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Chairman: Mr. Gómez Robledo . . . . . (Mexico)

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06-59384 (E)

The meeting was called to order at 4.40 p.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Ms. During** (France) said that she would not comment on the draft guidelines on reservations to treaties adopted by the International Law Commission at its fifty-eighth session, except to point out that, in her delegation's view, draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) did not reflect the law or the practice relating to the role of the depositary. The draft guideline gave the depositary the power to assess the validity of reservations and, where appropriate, inform interested parties of a reservation that, in its view, raised legal problems. The depositary should not, however, have such a power in the absence of a provision expressly authorizing it. Its duties should be limited to registering and communicating reservations, even if it considered them "manifestly invalid".

2. The draft guidelines relating to the competence of the treaty monitoring bodies, currently being considered by the Drafting Committee of the Commission, raised questions not unrelated to the point she had made about draft guideline 2.1.8. Although it was not uncommon for such bodies to be given competence to assess the validity of reservations, draft guideline 3.2.1 (Competence of the monitoring bodies established by the Treaty) seemed to confer competence to assess the validity of reservations as a direct result of the competence to monitor the treaty. Although, as the Special Rapporteur was at pains to emphasize, the text did not aim to give such bodies competence for which no provision had been made, it would be preferable to find a formulation that avoided such an automatic link and rather emphasized the need to insert in treaties clauses specifying the competence of monitoring bodies to assess the validity of reservations, as set out in draft guideline 3.2.2.

3. Draft guidelines 3.2.3 (Cooperation of States and international organizations with monitoring bodies) and 3.2.4 (Plurality of bodies competent to assess the validity of reservations) were unexceptionable, although their usefulness was questionable. That was the case, in particular, with draft guideline 3.2.4, which seemed not to consider the possibility that monitoring bodies might disagree on the validity of reservations.

4. Her comments naturally applied also to the competence of the human rights treaty bodies. In that connection, the Commission had requested the views of Governments on adjustments they considered necessary to introduce in the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties", adopted by the Commission at its forty-ninth session. In her delegation's view, conclusions 1 to 3 and 10 were entirely acceptable. Conclusions 5 to 9, however, should be reviewed in the light of the comments made at the fifty-eighth session on draft guidelines 3.2 et seq. and the outcome of the Commission's meeting with United Nations experts in the field of human rights.

5. The question of non-validity of reservations, which the Commission had started to discuss during its fifty-eighth session, was a difficult one, which the Vienna Conventions on the Law of Treaties had not resolved. For that very reason, the Commission should try to clarify the questions of the consequences of non-validity and the effect of an objection to a reservation. If it failed to do so, the Guide to Practice would not fully meet the expectations that it had legitimately aroused. Above all, the Committee should, when it came to discuss draft guidelines 3.3.2 to 3.3.4, clarify the concept of nullity and show the distinction between the separate effects of unilateral and collective acceptance of a reservation.

6. The new definition of the object and purpose of a treaty, contained in draft guideline 3.1.5, represented a marked improvement on the original wording, whichever of the alternatives was chosen, by stressing the rights and obligations indispensable to the "general architecture" of the treaty, thus making it possible to observe both the spirit and the letter — or the "balance" — of the treaty.

7. The principle contained in draft guideline 3.3 (Consequences of the non-validity of a reservation) was entirely acceptable, although its title did not really reflect the content of the guideline, which related rather to the causes of non-validity. Draft guideline 3.3.1 (Non-validity of reservations and responsibility), on the other hand, usefully showed that the consequences of the non-validity of a reservation arose from the law of treaties, not the law of international responsibility.

8. **Ms. Wilcox** (United States of America) said, in relation to reservations to treaties, that the Commission should proceed cautiously in considering what types of reservation might be invalid because they were incompatible with the object and purpose of a treaty. It should recognize that many States had felt able to become parties to treaties owing to the possibility of making appropriate reservations in the light of their national laws or legal systems. The Commission should also give careful consideration to statements drawing attention to the fact that monitoring bodies should not be assessing the validity of reservations unless the treaty expressly gave them that authority, which was very unusual.

