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***AD HOC* COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)**

GROUP OF SPECIALISTS ON RESERVATIONS TO INTERNATIONAL TREATIES (DI-S-RIT)

2nd meeting
Paris, 14-16 September 1998

MEETING REPORT

Secretariat memorandum
Prepared by the Directorate of Legal Affairs

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1. Opening of the meeting by the Chairman

1. The second meeting of the Group of Specialists on Reservations to International Treaties (DI-S-RIT) was held in Paris, 14-16 September 1998. The meeting was opened by Ambassador Franz CEDE (Austria), appointed Chairman of the DI-S-RIT by the CAHDI. Ambassador CEDE welcomed participants and called upon them to pursue the important work entrusted to the Group. The list of participants appears in Appendix 1 to the report.

2. The Chairman further welcomed the participation of Mr Alain PELLET, Special Rapporteur of the United Nations (UN) on reservations to international treaties and member of the International Law Commission (ILC), Mr Pierre-Henri IMBERT, Director of Human Rights of the Council of Europe and Mr Jean-Paul JACQUE, Director of the Legal Service of the Secretariat General of the Council of the European Union (EU).

2. Adoption of the agenda

3. The Group approved the agenda as it appears in Appendix 2 to the report. The Chairman proposed that under "Other business" the Group would consider developments concerning the partial withdrawal by the Government of Malaysia of its reservation to the Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979). In this connection, he referred to Professor Horn's article "Making reservations to the European Convention on Human Rights"[1], stressing that this article deals precisely with this kind of situation, i.e.: reservations to multilateral treaties even though at no point the terms "inadmissible" or "unacceptable" are mentioned in his paper. This could be explained because at the time the inadmissibility of reservations was not an issue. This is rather a new issue that appears particularly in connection with human rights treaties.

3. Activity of the International Law Commission on reservations to normative multilateral treaties including human rights treaties: exchange of views with Professor PELLET, Special Rapporteur of the United Nations

4. The Chairman welcomed Mr Pellet who had already participated in the first meeting of the Group.

5. Mr Pellet began his intervention stressing that the ILC depends on the interest of States in its work and therefore called upon the members of the Group to ensure that their delegations reply to the questionnaires circulated by the ILC. He referred in particular to the questionnaire on Succession in respect of Nationality and transmitted a call from Special Rapporteur MIKULKA for States" replies to his questionnaire.

6. As regards his work on reservations to international treaties, Mr Pellet observed that his work was also based on the replies from States to a questionnaire he had prepared and that at this stage he had not undertaken the definition of reservations and yet his third report is very significant in size[2].

7. The aim of his work is to identify a number of guidelines with a view to giving a more precise definition of reservations and interpretative declarations. He has encountered several problems concerning:

- Methods : there are three Vienna Conventions which are compatible and complementary. This has led him to propose a compound text which takes into

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[1] Included in "The European Convention on Human Rights and Reservations", Directorate of Human Rights, Council of Europe, May 1997 (Document H (96) 18), submitted during the 1st meeting of the DI-S-RIT, Paris, 26-27 February 1998. This and all other documents mentioned hereafter may be obtained from the Secretariat upon request.

[2] UN document A/CN.4/491. For the purposes of the DI-S-RIT work, this document is included in document DI-S-RIT (98) Inf. 2 "Documents of the International Law Commission concerning reservations to treaties".

account the three conventions.

- Deadlines: he has deliberately excluded this aspect for the time being.
- Different definitions which result in different legal regimes: he is confronted with a major difficulty which he is not certain to have solved. The question is whether a void reservation is or is not a reservation. In the ILC some members consider that it is a reservation while others do not. The ILC concluded that illicit and void reservations should not be confused. The ILC considers that definitions are necessary in order to subsequently determine the applicable regime. Thus, reservations of a general character are certainly reservations although they might be illicit and will always be so.

8. Mr Pellet observed that political considerations are ever-present in discussions at the ILC. Thus, he noted that the Arab members of the ILC firmly opposed the inclusion of any reference to "general reservations", the reason behind being the so-called "Sharia"-reservations which are obviously of a general character even though he does not take position on whether they are or not illicit, and the "non-recognition"-reservations about which he has no definite position. In his view, the important thing is whether we are confronted with a reservation or not. This highlights the significant importance of the political considerations.

9. Mr Pellet considers that the outcome of his work is somehow disappointing in so far as the definition of reservation is not as problematic as that of interpretative declarations.

10. His work is aimed at producing a practical guide, in the form of paragraphs explained by commentaries. It is expected that the model-clauses will be ready next year. However, the draft may be modified in the second reading, particularly in the light of discussion on interpretative declarations.

11. The Group welcomed the work presented by Mr Pellet which will provide States with useful guidance.

12. As regards the problem of definition and corresponding legal regimes, the Chairman noted that this issue goes back to the battle between the opposability and admissibility doctrine and in his view it would now seem that the ILC subscribes to the first doctrine.

13. Mr Pellet replied that the position of the ILC is a neutral one. The definition of reservation retained is that of the Vienna Convention (VC) and it has not been possible to prove that this definition supports one or other doctrine. On the contrary, this definition is neutral and in his view this neutrality should not fit one or other doctrine.

14. Mr Pellet further commented on the discussion about the "Strasbourg approach". He observed that in the replies to the questionnaire no delegation defended the extreme Human Rights approach. On the contrary, half of the delegations supported the ILC position that Human Rights monitoring bodies have the possibility to consider the admissibility of reservations, while the remaining delegations were opposed to it. Mr Pellet will support this position.

15. In reply to the question by the delegate of Romania about the use of dealing with reservations in bilateral treaties, Mr Pellet referred to addendum 5 to his report[3] which deals specifically with bilateral treaties, and to paragraphs 422 and following and notes 557 and following, stressing that many members of the ILC referred to this issue. He recognised that this issue is not particularly complicated and for that reason wanted to deal with it in the first instance so as to not have to deal with it again later on.

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[3] UN document A/CN.4/491/Add.5. For the purposes of the DI-S-RIT work, this document is included in document DI-S-RIT (98) Inf. 2 "Documents of the International Law Commission concerning reservations to treaties".

16. The delegate of Slovakia referred to reservations which are incompatible with the object and purpose of the treaty and questioned whether they are null and void *ex lege* or they would produce legal effects only once a 12-month deadline had expired. In this connection, he noted Mr Imbert's stand according to which once the 12 month period has lapsed it is not possible to question that the reserving State is a Party even though it is possible to react to its reservation.

17. Mr Imbert noted that public international law reflects practice and that in practice there are many examples where States object to reservations after the twelve month period provided for in the VC. In his view the twelve-month period should not constitute an obstacle to the forty member states of the Council of Europe to co-ordinate.

18. Mr Pellet stated that he wishes to deal with this and other problems including form, procedure, deadlines, etc, in 1999.

19. A number of items were the subject of significant discussion by the Group and follow hereafter:

Reservations having territorial scope

20. The delegate of the United Kingdom referred to draft guidelines So 1.1.3[4] on territorial application and stressed that it is not based on current practice. He stressed that declarations on territorial application do not restrict the legal scope of a treaty but rather specify the territorial scope of their application. He therefore concluded that State practice on this issue is clear and consistent: statements on territorial application are not reservations, and observed that the only British precedent dates from 1912. Otherwise this would lead to unacceptable situations, e.g. the United Kingdom could not be a party to the UN Convention on the Law of the Sea because it made a declaration on territorial application.

21. Similarly, the delegate of the Netherlands expressed some doubts on whether such declarations really constitute a reservation. However, she observed that for very decentralised States and those with federal structure such declarations would be a reservation. She therefore suggested that a distinction be introduced in this draft guideline between elements of constitutional structure and the political will of a government to exclude the application of a treaty in the entirety of its territory.

22. Mr Pellet deeply disagreed with the delegate of the United Kingdom and referred to Article 29 VC on Territorial scope of treaties which states that "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory" and concluded that this was not the case in the UN Convention on the Law of the Sea. In the light of the VC, there is no reason to consider that these declarations are not reservations because they aim at preventing the whole application of the treaty. This being said, such reservations are not necessarily forbidden.

Conditional interpretative declarations and General declarations of policy

23. The delegate of the Netherlands questioned the usefulness and opportunity of draft guidelines 1.2.4 and 1.2.5 in Addendum 6[5] to Mr Pellet's Third report on reservations to treaties. In her view, the system on reservations was complicated enough without the need to introduce a new intermediate category of conditional interpretative declarations to which

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[4] Number 1.1.3 as it appears in UN document A/CN.4/L.564 "Draft report of the International Law Commission on the work of its 50th session", originally number 1.1.8 in the Third report of the Special rapporteur UN document A/CN.4/491 and addenda 1-6) included in document DI-S-RIT (98) Inf. 2 "Documents of the International Law Commission concerning reservations to treaties".

[5] UN document A/CN.4/491/Add 6 included in document DI-S-RIT (98) Inf. 2 "Documents of the International Law Commission concerning reservations to treaties".

