1 (d) and (e), of the Vienna Convention on the Law of Treaties, examine the form in which reservations were made in order to see if they were in conformity with the relevant rules of the Convention and could draw the attention of the State concerned to any anomalies. A depositary was not, however, the interpreter of the text of that treaty nor a judge of a State's compliance with it, and so a depositary should not be endowed with the right to review the legitimacy of reservations to a treaty or to refuse to transmit reservations which he deemed illegitimate. Instead, the depositary should inform other State parties of the reservations and leave the matter to their judgement.

31. **Mr. Leanza** (Italy), referring to Chapter V of the report, which dealt with international liability for injurious consequences arising out of acts not prohibited by international law, said that, on the whole, the text concentrated on risk management and due diligence in preventing harm. It highlighted States' obligations to consult one another about potential risks of transboundary harm, but did not give any State the right to veto the dangerous activities of another State in its own territory.

32. The approach adopted in the preamble seemed appropriate, but the absence of an explicit reference to the principle of precaution was regrettable, even if mention were made of the Rio Declaration on Environment and Development.

33. As for article 1, it was hard to see why the fact that an activity was unlawful for reasons other than its transboundary consequences should exempt a State from meeting its obligations in respect of transboundary harm. Limiting the scope of the draft articles to activities that were not prohibited did not seem to be entirely consonant with draft article 3 taken with Principle 21 of the Declaration of Stockholm of 1972 and with Principle 2 of the Rio Declaration.

34. Draft article 4, which had been partly reformulated to reflect the primacy of the principle of prevention set forth in article 3, was in conformity with Principle 24 of the Declaration of Stockholm and Principle 7 of the Rio Declaration and was therefore important.

35. The provision in article 4 that the States concerned should seek the assistance of the competent international organizations appeared to be significant. Nevertheless, the phrase "as necessary" left open a number of situations in which a State was not required to seek such assistance, for example, where it possessed sufficiently advanced technology, or where the treaty establishing the international organization concerned did not permit it to provide assistance in such cases. On the other hand, the formula used made it possible, as his delegation had hoped, to extend the scope of the provision to non-governmental organizations capable of offering appropriate cooperation with a view to preventing and minimizing the risk of transboundary harm.

36. His delegation had concerns about the fact that the rules of procedure provided for in the draft articles imposed certain obligations only after an environmental impact assessment had been undertaken. The fact that the assessment was to be undertaken by the very State in whose territory the hazardous activity was being carried out could limit the scope of the obligations set out in the draft articles, as it was reasonable to assume that the State concerned would have an interest in underestimating the potential risk of the activity in question. His delegation therefore reiterated the critical view which it had expressed the year before with regard to articles 7 and 8.

37. Among the articles that had been improved was article 11, which defined the procedure to be followed in the absence of notification by the State of origin concerning a risk of transboundary harm.

38. Another important innovation introduced by the Commission concerned the changes made to article 12, which clarified the relationship between the information to be exchanged between the States concerned and the activity actually carried out. The changes were designed to ensure that the requisite exchange of information took place not only during the period in which an activity involving risk was carried out, but also after the activity had ceased. That provision was important in situations where a manifestation of harm might occur only after an activity had been carried out, as in the case of activities involving the use of nuclear energy, which could

produce radioactive waste that was extremely harmful to the environment.

39. With regard to the form that the draft articles might take, he reaffirmed the views expressed by his delegation in the previous year, namely, that the Commission could not be regarded as having completed its task until it had dealt with the legal regime of consequences arising from transboundary harm. Nevertheless, the draft articles appeared to represent, a significant development in the field of risk management. For that reason, his delegation did not object to the Commission's recommendation that a convention should be elaborated on the basis of what might be considered the preliminary result of the work done in that area.

40. With regard to chapter VI of the report and the issue of so-called "late" reservations, while the Vienna Convention on the Law of Treaties always referred to reservations as unilateral declarations which could be formulated at the moment when the obligation arose, he believed it was entirely appropriate to raise questions about the late formulation of reservations, since practice existed in that area and the draft articles were intended to complement such practice. The attention devoted to the issue was not necessarily an encouragement of that practice, but rather an effort to clarify its relationship to the Vienna Conventions.

41. The real nature of such declarations was made clear by the definition in the draft guidelines of the procedure for the late formulation of reservations. The possibility of formulating late reservations was limited, in the absence of explicit authorization in the treaty, to cases in which there was unanimous consent on the part of all the other contracting parties, expressed as a lack of objections. The procedure envisaged the formation of a new tacit agreement among all the contracting parties to accept the "late" reservation without compromising the integrity of the principle *pacta sunt servanda*.