9. With regard to unilateral acts of States, a particularly challenging topic, she said that the Guiding Principles adopted by the Commission were a fitting conclusion to the Commission's work on the topic. Her delegation welcomed the Commission's decision to focus on formal declarations formulated by a State with the intent to produce obligations under international law. States should be able to make public statements without fearing that they might inadvertently be creating obligations that were binding under international law; they should be bound by unilateral public declarations only when they intended to be. The efficacy of the Commission's principles lay in the extent to which they would serve that objective. The provision in Guiding Principle 7 that, in case of doubt, obligations must be interpreted in a restrictive manner, was essential in any determination as to the legal effect of a unilateral declaration. The Commission's conclusions regarding the interplay between unilateral declarations and peremptory norms of international law should not give rise to any controversy. There could be no question of unilateral declarations by a State trumping peremptory norms of international law.

10. Her delegation was concerned by the content of Guiding Principle 10, which concerned the revocation of unilateral declarations. There was an understandable desire to limit arbitrary revocations of unilateral declarations in cases where a State had clearly manifested its intent to be bound and there had been detrimental reliance on that declaration by the addressee. It was not obvious, however, that conditions should be imposed upon the revocability of such declarations, in accordance with the principle embodied in article 62 of the Vienna Convention on the Law of Treaties (Fundamental change of circumstances). A fundamental change of circumstances might justify the revocation of a declaration even if there had been a clear manifestation of intent to be bound and notwithstanding the other considerations set out in article 62 of the Convention. Since unilateral declarations were not the same as agreements negotiated among States, rules relating to the revocation of such agreements should not necessarily apply automatically to unilateral declarations.

11. **Mr. Makarewicz** (Poland) noted that between its fiftieth and its fifty-seventh sessions the Commission had provisionally adopted 71 draft guidelines on reservations to treaties, with some 20 more in the pipeline. The numbers were impressive, but he feared that the proliferation of detailed guidelines held out little hope for a successful conclusion to the topic in the near future.

12. Draft guideline 3.1 (Permissible reservations) might well be superfluous, in view of the rules contained in the Vienna Convention on the Law of Treaties. The only reason to retain it would seem to be the desire to make the draft guidelines a complete statement of the rules on reservations to treaties. Draft guideline 1.6 (Scope of definitions), meanwhile, needed clarification. There was no explanation of what the "rules applicable to them" were or where they could be found.

13. Draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) gave rise to concern, for it inappropriately extended the functions of the depositary. According to a well-established customary rule, codified clearly in the 1969 and 1986 Vienna Conventions, the depositary was a neutral administrator of a treaty, with an obligation to act impartially. There was no requirement for it to pass judgment on the legality of the instruments deposited with it, except with regard to technical matters of a purely formal nature. The draft guideline would be detrimental to that rule and create more problems than it sought to solve.

14. With regard to the recommended meeting between the Commission and United Nations experts in the field of human rights, his delegation would be offering the Commission its view on possible adjustments to the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human

Rights Treaties", adopted by the Commission at its forty-ninth session.

15. Turning to the topic of unilateral acts of States, he said that the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations were, despite the many years of work devoted to the topic, descriptive rather than prescriptive. Moreover, their scope was restrictive: not only were they limited to unilateral declarations of State capable of creating legal obligations but were a departure from the Commission's previous approach, which had generally been based on analogies with the law of treaties. Regrettably, their adoption of the second reading seemed to have definitively concluded the Commission's work on the topic. Nor had any serious consideration been given to the ninth report (A/CN.4/569 and Add.1) of the Special Rapporteur, who had clearly been unable to convince the Commission to persist with its original approach. The end result was not entirely satisfactory, but it might be the only possible one, given the serious differences of opinion on the topic within the Commission and among States. Perhaps the time was not yet ripe for more developed codification. Meanwhile, State practice might develop faster thanks to the existence of the Guiding Principles, which would, at least, enable States to judge with reasonable certainty whether and to what extent their unilateral conduct was legally binding at the international level and would thus strengthen the principle of good faith in international relations.