States should have the possibility to react, implying a moment in time for such reaction to establish whether the interpretative declaration would amount to a reservation or not.

24. Mr. Pellet explained that draft guideline 1.2.5 is his own proposal which has not been endorsed by the ILC, while draft guideline 1.2.4 introduces a distinction between conditional and simple interpretative declarations which is crucial and should be assumed from the outset of the report. Conditional interpretative declarations are very close to reservations even if they are not reservations *stricto sensu*. States should therefore have the possibility to object to them. Such would not be the case with simple interpretative declarations. The legal consequences of the distinction are therefore significant. He stressed that this draft guideline is not a creation of the doctrine but a reality based on practice. He will therefore maintain this draft guideline and develop its study as regards the corresponding legal regime which he did not cover due to the fact that the VC does not deal with it and due to existing case-law such as that of the European Court of Human rights (ECHR) which recognises them not as a reservation but as a conditional interpretative declaration as such[6].

Reservations formulated when notifying territorial application

25. The delegate of Greece expressed serious reservations on draft guideline 1.1.4.

26. Mr. Pellet explained that, as it stands, the text adopted by the ILC differs considerably from his original draft aimed at transversal declarations, e.g. the treaty does not apply to the military.

27. The Chairman thanked Mr Pellet for his presence and willingness to comment on his work.

4. Exchange of views with Mr IMBERT, Director of Human Rights of the Council of Europe[7]

28. Mr Imbert thanked the Chairman for inviting him to take part in the interesting meeting.

29. He observed that, for a number of years, human rights treaties have been the subject of serious reservations. These treaties do not contain reservation clauses and therefore reference is made to the VC or, if they contain reservation clauses, they do not function properly. Referring to the VC is not a satisfactory solution because it implies a value judgement which has to be necessarily *erga omnes* and not on an individual basis.

30. In his views, the activity of the CAHDI in the field of reservations to international treaties should take into account the replies to three questions:

- What are the real features of the situations?
- What is the role of the VC?
- What is the role of the Strasbourg approach?

The real features of the situation

31. When the VC was prepared the current network of treaties did not exist. Preliminary conclusion # 4 of the ILC and the documents of the Sixth Committee of the General Assembly of the UN refer to a new problem: the introduction of monitoring bodies that had not existed until then.

32. Before the VC several very important treaties on human rights existed and after the VC other conventions were adopted in this field, e.g.: discrimination against women, rights of

[6] ECHR, *Belilos vs. Switzerland*, 29.04.1988, Series A, no. 132.

[7] Mr Imbert's presentation can be obtained from the Secretariat upon request (document DI-S-RIT (98) 9/CAHDI (98) 23).

the child, against torture, etc. The negotiators did not wish or were unable to see the problem for various reasons:

- human rights treaties have been considered "exotic" and the claim that they had special features was seen as pretentious,
- fear of having to draw all the conclusions resulting from the recognition of special features to such treaties,
- the will to ensure the widest possible participation of States.

33. Yet, all specific features of these treaties were erased or diluted. All the questions raised by the DI-S-RIT were also raised then and excluded. The only issue which remained concerned monitoring bodies and the question was not properly raised. No one foresaw a procedure where interpretation by monitoring bodies would put into question the participation of a State party. Moreover, States did not foresee the internal dynamism of human rights treaties and their internal scope. These treaties were considered in no way different from other treaties from a static point of view, particularly as regard the appeals. However, individual appeals quickly became very important.

34. In addition, developments concerning "jurisdiction" and "number of reservations" added in favour of stating the competence of monitoring bodies for considering reservations. Thus, the truly specific feature of Human rights was established, i.e.: they affect various aspects of society.

35. Another specific feature in human rights treaties is that objections to reservations to these treaties cannot have the same legal effects as those concerning reservations to other treaties. In the field of human rights, there is a general trend towards excluding reserving States because reservations generally hamper protection of individuals and because, other than the political considerations, States have no direct interest in these treaties.

The position of the Vienna Convention in this context

36. The VC is not suitable for it has several lacunae particularly as regards legal consequences of inadmissible reservations. However, it is commonly agreed that the Vienna regime has a subsidiary character. Moreover, the VC is of a general and universal nature and therefore cannot provide sufficient precision in this field.

37. The VC has made a choice: after abandoning the rule of unanimity, the fact that at universal level there is not body for deciding on the validity of reservations means the only system that could be envisaged was that of individual reactions.

38. Filling in the gaps of the VC means including appropriate reservation clauses in treaties. However, experience shows that the adoption of such clauses is sometimes very difficult and it appears therefore easier to refer to the VC which moreover has become common law. In this context, the work of the DI-S-RIT proves the interest States have in solving these issues.

The Strasbourg approach

39. This approach is interesting and innovative, particularly as Member States are rather conservative in the field of reservations to international treaties. Contrary to this approach, the Council of Europe and the Depositary's position were rather conservative.

40. The main features of this approach are:

- Self-declaration of jurisdiction to decide on the admissibility of reservations,
- A number of reservations have been considered inadmissible and, as a result,
- They have been considered null and void.

41. A body has therefore made decisions of a general (*erga omnes*) character. However it is not possible to transpose the system at universal level. Moreover, it is dangerous to identify this approach with the ECHR and its case-law because there are certain systems where similar organs (courts) do not exist.

42. In the European Convention on Human Rights there is a clause on reservations. This clause has allowed the ECHR to follow a formalistic approach which has spared it from having to consider the compatibility of a reservation with the object and purpose of the treaty.

43. The element of severability can be extrapolated from the approach. However, this encounters some problems:

- The severability of reservations is not acquired because it implies imposing upon States rules that they did not want to accept, thus in the context of the ECHR reservations have been decided inadmissible on formal grounds, e.g. absence of short *exposé* of national legislation, and not on grounds of substance.
- The ECHR and the Member States have a very particular position in the system.
- Other elements:
    - The criticisms of the Human Rights Committee (HRC) commentary 24[8] come from two countries which are Council of Europe Member States. These countries exclude severability in the context of the UN, yet admit it in the context of the Council of Europe.
    - Moreover, when the HRC followed the Strasbourg approach it was criticised by two countries, also Member States of the Council of Europe, who do not refer to the ECHR case-law.
- The weight of objections. The ECHR undervalued contracting parties" reactions since, whatever these reactions are, it considers itself competent and ignores the reactions. Nevertheless, the parties always have the possibility of reacting individually, even when the ECHR has taken position, i.e. the ECHR jurisdiction does not exclude State reaction. Yet States do not react, perhaps because that suits them.

44. The ensuing question is what can be done to improve the situation within the Council of Europe and outside the Organisation.

45. In the framework of the Council of Europe, he stressed that the Council of Europe message will not be echoed outside the Organisation if it is not applied internally as regards, for instance, withdrawal of reservations. The Committee of Ministers has authorised steering committees to examine the reservations to treaties in their field of competence. However, it refused to go further. This position could be reconsidered. It would be useful, for instance, to publish the findings of the steering committees" consideration of reservations and state the reasons justifying maintaining a reservation.

46. Outside the framework of the Council of Europe, it would be useful for member States to co-ordinate objections to reservations and adopt common positions. This will be easier if this is not considered a didactic exercise from the West to the rest of the world and if it is supported by conventional committees even though States do not wish such committees to consider reservations in depth.

47. Member States could inspire the international community with the ECHR case-law,

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[8] Human Rights Committee, General Comment 24(52), General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Document CCPR/C/21/Rev.1/Add.6 (1994).

including: introduction of general notions of law, content of reservations and the idea of dialogue regardless of the legal position taken by states because the debate about reservations, by their very nature, includes irrational elements, e.g.: religion (Sharia law).

48. Moreover, it could be envisaged that the Council of Europe would take position on the basic elements of the Strasbourg approach and its implications for reservations to international treaties. The resolution adopted by the OEA General Assembly in 1973 provides a precedent.

49. The delegate of Croatia observed that some States" constitutions provide for the supremacy of international treaties over national law. For these countries, invoking internal laws as a difficulty justifying a reservation to a convention might be an ungrounded legal position.

50. Mr Imbert declared himself puzzled by the relations between international and national law and observed in this respect an absolute confusion between States with monist and dualist systems of international law.

51. The delegate of Spain observed that there is excessive fragmentation of international law, particularly in the field of human rights, and noted that this might have consequences for the overall efficiency of international law.

52. The delegate of Finland stressed that there is a contradiction resulting from the doctrine of severability. Monitoring bodies have the right to draw the line where their competence ends by virtue of the doctrine of implicit powers and States accepted this self-attribution of competence. Therefore, such a situation cannot be described as fragmentation but rather endorsement by competent services of member States. Thus, Finnish practice shows no contradiction between Council of Europe practice and global attitude.

53. In this respect, the delegate of Sweden noted that States tend to accept decisions of the control organs because the legal advice is of a very high quality and they know that the decision is the result of very deep thinking. However, the same is not true for all monitoring bodies.