42. It might therefore be concluded that the procedure to be followed in respect of the late formulation of reservations, as adopted by the Commission, did not differ on essential points from the provisions of the Vienna Convention on the Law of Treaties. The late formulation of reservations was, of course, a complicating factor in treaty relations, and should be limited as far as possible. States should therefore ensure that the practice of formulating late reservations remained limited to cases in which the late formulation represented a reasonable alternative to the practice of denunciation of the treaty, followed by a new ratification accompanied by a new reservation.

43. **Mr. Choung Il Chee** (Republic of Korea), referring to chapter III of the report, drew attention to paragraph 169. In that paragraph the Special Rapporteur dealt with a criticism made of the traditional rule of continuous nationality, namely, that the rule could lead to the denial of diplomatic protection to individuals who had changed nationality involuntarily, whether as a result of succession States or for other reasons, such as marriage or adoption. The Special Rapporteur recommended that the Commission should adopt a more flexible rule, giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection. His delegation welcomed that approach and suggested that article 9, paragraph 4, should be deleted from the draft articles.

44. He drew attention in that regard to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, which required States parties to grant women equal rights with men to acquire, change or retain their nationality and to ensure that neither marriage to an alien nor change of nationality by the husband during marriage would automatically change the nationality of the wife.

45. Paragraph 28 (a) of the report appeared to relate to the 1970 rulings by the International Court of Justice in the *Barcelona Traction* case. The Court majority had ruled that where it was a question of an unsuccessful act committed against shareholders of a company representing foreign capital, the general rule of international law authorized the national State of the company alone to make claim, thus denying diplomatic protection to the shareholders of the company. Nevertheless, that ruling had been criticized by various writers as unfair to the shareholders. His delegation believed that if damages and injuries were sustained by a shareholder, the State of which the shareholder was a national should be able to exercise diplomatic protection on its behalf.

46. With regard to paragraph 28 (b), the issue of foreign shareholders bringing a claim against their own company appeared to fall within the purview of the internal law of States, except where there was a denial of justice or discrimination against aliens.

47. With regard to chapter IV of the report, it was proposed that the previous references to serious breach of an obligation owed to the international community as a whole should be replaced with the category of peremptory norms; his delegation endorsed that view and the rationale provided.

48. With regard to countermeasures, it would have been helpful to provide a definition of countermeasures in article 49. Such terms as "non-use of force" and "legitimate act under international law" could have added clarity and certainty to the concept of countermeasures. The regime of countermeasures which had been known in the past as retaliation had now surfaced as a legitimate regime under international law since the Court's judgement in the *Gabčíkovo-Nagymaros* case and, as such, was a relatively new regime. Practitioners and scholars in the field of international law could benefit from a clear and settled doctrine.

49. With regard to the conditions relating to resort to countermeasures set forth in article 52, he said that paragraph 1 (a) of that article imposed an unfair burden on the injured State by requiring it to call on the responsible State to fulfil its obligations before taking countermeasures. Paragraph 1 (b) imposed further burdens on the injured State by requiring it to notify the responsible State of any decision to take countermeasures and to offer to negotiate with that State.

50. With regard to the form of the draft articles, his delegation was in favour of a binding convention, as it believed that 50 years of work by the Commission should not be taken lightly. Nevertheless, in order to accommodate the divergent views expressed, his delegation was inclined to support the Commission's recommendation that the draft articles should be annexed to a resolution of the General Assembly, and that an international conference of plenipotentiaries should be convened at a later stage.

51. With regard to chapter VIII of the report, the draft article included a classification of unilateral acts, namely, promises, waivers, recognitions, protests, and so on. Nevertheless, it omitted unilateral declarations and the conduct of States, an omission which might not be warranted. He could cite two unilateral declarations which had evolved into norm-creating precedents, namely, the two Truman Proclamations of 1945 on conservation and on the continental shelf.

52. With regard to the conduct of States which might produce legal effects, his delegation was familiar with two relevant decisions by the International Court of Justice, namely, the *King of Spain* case of 1960 and the *Temple of Preah Vihear* case of 1962. In those two cases the Court had established a rule that States were bound by the consequences of their conduct. For that reason, his delegation believed that the conduct of States deserved independent scrutiny apart from unilateral acts.

53. With regard to the Special Rapporteur's statement that the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties could constitute a valid reference in the elaboration of rules for the interpretation of unilateral acts, his delegation noted that while the Vienna Conventions were based on a treaty which was consensual in character, unilateral acts were purely unilateral; that difference should be kept in mind.

The meeting rose at 4.35 p.m.