16. **Ms. Kaplan** (Israel), addressing the topic of reservations to treaties, said that her delegation still had some doubts concerning both alternative versions of draft guideline 3.1.5 (Definition of the object and purpose of the treaty) or (Incompatibility of a reservation with the object and purpose of the treaty). Such elements as "essential rules", "raison d'être", "general architecture" or "balance of the treaty", which were common to both alternatives, did not add any substantial clarification and might even complicate the definition of the object and purpose of the treaty.

17. With regard to draft guideline 3.2 (Competence to assess the validity of reservations), her delegation proposed a number of amendments, as a result of which the provision would read:

"The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

- The other contradicting States (including, if applicable, their domestic courts) or other contracting organizations;
- Dispute settlement bodies that are authorized by the contracting States as competent to interpret or apply the treaty and reservations to it; and
- Treaty implementation monitoring bodies established by the treaty and authorized by it as competent to interpret or apply the treaty and reservations to it."

The purpose of the proposed changes was to avoid implied authorization for any monitoring body to pass judgement on the validity of reservations. In addition, she wondered what relevance the ruling of a domestic court had to the validity of a reservation under international law. In Israel, domestic court rulings affected only internal law.

18. With regard to draft guideline 3.2.1 (Competence of the monitoring bodies established by the Treaty) the first paragraph should similarly be reworded to read: "Where a treaty establishes a body to monitor application of the treaty, and authorizes it to make decisions on reservations to treaties, that body shall be given competence by the contracting States to assess the validity of reservations ...".

19. In accordance with its view that the role of the monitoring bodies should be given explicit expression, her delegation favoured the deletion of the square brackets in draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies). Her delegation accepted draft guideline 3.2.4 (Plurality of bodies competent to assess the validity of reservations), but drew attention to the fact that the different mechanisms for assessing the validity of reservations might not be mutually compatible.

20. Consideration should be given to deleting draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), which was somewhat ambiguous, as well as seeming to contradict draft guideline 3.2.4. As for draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), the depositary's role was, in her delegation's view, a purely technical one. The draft guideline should therefore be very cautious in extending that role. Secondly, the meaning

of the term "collective acceptance" was unclear. In some cases, there might be a need for unanimous acceptance rather than merely collective acceptance. The decision on whether a specific case had achieved collective acceptance or not might have far-reaching consequences and was therefore, beyond the authority of the depositary. Such a procedure might also create vagueness and undesirable differences between the text of the treaty and its actual meaning.

21. With regard to the topic of unilateral acts of States, the Commission should insist on a rigid approach to Guiding Principle 4: under Israeli law, for example, ministers or high-ranking officials required express authorization in order to engage the State through unilateral acts or declarations.

22. In view of the possibility of misunderstandings regarding declarations by States, and their sensitive nature in the context of inter-State relations, she urged the Commission to pay special attention to Guiding Principle 7, which called for a restrictive interpretation of such declarations. In case of any doubt concerning a State's intention, it was preferable to interpret a declaration as non-binding under international law. Her Government would attribute legal significance to its own or other States' unilateral acts only if there existed a clear and unequivocal intention to effect binding legal consequences.

23. **Mr. Pellet** (Special Rapporteur) welcomed the opportunity to respond to the Committee's comments on the draft guidelines on reservations to treaties. In his view, the dialogue between the special rapporteurs of the International Law Commission and the members of the Sixth Committee was very important in reinforcing the relationship between the two bodies. Nevertheless, there were two significant limitations to that dialogue. First, Governments' comments generally arrived, after the Commission had taken a position on the proposals submitted by its special rapporteurs. Once the Commission had adopted a set of draft articles or guidelines on first reading, it generally did not re-examine them until the second reading several years later, and it was only then that the comments of States, whether made in the Sixth Committee or submitted in writing following the adoption on first reading, would be taken fully into account.

24. That was not to say that the discussion in the Sixth Committee was not useful. On the contrary, it enabled the special rapporteur to discern trends and get a sense of the majority opinion — when there was one — on the draft articles or guidelines under discussion. If the members of the Sixth Committee expressed strong reservations about something, most special rapporteurs would modify their proposals accordingly. Moreover, the discussion in the Sixth Committee could be very useful in charting the course for the Commission's future work. Indeed, one of the most helpful forms of input that Governments could provide was suggestion of topics for study by the Commission. As he had said on previous occasions, however, the Committee's deafening silence in that regard was cause for concern. Governments could also influence the Commission's work on a particular topic by responding to the issues raised each year in chapter III of the Commission's report.