54. Mr Imbert suggested that there should be more dialogue between the ECHR and the intergovernmental sector. This would result, moreover, in greater visibility for the Strasbourg approach. He noted that there is already an institutional link between the ECHR and the Committee of Ministers in so far as the latter is responsible for ensuring execution of the ECHR decisions.

55. The delegate of the United Kingdom welcomed the suggestion as an interesting concept but questioned whether it could affect the independence of the Court. Moreover, he acknowledged, like prior speakers, that there are significant differences between the ECHR and the HRC. Essentially, they have a different nature. The first is practical but not the second. Moreover the quality of membership is variable just like the quality of its analysis and there are a number of weaknesses in the second which, moreover, does not have a procedure to consider cases consistently. For these reasons, in his view, the "classical" international law position must prevail in the context of the HRC. This explains the position of his delegation in respect of Commentary 24. He also agreed that there is a certain "sectorialisation" of international law and suggested that those dealing with human rights should not lose touch with classical international law and its underlying principles, namely: that States are masters of the treaties. Finally, he agreed that the reservations regime should be reviewed in general because original situations might have changed and some developments had not been envisaged, e.g. formulation of general reservations, role of monitoring bodies, etc.

56. Mr Imbert disagreed in that last respect, particularly regarding general reservations.

The VC envisaged them, yet, they were not significant in number and therefore did not represent a real problem. The VC regime was suitable for States because it did not restrict their freedom in any way and at the same time it spared them undesirable debates about general reservations. However, it had negative consequences.

57. The delegate of Slovakia stressed that other human rights monitoring bodies should also be entitled to consider reservations and invite Parties to reconsider them, otherwise they would not be in a position to exert their role.

58. The delegate of France referred to Mr Simma's article, which refers to an "overreaction" on the part of two Member States of the Council of Europe to the HRC commentary 24. He stressed that there was no such overreaction and France considers that the ECHR and the HRC do not have the same role. France was surprised by ECHR decisions such as *Belilos*[9] and *Lozidou*[10], yet it did not intervene because it did not have a direct interest. However, it provided observations on Commentary 24 because it cannot agree to grant the HRC the same powers as the ECHR has because the first is not a judicial body.

59. Mr Imbert observed that it might have been considered that France and the United Kingdom had overreacted because their observations were of a general character. As a result the overall system of international law was at stake if the severability doctrine was to be considered contrary to international law. Moreover, before the decision *Belilos*[11], the European Commission of Human Rights had adopted a report in the *Temeltash* case[12]. The report was submitted to the Committee of Ministers. In this context, States had the possibility of reacting but did not. Yet States have an interest, even when they are not directly concerned, and the ECHR is but one element of a system which involves also political action.

60. The Chairman thanked Mr Imbert for his excellent presentation and contribution to the work of the Group and asked the Secretariat to provide the Group and the CAHDI with a transcript of his presentation.

5. Key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and post-ratification stage

61. The Group considered an outline prepared by the delegation of the Netherlands[13]. The delegate of the Netherlands pointed out that this was a preliminary outline and should by no means be considered final.

62. She observed that, during negotiations on a treaty, negotiators often forget to introduce a reservation clause that brings everything to the object and purpose clause. Therefore, it is preferable to address this issue at the negotiation stage, i.e. to make sure of what should be admitted, by introducing a reservation clause in the text. Regarding the role of the Depositary, she noted that it has an additional role in determining whether a given reservation complies with the provisions of a Convention unless it falls with 19 a) or b) of the VC on the Law of the Treaties. As regards the post-ratification stage, she stressed the importance of an ongoing consideration of the need for a given reservation. In this connection, she referred to the possibility of formulating new reservations after the ratification stage (item 11 on the outline) and observed that if a State wishes to do such thing

[9] Idem 6.

[10] ECHR, *Loizidou vs. Turkey*, (preliminary objection), 23.03.1995, Series A, no. 310.

[11] Idem 6.

[12] (1982) 5 EHRR 417, para. 84.

[13] Document DI-S-RIT (98) 6.

the real issue is whether the State in question can denounce the treaty and subsequently sign it again then making the reservation wanted.

63. The delegate of the Netherlands concluded her presentation of the paper by stressing that her position is not that a reservation should be fought at any rate but rather that the situation should be clear-cut and that is why 19 a and b are preferable. In this context, it was intended to facilitate understanding of these complex issues

64. The Chairman thanked the delegate of the Netherlands for the preparation of the paper which is an extremely useful way of looking at treaty-making and formulation of reservations indeed facilitated understanding and discussion of the various issues at stake.

65. The Group held an exchange of views on various aspects of the outline as follows hereafter:

Item 1: "[individually or co-ordinated] Formulate appropriate reservations clauses" (legal effects at the negotiation stage)

66. The delegate of the United Kingdom noted that there is a key difference between regional and universal instruments. Thus, for instance, in the context of the Council of Europe, one could expect a lesser need for reservations because this Organisation is a more homogeneous setting. Such is not the case at universal level where individual positions, such as e.g. the US position, often result in a reservation due to internal policy (for instance, because the Senate so requires). In his view, ultimately one has to decide during the negotiation stage whether one wishes to accept reservations or not. Moreover, there are cases where treaties are so interlocking that it would be a mistake to allow the formulation of reservations because it would mean "taking out a brick from a wall".

67. The delegate of Germany agreed that at the onset it is necessary to think about the reservation issue and, furthermore, that it is essential to have clear rules on reservations. He noted that it would be useful to think of different avenues to avoid the formulation reservation and particularly to avoid ending up in Article 19 c) of the VC due to lack of rules. Such avenues would include for instance: opting-in clauses.

68. The delegate of Finland : You must be prepared before negotiation (on reservation) but also to take into account the specific national requirements in the treaty and thus avoid the reservation.

69. Under this item the delegate of Romania suggested the inclusion of a reference to "adoption" as opposed to signature (item 2 in the outline). He explained that adoption occurs by means of a final act regardless of the form. In this connection, he further observed that the "paraphing stage" before the signature is also of significant importance even though it carries no legal effect whatsoever.

Item 2: "[individually or co-ordinated] Establish a position on a future reservation regime before negotiations" (political action at negotiation stage)

70. The delegate of France stressed that the Permanent International Criminal Court experience shows that this is not always possible and the item, although theoretically useful, might not be realistic.

71. The delegate of the Netherlands, found it useful and thought should be given to the need for a Reservation : the point is proper preparation.

Item 6 A.: "[Individually] Decide whether there is a (domestic) need for making a reservation" (legal effects at ratification stage)

72. The delegate of Sweden observed that the first thing to be considered when negotiating a treaty is the possibility of changing domestic legislation. Only when this is not

possible should reservations be made, yet emphasis should be put on the need to change the legislation in as far as possible. The delegate of Finland suggested that alternatively a reservation could be made only for a given time.

Item 7: "[individually or co-ordinated] Consider the need to object to a reservation previously made by other parties" (legal effects at ratification stage)

73. The delegate of the Netherlands noted that this item is connected with the efforts undertaken by the Group of Specialists to standardise objection clauses to inadmissible reservations[14].

Item 8 B.: The role of the depositaries "Functions - establish whether the reservation complies with the treaty's reservation clause (ratification stage)

74. The delegate of the United Kingdom noted that his delegation does not consider that it is for the Depositary to establish whether a reservation complies with the treaty's reservation clause. When the Depositary receives a doubtful reservation, it can bring up the issue with the reserving State but it cannot decide on its admissibility, i.e. whether it is or not compatible with the treaty.

75. The delegate of France agreed that it is questionable whether the Depositary has such a role. In his view, the Depositary may recall that a given reservation is forbidden on the basis of the VC but may not take position on its admissibility.

76. Similarly, the delegate of the Russian Federation agreed that the Depositary should have a post office function and in any case the Depositary could not refuse a notification. In the eastern block there was a trend to find a neutral Depositary (a country) to serve as arbiter and this resulted in many problems.

77. On the contrary, the delegates of Germany and Spain considered that, provided no value judgement is involved, the Depositary has the role indicated in this item.

78. The delegate of Romania suggested a possible compromise since in this particular area the Depositary may play a very useful role in contributing to solving problematic reservations and trying to circumscribe the issue in the scope of either Article 19 a) or b) of the VC.

79. The delegate of the Netherlands concluded by stressing the advantage of a clear rule on Reservations that gives guidance to the Depositary on what it is and is not acceptable by the parties. Article 19 c) of the VC requires a lot of interpretation and this should not be the role of the Depositary while, if reservation rules are clear, the Depositary has a clearer and more administrative task and it can then get back to the reserving State directly.

80. Mr Polakievicz (Central Division of the Directorate of Legal Affairs, responsible for providing secretarial support to the Depositary of the Council of Europe) referred to the role of the Depositary from the perspective of the Council of Europe. In his view, the item as reflected in the outline-table is correct. There are few accessions and in most cases States sign and ratify even in the case of "old" conventions. The Depositary checks compatibility and if there are doubts it brings the matter to the attention of the member State concerned and possibly of other member States on an informal basis. Once the deposit takes place, notification occurs and there might be minor linguistic corrections. As regards the scope, when provisions on reservation are clear the Depositary exerts total control because there is no judgement involved. If Article 19 c) is involved, a certain element of political assessment is necessary, which is dangerous.

81. He further suggested two more reasons in favour of an active role by the Depositary :

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[14] See item 6 below.

- many conventions aim at harmonising and setting minimum standards; this implies ensuring legal certainty and uniform application;
- the rather unsatisfactory results of the provisions of the VC regarding objections: objections only produce bilateral results and the Council of Europe Conventions go beyond that frame. Fragmentation must be avoided.

82. The Chairman concluded this item by observing that the CAHDI had already held significant debates on the role of the Depositary and concluded it should have a rather neutral function.

Items 11 and 14: "No new reservations may be made after the ratification stage (legal effects and role of the Depositaries at post-ratification stage)

83. The delegate of the United Kingdom referred to the possibility of making subsequent reservations after ratification has taken place and noted that in some instances this issue might be solved by diplomatic means.

84. Further to that, the delegate of France further observed that practice already shows that there are new strategies for overcoming the prohibition of formulating reservations after the ratification stage.

85. The delegate of the Russian Federation informed the Group that the *Duma* is seriously considering the possibility of denouncing and subsequently signing a treaty again as a way of introducing required reservations or interpretative declarations.

86. The delegate of the Netherlands recognised that new forms of behaviour are being developed. On the other hand article 2 VC[15] provides only a definition and that is problematic. Moreover, she deplored the situation described by the Russian delegation which could have very negative consequences.

87. The delegate of Germany considered it very important to respect the rule established in this item. He recognised that it is legally possible for a State always to have the possibility of withdrawing and then coming back but this constitutes a circumvention of the Convention. Another problem in this connection is a partial withdrawal of a reservation and by this means adding something new to the actual reservation, which should therefore be opposed. Yet he recognised that there is ongoing debate on this issue between the various ministers. However, the Ministry of Foreign Affairs" stand is that this is not allowed.

88. In this connection, the delegate of Finland observed that reference should be made to Article 26 of the VC which enshrines the *pacta sunt servanda* or good faith principle. The practice of denouncing and then signing again a convention might be in breach of that principle. This is a crucial issue because if this becomes practice, the system of international treaties is going to fall apart. He therefore called upon the Group to pay special consideration to this issue.

89. The delegate of Spain further referred to Articles 18, 26 and 31 of the VC which contain the notion of "good faith" itself. Yet he recognised that certain cases are not covered, e.g.: if the treaty requires that the State has to confirm its reservation every five years and it does not do so, what is the status of the reservation. He observed that in the context of the

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[15] Vienna Convention on the Law of Treaties, 23 May 1969 (VC).

Article 2 - Use of terms

1. For the purposes of the present Convention: (…)

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; (…)

Council of Europe this issue has been solved *intra muros*.

90. In this connection, the delegate of Germany stated that he understood Finland's reasoning concerning the reference to article 26 CV. It is necessary to realise that this rule only applies as long as there is a treaty and there is possibility to leave it but in some cases it is not possible, e.g. North Korea and ICCPR. If there is a possibility to leave the treaty then art 26 does not help.

91. The delegate of Finland stressed that good faith is an underlying concept in international law. If we are trying to fill in the gaps we should bear this idea in mind in the context of the growing practice of denouncing/resigning.

Item 6 B: "[Individually] Consider the possibility of making a "proper" interpretative declaration instead" (of a reservation) (legal effect at ratification stage)

92. The delegation of the Russian Federation considers this useful, yet the issue remains of who should judge and how it should be judged whether we are confronted with a reservation or an interpretative declaration. He therefore suggested introducing in the outline a reference in this sense.

Items 9-14: Post-ratification stage

93. The delegate of Romania observed that State Parties often meet on a regular basis in order to discuss issues relating to reservations. The usefulness of such a practice should be highlighted in the outline. Moreover, it would be important to refer to the role of the monitoring bodies.

94. In this connection, the delegate of the Netherlands agreed that periodic meetings of Parties are not explicitly mentioned but could be considered included under the heading "political action" in the post-ratification stage. She noted that she did not include the role of monitoring bodies because it is contentious.

95. Following a fruitful discussion the Chairman renewed his thanks to the delegate of the Netherlands and stressed that the outline-table does not constitute a verbalised practice but rather an overview of the situation. He suggested making it more user-friendly and, in the context of the preparation of model-objection clauses, to develop it as a background paper taking into account comments made by the delegations and Mr Horn's article (cited above).

96. The delegate of the Netherlands thanked members of the Group for their suggestions and agreed to produce an elaborated version of the outline including a description.

6. Model-objection clauses to reservations to international treaties considered as inadmissible

97. The delegate of Sweden presented a paper on model-objection clauses to reservations to international treaties considered as inadmissible[16]. He stressed that the paper was very much inspired by State practice in the field of human rights treaties. To facilitate understanding he introduced a basic distinction between unspecific and specific inadmissible reservations. A number of variants are included to try to fit in the political considerations of the State which are included in the "concluding statements".

98. As regards the model objection to unspecific reservations, the delegate of Sweden observed that among the concluding statements, alternative a) is the most popular and referred to Mr Simma's article. Alternative b) is used by States such as for example Norway and constitutes a variant of the severability doctrine. Alternative c) constitutes a variation of alternative b). Alternative d) is rarely used because it states that the objection precludes the entry into force of the treaty. It is therefore restricted to those cases where the objecting

[16] Document DI-S-RIT (98) 4.

State cannot remain silent. He noted that Sweden only used this formula in relation to a reservation by the Maldives to the International Convention on the Elimination of All forms of Discrimination against Women. Finally, alternative f) is an invitation to dialogue used often by States, e.g. Austria. It could possibly be extended to specify that the objection precludes the entry into force of the treaty.

99. He observed that the situation is clearer regarding objections to specific but inadmissible reservations and therefore the options are more clear cut. Moreover, alternative f) cited above cannot be used here.

100. He concluded his presentation by underlining that his paper is not intended to constitute a guideline but rather to provide examples of State practice. It could be a source of inspiration but obviously it would be up to each State to formulate precisely their objections.

101. The delegate of the Netherlands stressed that the paper prepared by the delegation of Sweden may result in more timely reactions and objections by this block building system.

102. The Chairman thanked the delegation of Sweden for the preparation of the paper. He noted that alternative a) is covered by Article 21 VC[17]. He referred to alternatives b) and c) and asked what the situation would be if the reserving State does not accept the objections resulting therefrom, and in particular what happens if there is no agreement on the severability and the other party does not agree with the formulation of the reservation.

103. The delegate of Sweden replied that they have the merit of establishing a certain dialogue, yet he recognised that the VC does not provide any answers on this. He therefore, called upon the ILC to analyse the problem which is particularly crucial in the field of human right treaties where it is very difficult to determine the effects of a reservation or declaration.

104. The Group held a significant discussion about alternative f) - dialogue with the reserving State.

105. The delegate of Germany referred to this alternative and observed that there is a growing practice supporting it, yet he wondered about dealing with time-limits as provided by Article 20.5 VC[18] in this context particularly if the reserving State decides to pursue dialogue.

106. The delegate of the Netherlands referred to the practice followed by Austria in this respect and asked about its practical results. In her views the reserving State will not feel compelled to provide complementary information. Further more she recognised that there is a margin depending on whether a State chooses political dialogue or legal action. In any event, in case of doubts about the scope of a reservation it is up to the State to bring the

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[17] Article 21 VC - Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

[18] Article 20 VC - Acceptance of and objection to reservations (…)

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

matter to the public or not. She nevertheless, concluded by recognising that the political dialogue avenue is more discrete and might give the reserving State the possibility to reconsider its reservation.

107. The delegate of Austria told members of the Group of his experience in this field. Austria had tried political dialogue in respect of Iran's reservation based on the Sharia law to the UN Convention on rights of the Child and terms similar to alternative f) were used. Unfortunately this attempt did not prove successful as there was no change or withdrawal of the reservation. On the contrary, dialogue has brought results in regard to Malaysia's reservation based on Sharia Law to the UN Convention against discrimination for women. Malaysia responded by modifying the original reservation and reducing its scope. However, it turned out that there was no partial withdrawal but a new reservation.

108. The delegate of Austria concluded that the dialogue avenue gives the reserving State the possibility to reconsider and possibly to withdraw, at least partially, its reservation. This avenue comprises an element of political psychology and represents an alternative to flat legal objection which may have negative consequences on bilateral relations. However, he recognised that this avenue gives rise to tricky issues of time-limit problems (cfr. Art. 20.5 VC). Moreover, some States consider that it does not reflect adequately customary international law and are linear in applying the time-limits or not. Austria for its part considers that dialogue constitutes a preliminary objection and the time-limit requirement would be done away by allowing interpretation of Article 20.5 VC provision beyond the boundaries of the 12 months.

109. The delegate of Greece considered that alternative f) is a very innovative and creative approach which merits further consideration.