25. The second limitation to the dialogue between the special rapporteurs and the Committee was of a different nature: once the Commission had adopted a set of draft articles or guidelines, they no longer "belonged" to the special rapporteur, and it could happen that the draft ultimately submitted to the Sixth Committee for discussion did not reflect his or her personal convictions.

26. Turning to the topic of reservations to treaties, he had taken note of the generally negative reaction to draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), in particular the role assigned to the depositary, which most speakers had seemed to regard as excessively important. He assumed that that view also applied to draft guideline 3.3.4, although not many speakers had said so explicitly. While the Commission should certainly bear those reservations in mind at the second reading of the draft guidelines, he was a little surprised at the sudden outcry over draft guideline 2.1.8, which had been adopted by the Commission and discussed by the Sixth Committee three or four years earlier. It had been included, together with its slightly modified commentary, in the Commission's report for 2006 only because the Commission had decided to replace the words "permissibility" and "non-permissibility" with "validity" and "invalidity" or "non-validity". He sincerely did not understand why there would be reluctance to use the concept of validity in respect of reservations. It was essential to draw a distinction between valid and invalid reservations. Whether or not a reservation was valid mattered a great deal, and, in his opinion, an objection to an invalid reservation

should not be subject to the same rules as an objection to a valid reservation.

27. He was similarly puzzled at the opposition of some States to his attempt, in draft guideline 3.1.5, to clarify the ambiguous concept of the object and purpose of the treaty. When the Commission, with the support of the Sixth Committee, had decided to re-open the question of reservations to treaties, despite the existence of the Vienna Conventions, it had been at least in part because of the lack of clarity — in doctrine, jurisprudence and State practice — with regard to that fundamental concept. In his view, it might be possible to achieve greater clarity by combining draft guidelines 3.1.5 and 3.1.6, which he considered inseparable.

28. His proposals regarding the role of treaty bodies seemed generally to have been well received, the only criticism of the draft guidelines being that they were not detailed enough. The Committee's comments in that regard would doubtless lead the Commission, during its next session, to revisit its 1997 preliminary conclusions, which were closely related to the complex issue of the role of treaty bodies. He continued to believe that it would be extremely useful to organize a meeting with United Nations experts in the field of human rights, including representatives from human rights treaty bodies, and appealed to the Committee and to the General Assembly to express explicit support for such a meeting in the resolution to be adopted on the report of the International Law Commission on the work of its fifty-eighth session.

29. Some delegations had remarked on the slowness with which the work on the topic was proceeding. That might be true, but the subject was an extremely complex one, from both a theoretical and a practical standpoint. It was preferable, in his view, to proceed slowly and carefully in order to produce a Guide to Practice that would truly be useful to States in dealing with problems relating to reservations to treaties.

30. He thanked the Committee for its comments on the topic. Although he might disagree with some of the views put forward, he could assure members that the Commission and its Drafting Committee attached great importance to the input received from the Sixth Committee and would consider all comments with an open mind.

31. Speaking as the Chairman of the Working Group on Unilateral Acts of States, he said that several delegations had noted that the Commission had limited its study of the topic to unilateral declarations of States. That was because the Commission had deemed that it would be impossible to draw any specific conclusions on any aspect of the topic other than unilateral declarations made by States with the intention of creating legal obligations. If Governments wished the Commission to broaden the scope of its work to include other aspects, they should express that view. However, the Working Group on the Long-term Programme of Work, after weighing the pros and cons, had not recommended the inclusion of unilateral acts of States on the Commission's long-term programme of work, and in the absence of specific instructions from the Sixth Committee, it was unlikely that the Commission would pursue the topic any further. Hence, Governments would need to decide whether the adoption of the Guiding Principles and their accompanying commentary marked the conclusion of the Commission's work or whether additional work on the topic should be undertaken.

The meeting rose at 5.55 p.m.