110. Similarly, the delegate of Slovakia recognised merit in political bilateral contacts. Yet he observed a problem with showing compatibility through "subsequent practice" particularly in the light of the time-limits mentioned by prior speakers.

111. The delegate of Finland declared that Finland has been attracted by the dialogue avenue pursued in some instances by Austria and Sweden, but in doing so Finland has considered that it was formulating legal elements and in view of the results would subsequently enter into political bilateral dialogue. Thus, the legal element allowed the narrowing of reservation scope. As regards time-limits set in the VC, in his view they apply to "standard" admissible reservations and not to inadmissible reservations, because e.g. contrary to the object and purpose of the treaty. These are "out of order" and therefore Article 20. 5 VC does not apply. He suggested that nevertheless this issue be clarified in the model objection clauses.

112. In this connection, Mr Imbert observed that the time-limit set by the VC might have changed in nature. It represents a period after which it is not possible to question the status of a reserving State. This, however does not preclude other States from objecting to the reservation once the time has lapsed, as practice shows, e.g. UN Convention on the Law of the Sea concerning the Continental Shelf. Thus, it can be said that something has changed in the VC and while after the period of 12 months it is not possible to prevent a reserving State from being Party to a treaty, a formal reaction to its reservation can still take place.

113. The delegate of Greece considered that introductory statements contained in introductory paragraphs 4 and 5 are too strongly worded and perhaps over-didactic and suggested that they should be reconsidered or possibly seen as alternative.

114. The Group agreed to this suggestion because some countries may not wish to be so didactic. The relevant paragraphs would therefore appear as alternatives for initial

statements.

115. The delegate of Slovakia considered that the paper does not deal with legal effects of objections but rather represents a guide to practice of great use for Ministries of Foreign Affairs with limited resources. In this respect, he observed that the reason why some countries do not object is the lack of resources. Thus, if a State does not object to a given reservation it does not necessarily agree with it, but rather that it did not have the means to object. This fact is not reflected by articles of distinguished commentators e.g. Mr B. Simma. The delegate of Slovakia observed that one aspect missing in the paper is that a State might not invoke domestic provisions as a justification for the non-respect of treaty obligations, i.e. non-performance of treaty obligations as an element of objection (Article 27 VC).

116. Mr Imbert called upon the members of the Group to reflect on concrete measures allowing the Committee of Ministers of the Council of Europe to react in a co-ordinated manner to inadmissible reservations to international treaties.

117. The delegate of Sweden agreed to the suggestion made by the delegate of Slovakia on the use of recalling Art 27 VC. He also agreed with Mr. Imbert. The introductory part should not be seen as a bloc, but as with a number of alternatives: the building block method.

118. The delegate of the United Kingdom expressed some reservations concerning alternative c) and noted that his government would have some difficulty in subscribing to it as a general principle despite what is mentioned in Mr. Simma's Article.

119. In connection with Mr Imbert's statement, the delegate of Romania referred to possibilities: either the treaty is not in force or legal effects are restricted only to those provisions mentioned in the reservation. In his view this is the core of the problem, i.e. to accept or refuse the severability. As regards the time limits, it is possible to envisage that a reserving State is already a Party to the treaty if one Party accepts the reservation even before expiration of the 12 month time-limit. Therefore, this deadline should not be taken *ex litera.*

120. The delegate of the Netherlands stressed that the paper reflects Dutch practice which includes as a general rule the use of alternatives a) and b). She expressed some doubts about alternative f) which has a different character from a) or b). The purpose of f) is to obtain additional information and does not legally state effects of an objection. She therefore, wondered whether it is politically wise to state that "a final assessment cannot be made without further clarification" because if that information is not provided the situation is ambiguous. On the other hand if the information is provided the question remains about its legal status. She observed a certain contradiction in this alternative: first there is the acknowledgement that no assessment is possible without further clarification and then there is, nevertheless, a preliminary assessment.

121. The delegate of the Russian Federation welcome the preparation of the paper. He observed that in practice they are confronted with delicate choices regarding the wording of objections to reservations. He noted that States have a right to make reservations and in most cases there is no third body to decide on the admissibility of reservations. Thus, there is in general freedom to formulate reservations but they should be specified. He proposed that alternative f) be formulated more closely to the VC so that it cannot be contested by States. In addition, he recognised there might be some tricky issues resulting from this alternative, e.g. a certain degree of ambiguity, even though this is not necessarily bad; and time-limits, which however might not apply in this context.

122. The delegate of Sweden concluded with the realisation that it is not possible to agree on one single model for reservations that fits every State, and stressed that clearly that is not the purpose of the exercise, which is to reflect recent State practice without attempting to regulate it. He further agreed to the Finnish analysis but did not think it possible to include

the effects of the objections to a reservation because there is no agreement on what the VC means today.

123. The delegate of Germany observed that alternative f) provides a fruitful means for dealing with a problem. When confronted with a doubtful reservation a group of States could enter into dialogue with the reserving State while respecting the time-limits. If the dialogue does not prove useful, then objecting is still possible. He noted that the VC does not cover objections to reservations in Article 19 c). This is an academic construction but wonders whether this is so in practice and State therefore are better off by complying with 12 months. He wondered whether it is in the interest of the reserving State to have the matter settled in the shortest possible time. It is wiser to do everything possible to stick to the time-limit, to pre-empt that reserving State from opposing the time-limits.

124. The delegate of Bulgaria observed that there are two alternatives depending on whether a State wishes to be explicit (alternatives a-d) or not. He recalled the history of Article 21 VC[19]. The final version adopted refers to absence of opposition from objecting States for the entry into force between the reserving and objecting States. Thus, where a State remains silent there is no opposition to the entry into force of the treaty. Clearly it is up to each State to take position but the legal effects are clearly stated.

125. The Chairman concluded that clearly the aim of the exercise is not to impose any language on a State when objecting to reservations but to be a source of inspiration in this respect. The Group agreed that the delegate of Sweden will restructure the document to take into account the comments which are intended to reflect current practice. Clearly there is no prescriptive character on the document.

126. Following comments by delegations, the delegate of Sweden presented a slightly amended version[20] including an "initial block" that could be used in all instances followed by "additional statements" which are recent examples of State practice. He expressed some hesitations concerning the inclusion of a reference to Article 27 VC at this point. Finally, he noted that in the section "concluding statements" include as many examples as possible but it is not exhaustive. Moreover, some changes were made regarding specific inadmissible reservations. He called upon the Group to consider the usefulness of distinguishing between specific and non specific reservations and the legal status of the text.

127. The delegate of Belgium also expressed some doubts concerning the reference to Article 27 VC in the context of specific reservations. The Group therefore agreed to deleting such reference.

128. The delegate of Romania observed that alternatives c) and d) are identical under 1) (objections to non-specific reservations) and under 2) (objections to specific reservations). In the light of the VC, he suggested including an alternative recognising legal effect only for the provisions covered explicitly by the reservation, i.e. recognition of partial legal effects which is partially and implicitly covered in alternative a) as it stands.

129. The delegate of the United Kingdom observed that while the heading refers to inadmissible reservations in general, the paper concerns only reservations which are contrary to Article 19 c) VC, i.e. contrary to the object and purpose of the treaty. Moreover, States have a right to object to any reservation and not only those in Article 19 and he

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19 Article 21 VC - Legal effects of reservations and of objections to reservations (…)

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

[20] Document DI-S-RIT (98) 4 rev.

suggested that this should be reflected in the introductory part.

130. The delegate of the Netherlands stressed that from the point of view of consistency the choice between b) and c)-d) comes down to the State's position on the issue of severability and this is a policy issue. As regards the proposal by the delegate of Romania, on the one hand she agreed from the strict legal point of view but on the other hand recognised that it could send the wrong message. If a reservation is troublesome then it might be wiser to remain silent and let the contractual relation be established without creating more problems. Yet this is a policy issue rather than technical issue.

131. The delegate of Sweden concluded that the paper constitutes “à la carte” guidelines and not a binding text, moreover it does not deal with legal effects but rather constitutes a reflection of current State practice. The guidelines deal with inadmissible reservations in the sense of Article 19.c and do this on the cover page.

132. Further, the delegate of Finland suggested: it should be stated in the foreword or preamble that these alternatives are proposed because the VC does not provide a solution to the problematic issue of reservations which are contrary to Article 19 c).

133. The delegate of Romania stressed that the alternatives contain some indications concerning legal effects. However the text lacks a reference to the severability doctrine which also concerns legal effects.

134. The delegate of Germany expressed some hesitations about this proposal because too many explanations about the scope of the guidelines might give the impression that the Committee is endorsing such doctrine. Moreover, some authors consider that reservations which are contrary to Article 19 c) fall outside the scope of the VC, including e.g. time-limits. Therefore it would not be wise to give an explanatory foreword in this connection.

135. In this connection, the delegate of the Netherlands proposed that anything in the nature of a foreword could be included in her paper which could be attached to the guidelines and as a whole we would produce a general paper on reservations and their objections.

136. The Group agreed to this proposal and decided that the paper would constitute a guide to State practice to which States may refer when making a decision on reacting to reservations raising doubts as to their admissibility. The Chairman noted that this would be in line with the terms of reference given to the Group, namely to make a contribution to the practice of member States in this regard. The Group therefore decided to prepare a recommendation to be put to the best use of States, noting that the recommendation should be flexible and “à la carte” not binding in nature. Further to that the Group agreed that the paper prepared by the delegation of the Netherlands could constitute an introduction to the recommendation. The Chairman noted that this document would be considered at the next meeting of the Group, including the question of what reservation can be objected to and what should be included in the foreword to the paper submitted by the delegation of Sweden.

6. European Observatory of Reservations to International Treaties (EORIT)

a. Consideration of reservations to international treaties in the context of the EU: the COJUR

137. The Chair invited Mr JACQUE to provide members of the Group with information concerning the screening of reservations to international treaties in the context of the EU. Mr Jacqué thanked the Chair for his invitation to attend the meeting.

138. He observed that the authors of the EU Treaty included substantial elements of the European Convention on Human Rights (ECHR) (including its Protocols). Moreover the

Amsterdam Treaty confirmed and extended the jurisdiction of the Court of Justice of the European Communities (CJEC) to cover the action of the EU in this field as a result of the refusal to adhere directly to the ECHR. This is interesting because the position of the EU Member States is not homogeneous - thus, they have not all signed the relevant Protocol. Therefore there is a risk that the CJEC imposes upon States obligations that they have not assumed.

139. The CJEC is competent for judging respect of obligations in the field of human rights by the EU and the European Community. In addition, it is competent for the action of national legislature is so far as it falls within the field of community law. Thus, there is a certain risk of introducing judicial control of national legislation by the CJEC through the back door. One can wonder about the direction that CJEC case-law will follow.

140. He referred to the work and operation of the Working Group on Public International Law (COJUR) of the Council of the EU. The COJUR is made up of the Legal Advisers of the EU Member States. It meets twice under every EU Presidency and provides the Council of the EU with advice in the field of legal policy. It does not provide legal advice but makes legal policies. In addition, it also works in the field of the Common Foreign Policy and Security. It acts on its own initiative or at the request of a Member State.

141. In this context, for three years the COJUR has regularly held exchanges of views on reservations to international treaties. This item is part of its agenda and all kinds of reservations are considered. States indicate whether they have any difficulties with them, whether legal or political.

142. One of the main practical difficulties is to obtain updated information.

143. The aim of the COJUR's action in this connection is to co-ordinate the national positions, to exchange views and, if the case so requires, to adopt a common position so that the Member States act in the same manner. Such a common position was adopted, eg. as regards North Korea's denunciation of the International Covenant on Civil and Political Rights.

144. The COJUR is currently discussing the possibility for States to denounce a treaty and subsequently adhere making a reservation. It instructed some delegations to prepare a discussion paper. The paper gave rise to significant discussion and contradictory positions: while some delegations follow a formal position other subscribe to a more substantial one.

145. The examination of reservations works because it is pragmatic and has not resulted in the setting up of new structures. On the contrary, such exercise has become a routine. When there is a specific problem it is highlighted and discussed, yet there is no voting. However, Mr JACQUE acknowledges that this might be possible with 15 Member States but may not be so with 40 since a certain flexibility is required.

146. Moreover, the exercise is facilitated by the fact that there is a permanent communication network (CREU) which allows the common circulation of information and positions. In this respect, the COJUR section of the CREU is becoming increasingly important.

147. He concluded by emphasising that the COJUR is guided by a concern for efficiency which is achieved by the absence of theoretical discussion. This may be, nevertheless, regrettable.

b. Practical aspects of the functioning of the CAHDI as an observatory to international reservations.

148. The Secretariat presented a paper regarding the setting up of an observation

procedure including preliminary-draft specific terms of reference for the setting up of a Group of experts on reservations to international treaties (DI-E-RIT)[21].

149. The delegates of Romania and Spain supported the continuation of the Group of specialists in order to help the CAHDI to better identify the problematic reservations. In his view the work of the DI-S-RIT has already proven very useful.

150. The delegate of the United-Kingdom suggested that the Chairman could screen the reservations and then bring to the attention of the CAHDI those which would call for further discussion in the CAHDI. Moreover, he stressed that the important thing is not that the CAHDI takes a position but draws the problematic ones to the attention of participants. In this respect, the CAHDI might suggest objections or even mandate the chairman to enter a dialogue with a given country. However, it was noted that the CAHDI has many issues on its agenda and should not pay more attention than necessary to the issue of reservations.

151. The delegate of Sweden stressed that the observatory should raise awareness and stay in proportion with other activities.

152. As regards the scope of the observation procedure, the delegate of Romania stressed that the observation of reservations should be directed at human rights treaties.

153. On the contrary, the delegate of Spain considered that such restriction would not be wise and stressed that the moment has come to co-ordinate member States" positions on objections to reservations to international treaties, particularly in the field of human rights.

154. As regards the method for the observatory, the delegate of Germany proposed to follow the example of the COJUR within the EU and propose starting from a more modest and humble approach. Thus, reservations could be discussed shortly before the CAHDI meeting.

155. However, the delegate of Slovakia noted that the Council of Europe has 40 Member States while the EU has 15. Therefore the exercise is worth, particularly in view of co-ordinating the position on legal issues. CAHDI should have on its agenda the item reservation but how should the issue be tackled. The system should not be rigid. The Group should not continue as a theoretical exchange of views.

156. The delegate of Finland suggested that the role of circulating information would be given not only the Secretariat but also to the Chair of the CAHDI and observed that there might be sources of information other than the COJUR. He supported the suggestion that a Group of experts would meet before the meeting of the CAHDI to discuss the various reservations with a view not so much to co-ordinating but rather to raising awareness.

157. Similarly, the delegate of Greece suggested exploring alternatives to obtaining information from COJUR, e.g. receiving it from Permanent missions to the UN.

158. The delegate of the Russian Federation stressed that the observation mechanism should be: practical, lean, efficient and flexible and that the whole exercise should be guided by realism. In this connection, he suggested that the Group be flexible and meet if necessary.

159. The delegate of the United Kingdom suggested that at its second meeting in 1999 the CAHDI would decide if the Group is necessary for the following year and expressed his hopes that it will not be. He thinks that the Group has been very useful but the CAHDI may in future want to consider other matters and therefore this Group should not be a permanent organ in the CAHDI structure.

160. In this connection, the delegate of Sweden suggested that meetings of the Group be

[21] Document DI-S-RIT (98) 7.

held immediately before the CAHDI to reduce the financial burden.

161. The delegate of the Netherlands stressed that her delegation keeps an open mind on the way to carry out the exercise.

162. The Chairman concluded that the Group agreed on establishing an observatory of reservations to international treaties within the CAHDI. With regard to the structure and working methods, the observatory should be lean, flexible, efficient, practical. It would have 3 main functions:

- clearing house for information – share information (in co-operation with the COJUR (EU))
- increasing awareness
- although common positions of all member States of the Council of Europe on reactions would be unrealistic, it would be useful to exchange views among member States on such questionable reservations in terms of an object and purpose test.

163. As regards the scope of the observation exercise, the Chairman concluded that it should not only be Human Rights but extend to other fields, not only universal but also Council of Europe, but in the first place we should concentrate on universal Human Rights fields.

164. In practice, the Group agreed that the item "reservations to international treaties" should be a permanent regular item on the CAHDI agenda. It would be the responsibility of both the Chair of the CAHDI, in conjunction with the Chair of the DI-S-RIT (now renamed DI-E-RIT), and the Secretariat to circulate in due time, and for the Chair of the CAHDI to select, the reservations which should be brought to the attention of the CAHDI based on the opinion of the DI-S-RIT.

165. The Chairman concluded that meetings of the DI-S-RIT should take place immediately before meetings of the CAHDI and, if need be, a third meeting could take place in between the two meetings of the CAHDI meetings. The Group approved preliminary-draft specific terms of reference for the DI-E-RIT and asked the Secretariat to transmit them to the CAHDI for adoption. The preliminary-draft specific terms of reference are the subject of appendix 3 to the report.

c. Observation procedure

166. The Secretariat presented the list of reservations to be considered by the Group of specialists as a pilot observation exercise, and explained how the list was compiled on the basis of information circulated in the framework of the COJUR and access to the UN treaties web site[22].

167. The delegate of the Russian Federation suggested that reservations to Council of Europe treaties be included in future lists. The Group agreed to this proposal.

168. The delegate of Finland observed that the COJUR list does not include all reservations to international treaties but only those which raise doubts as to their admissibility. Similarly, in the context of the observation procedure in the Council of Europe, he stressed that there should be some judgement as to what is relevant for the purposes of the CAHDI and he proposed that the Chair should take responsibility for the selection.

169. In this connection, the Chairman noted that it would be the job of the observatory (the CAHDI and its working party - the Group of experts) to spot in the ocean of reservations those problematic ones and raise colleagues" awareness of them.

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[22] For information on this issue, please refer to document DI-S-RIT (98) 8.

170. The delegate of Germany asked about the time framework for the exercise and stressed the need to limit the scope of the exercise in order to respect the provisions of the VC. He suggested that the exercise be restricted to reservations to international treaties in the field of human rights, in the 12 preceding months, contrary to Article 19 c) VC.

171. The Group undertook consideration of the list of reservations[23].

Reservation by Canada[24], to the Convention on Environmental Impact Assessment in a Trans-boundary Context (Espoo Convention) 25 February 1991

172. The delegate of the Russian Federation observed that this reservation is problematic for his country as there are 89 subjects of the Federation. If the Parliament is ratifying a treaty, it assumes obligations of a general nature even though the opinion of the subjects concerned will be obtained.

173. While recognising that this reservation deals specifically with environmental issues, the delegate of the Netherlands stressed that the so-called “federal” reservations appear in connection with other fields as well. She therefore suggested that it would be wise to have agreement on how this type of reservation should be tackled, because they raise serious doubts as to the full scope of implementing the law.

174. The delegates of Spain and Sweden observed that this reservation does not recognise the State as primary player concerning the legal effects of treaties. The fact that a State has a federal structure does not exempt it from its obligations and the reservation in question raises doubts on the territorial scope to which Canada will apply the treaty.

175. The delegate of France considered that the reservation deals with territorial scope and in any event it cannot be contrary to he VC general rule that the treaty applies to the whole of the territory (Article 29 VC), rather than questioning whether it is compatible with article 19 c) VC.

176. The delegate of Croatia observed that this kind of issue has been solved in a simple way in Federal Yugoslavia, where every subject of the Federation's agreement had to be obtained before entering into treaty obligations. Yet he agreed that the Federation is in any case responsible for ensuring compliance with the treaty. Thus, he concluded that federal clauses are not necessarily contrary to the object and purpose of the treaty, but they undermine its application and therefore they should therefore be discouraged.

177. The delegate of Belgium informed members of the Group that since the last constitutional revision the federated entities of Belgium enjoy the *ius ad tractatum* on the same footing than the federal authority. It should not be excluded that in the future Belgium could formulate reservations such as the one under consideration. Yet, she recognised that this type of reservation may introduce an element of legal uncertainty.

178. In this respect, the delegate of Finland referred to the existence of an autonomous region in Finland which has no treaty-making power but legislative power. Thus, Finland could not undertake an international obligation implying legislative development in this territory without the prior agreement of the provincial government.

179. The delegate of Germany observed that this is a common problem for many States of a federal or composite character. Thus, Germany, can only ratify a treaty after obtaining the agreement of the Länder. He concluded that it is the responsibility of each country to deal with this problem in the best way.

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[23] Documents DI-S-RIT (98)8.

[24] Reservation dated 13 May 1998, communicated by the Depositary on 27 May 1998. Objection time-limit expires on 26 May 1999.

180. The delegate of Spain stressed that in all cases States should solve their problems of a federal nature internally. Yet they are responsible for treaty obligations and it is crucial to safeguard the notion of the State as subject to international law.

181. The delegate of the Netherlands stressed that the State should make clear the territorial scope of its commitment for the sake of clarity. It could do it at the time of ratification for instance.

182. The delegate of the United Kingdom did not consider that the reservation concerned the territorial application of the Convention. In his view, the Convention would apply to the whole of Canada; the reservation deals with certain activities. In this respect, he observed that the United Kingdom has a number of overseas territories on which it does not impose international obligations without their agreement. Moreover, there are specific constitutional agreements according to which overseas territories can enter into treaties in accordance with "entrustment", e.g. Hong Kong. He further referred to certain fields of community competence.

183. The observer of Canada provided members of the Group with some insight into Canadian constitutional law. In Canada, legislative responsibility is decided between the federal Government and the provinces according to a non-exhaustive list. In some cases competence is shared, e.g. environmental law (the area under which the convention in question falls). Yet, only the Federal Government can enter into treaties which are legally binding. Therefore, in his view the reservation does not concern territorial application but rather shared legislative competence. As a general rule, the Federal Government obtains the agreement of the Provinces, particularly when the competence belongs to the Provinces. Yet he recognised that the reservation may raise doubts as to what territory the Government applies it.

184. The Chairman noted that 13 delegations had intervened regarding the first in the list of reservations under consideration. In his view this highlighted the usefulness of such a dialogue and the appropriateness of setting up a mechanism to this extent.

Reservation by Saudi Arabia[25] to the International Convention on the Elimination of all forms of Racial Discrimination (7 March 1966)

185. The delegate of Sweden informed members of the Group that his delegation had objected to it and adhered to the severability doctrine stating that the reservation undermined the applicability of international law and the Convention entered into force without the reserving State benefiting from it.

186. The delegate of Finland agreed with the position stated by the delegation of Sweden bur referred to the time-limits.

Reservation by Bahrain[26] to the Convention against Torture or other Cruel, Inhumane or Degrading Treatment or Punishment (10 December 1984)

187. The delegate of the Netherlands observed that this reservation refers to the issue of whether supervisory organs are part of the object and purpose assessment which, in her view they are.

188. The delegate of Austria agreed with the analysis of the delegation of the Netherlands. If a treaty establishes a body to supervise the implementation of the treaty, a reservation amounting to non-recognition of the competence of such an organ is incompatible with the

[25] Communicated by the Depositary to the parties on 23 September 1997; objection time-limit expired on 23 September 1998.

[26] Dated 6 March 1998.

object and purpose of the Treaty.

189. The delegate of Finland disagreed with the interpretation by the prior delegation, because Article 28 of this Convention allows the parties to not recognise the competence of the Committee. He further observed that this reservation is similar to the declaration made by Cuba[27] on the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (14 December 1973).

190. Similarly, the delegate of Slovakia stressed that it is desirable that all parties recognise the competence of the supervisory organs. Yet, if the treaty allows for not recognising the competence (e.g. Article 20 of the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) then opting out is legally possible.

191. The delegate of the Netherlands observed however that there is a difference between not accepting the competence of the supervisory organs which provide guidance and that of the International Court of Justice which has jurisdiction on settlement of disputes.

Reservation by Malaysia[28] to Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979)

192. The delegate of Sweden stressed that the remaining part of the reservation no longer stood because France and the Netherlands had objected to it. He observed that his information came from the UN Internet site but had not been officially confirmed.

193. The delegate of France observed that the remaining reservation after partial withdrawal was still clearly incompatible and therefore subject to objection.

194. The delegate of Finland informed the Group that Finland also objected to the first reservation. The amended version of the reservation is more restricted as there is no general reference to the Sharia. In addition, reservations are made to Article 4 instead of prior Article 5. This is welcome, but is is however still incompatible, in particular Art 5 (a): equality between men and women, as this is clearly against the object and purpose. He expressed surprise at the information by the UN Secretariat that the new partial reservation had been declared "out of order" by the UN Secretary General because the same had not been done for the first reservation.

195. The delegate of the Netherlands observed a new development: dialogue is suitable but if a reservation is modified and still incompatible the question remains whether States can object again. His delegation considers that that is the case. In her view, the effort by Malaysia is welcomed but is still not enough because the remaining reservation excludes the provisions of Article 9 and 16 of the Convention which constitute the hard core, while article 5 is restricted to eliminating stereotypes. This is regardless of whether, formally, States can object to it or not.

196. In this connection, the delegate of Slovakia stressed that after ratification it is impossible to make a reservation. A partial withdrawal of reservation can be accepted provided that no other provisions of the Convention are affected. Malaysia's reservation is clearly contrary to the regime set up by the VC.

197. The delegate of Germany further stated that it would be dangerous if dialogue resulted in modification of a reservation which put in question other parts of the convention and stressed that States" practice should seek to avoid this.

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[27] Declaration dated 10 June 1998, communicated by the Depositary on 7 July 1998, objection time-limit expiring 6 July 1999.

[28] The Reservation notified by the Depositary on 6 February 1998 had subsequently been partially withdrawn.

198. The delegate of Finland agreed in principle with the comments by Slovakia and Germany but noted that, in this particular case, Malaysia did not stand in respect of the original reservation.

Reservation by Guatemala to the Vienna Convention on the Law of the Treaties

199. The delegate of Germany observed that this reservation is of a general nature and calls into question the application of Treaty law. He further informs the Group that Germany is going to object because it fears that this reservation might inspire other States to an unfortunate practice, namely: objecting to something as harmless as the VC.

200. The Chairman noted that this issue was discussed at the last COJUR meeting.

201. The delegate of Greece called upon the Group to consider a reservation by Trinidad and Tobago at its next meeting.

202. The Chairman concluded examination of the list of reservations, stressing that the fruitful discussion showed the usefulness of the method and the need to have a working party. Moreover this would be a regular item on the agenda.

8. Other business

275. None.

9. Date and place of the next meeting

276. The Chairman referred this matter to the decision that the CAHDI would be called upon to take during its 16th meeting concerning the activity on reservations to international treaties and in particular the continuation of the Group on specialists on reservations to international treaties (DI-S-RIT)[29].

10. Statement of the Chairman concerning the 2nd meeting of the DI-S-RIT

277. The Group agreed that the Chairman should report decisions taken at the meeting to the CAHDI, including the setting up of an observatory of reservations to international treaties within the CAHDI and the concrete measures for its implementation (continuation of the operation of the working party - the DI-E-RIT, methodology and list of reservations), the preparation of a recommendation of the Committee of Ministers on reactions to inadmissible reservations including, in appendix, the paper submitted by the delegation of Sweden on model-reactions to specific and non-specific inadmissible reservations; the preparation of an introductory document thereto by the delegation of the Netherlands on the basis of the outline on key issues regarding reservations at the various stages of the conclusion of treaties and post-ratification stage.

[29] At its 16th meeting (Paris, 16-17 September 1998), the CAHDI decided to pursue the activity on reservations to international treaties and adopted terms of reference for a Group of experts on reservations to international treaties (DI-E-RIT) to assist the CAHDI in carrying out the observation procedure and in any other work in the framework of the activity. See report of the 16th meeting of the CAHDI, document CAHDI (98) 24.

APPENDIX 1

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS

AUSTRIA/ AUTRICHE: Mr Franz CEDE, Legal Adviser, Ministère Fédéral des Affaires Etrangères **(Chairman/Président)**

BELGIUM/ BELGIQUE: Mme Anne-Marie SNYERS, Conseiller Général, Direction Générale des Affaires Juridiques, Ministère des Affaires Etrangères

BULGARIA/BULGARIE: Mr Aliocha NEDELTCHEV, Director of International Law Directorate, Ministry of Foreign Affairs

CROATIA/CROATIE : Mr Stanko NICK, Ambassador, Chief Legal Adviser, Ministry of Foreign Affairs

FINLAND/FINLANDE: Mr Holger- ROTKIRCH, Ambassador, Director General for legal Affairs, Ministry for Foreign Affairs

Ms. Sari MÄKELÄ, Legal Officer, Legal Department, Ministry for Foreign Affairs

FRANCE: M. Jean-François DOBELLE, Directeur adjoint des Affaires Juridiques, Ministère des Affaires étrangères

Monsieur Jean-Michel FAVRE, Direction des Affaires Juridiques, Sous direction du droit international public, Ministère des Affaires étrangères

GERMANY/ALLEMAGNE: Dr Ernst MARTENS, Deputy Head of the Treaty Division, Federal Foreign Office

GREECE/GRECE: Mme Phani DASCALOPOULOU-LIVADA, Legal Adviser, Deputy Head of the Legal Department

NETHERLANDS/ PAYS-BAS: Ms. Liesbeth LIJNZAAD, Legal Counsellor, International Law Division, Ministry of Foreign Affairs

NORWAY/NORVEGE: Mr Rune RESALAND, Assistant Director General, Legal Department, Ministry of Foreign Affairs

ROMANIA /ROUMANIE: M. Tudor MIRCEA, Directeur de la Direction Juridique et des Traités, Ministère des Affaires Etrangères

RUSSIAN FEDERATION/FEDERATION DE RUSSIE: M. Kirill GUEVORGUIAN, Deputy Director, Legal Department, Ministry of Foreign Affairs

SLOVAKIA/SLOVAQUIE: Mr Peter TOMKA, Director General for Legal and Consular Affairs, Ministry of Foreign Affairs

SLOVENIA/SLOVENIE : Mr Andrej GRASSELLI, Head of the Department of International Legal Affairs, Ministry for Foreign Affairs

SPAIN/ESPAGNE: M. Maximiliano BERNAD Y ALVAREZ DE EULATE, Professeur de Droit international et d"institutions et Droit communautaire européen, Université de Zaragoza

SWEDEN/SUEDE: Mr Lars MAGNUSON, Director General for Legal Affairs, Ministry for Foreign Affairs

UNITED KINGDOM/ROYAUME-UNI: Mr Christopher WHOMERSLEY, Legal Counsellor, Foreign and Commonwealth Office

OBSERVERS/ OBSERVATEURS

CANADA: Mr Mehul SHAH, Second Secretary, Political and Legal Affairs, Mission of Canada to the European Union, BRUXELLES

OECD/OCDE: Mr Nicola BONUCCI, Legal Adviser, Legal Directorate

SPECIAL GUESTS/INVITES SPECIAUX

M. Pierre Henri IMBERT, Directeur des droits de l"homme du Conseil de l"Europe

M. Alain PELLET, Rapporteur spécial de la Commission de Droit international des Nations Unies : Université Paris X, Faculté de Droit

M. Jean-Paul JACQUE, Directeur du Service Juridique au Secrétariat Général du Conseil de l"Union européenne

SECRETARIAT

Directorate of Legal Affairs /Direction des Affaires Juridiques

Mr. Alexey KOZHEMYAKOV, Head of the Public and International Law Division/Chef de la Division du Droit public et international

Mr Rafael A. BENITEZ, **Secretary of the CAHDI/Secrétaire du CAHDI**, Public and International Law Division/Division du droit public et international

Mr Jörg POLAKIEWICZ, Administrative Officer/Administrateur, Central Section/Section centrale

Mme Francine NAAS, Assistant/Assistante, Public and International Law Division/Division du Droit public et international

M. Christian JEHL, stagiaire, Division du Droit public et international

APPENDIX 2

Agenda

1. Opening of the meeting by the Chairman

   Report of the 1st meeting of the DI-S-RIT, (Paris, 26-27 February 1998) DI-S-RIT (98) 5

   Statement of the Chairman concerning the 1st meeting of the DI-S-RIT DI-S-RIT (98) 5 Appendix 3

   Reservations to Human Rights Treaties – Some recent developments (Offprint, Liber Amicorum, 1998) DI-S-RIT (98) Inf 1

2. Adoption of the agenda DI-S-RIT (98) OJ 2 rev 3

3. Activity of the International Law Commission on reservations to normative multilateral treaties including human rights treaties: exchange of views with Professor PELLET, Special Rapporteur of the United Nations

   Documents de la Commission de droit international concernant les réserves aux traités DI-S-RIT (98) Inf 2

4. Exchange of views with Mr IMBERT, Director of Human Rights of the Council of Europe

5. Key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and post-ratification stage

   Document submitted by the Delegation of The Netherlands DI-S-RIT (98) 6

6. Model-objection clauses to reservations to international treaties considered inadmissible

   Document submitted by the Delegation of Sweden DI-S-RIT (98) 4

7. European Observatory of Reservations to International Treaties (EORIT)

   Note of the Secretariat regarding practical aspects of the functioning of the CAHDI as observatory on reservations to multilateral treaties DI-S-RIT (98) 7

   List of outstanding reservations DI-S-RIT (98) 8

8. Other business

9. Date and place of the next meeting

10. Statement of the Chairman concerning the 2nd meeting of the DI-S-RIT

APPENDIX 3

PRELIMINARY-DRAFT SPECIFIC TERMS OF REFERENCE

1. Name of committee: GROUP OF EXPERTS ON RESERVATIONS TO INTERNATIONAL TREATIES (DI-E-RIT)

2. Type of committee: Committee of Experts

3. Source of terms of reference: *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI)

4. Terms of reference:

In the framework of the operation of the CAHDI as a European observatory of reservations to multilateral treaties of significant importance to the international community and of reactions by Council of Europe member States Parties to these instruments, the Group is called upon to:

a. assist the CAHDI in carrying out the observation procedure;

b. examine reservations and interpretative declaration to multilateral treaties of significant importance to the international community;

c. bring to the attention of the members of the CAHDI those reservations and interpretative declarations which raise issues as to their admissibility from the point of view of international law and in particular from the human rights perspective;

d. prepare reports concerning the admissibility of the above-mentioned reservations and interpretative declarations for the attention of the members of the CAHDI; and

e. contribute in any other related manners to the activity of the CAHDI as an European observatory of reservations to international treaties.

5. Membership of the committee:

a. All member States may appoint an expert in the Group.

b. The Council of Europe bears the travel and subsistence expenses of 7 experts, one from each of the following countries: Croatia, Finland, Netherlands, Romania, Russia, Spain and Turkey.

c. The European Community may appoint a representative without reimbursement of expenses nor right to vote.

d. Representatives of the following organisations and countries will be invited to take part as observers in the meetings of the Group:
   - The Hague Conference on Private International Law
   - Organisation for Economic Co-operation and Development (OECD)
   - North Atlantic Treaty Organisation (NATO)
   - Armenia
   - Australia
   - Azerbaijan
   - Canada
   - Holy See
   - Japan

- New Zealand
- United States of America
- United States of Mexico (*)
- The United Nations and its specialised agencies

6. Working structures and methods:

   a. The Group is co-ordinated by the representative of Austria in the CAHDI, Ambassador Franz CEDE.

   b. In carrying out its terms of reference, the Group may have recourse to specialists.

7. Duration: The present terms of reference expire on 31 December 1999.