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Summary record of the 2678th meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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State responsibility¹³ (continued)* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,¹⁴ A/CN.4/517 and Add.1,¹⁵ A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)*

45. Mr. CRAWFORD (Special Rapporteur), reporting on two meetings of the open-ended working group convened to provide guidance to the Drafting Committee on the remaining questions of principle relating to the draft articles on State responsibility, said the Committee had already resolved the issues relating to terms such as “injured State”, “injury” and “damage”. Two groups of issues of general concern had remained, however. The first related to Part Two, chapter III (Serious breaches of essential obligations to the international community), and the second to Part Two *bis*, now renumbered as Part Three, chapter II (Countermeasures). A helpful discussion had been held and the Committee had already implemented the results by completing, in a form that was extremely satisfactory, a new version of Part Two, chapter III.

46. Part Two, chapter III, had been the subject of lengthy and difficult discussion. It was generally agreed that it could be retained, with the deletion of paragraph 1 of article 42 (Consequences of serious breaches of obligations to the international community as a whole), which referred to damages reflecting the gravity of the breach, but with the possible substitution, to be considered by the Drafting Committee, of a category dealing with serious breaches of an obligation established by a peremptory norm of general international law. Apart from the fact that the notion of a peremptory norm was well established by the 1969 Vienna Convention, it had seemed sensible to envisage the effect of such fundamental obligations as relating to the underlying issues of obligation covered in Parts One and Two. The notion of obligations to the international community as a whole related more to questions of invocation, as ICJ had put it in the *Barcelona Traction* case. It had also been proposed that the Committee should give further consideration to aspects of the consequences of serious breaches, as contained in article 42.

47. As to Part Three, chapter II, the working group had thought it undesirable to try to incorporate all or a substantial part of the articles on countermeasures into article 23 (Countermeasures in respect of an internationally wrongful act), which was about only one aspect of the problem. Article 23 would be retained, as would Part Three, chapter II, but article 54 (Countermeasures by States other than the injured State) had been extremely controversial and would be replaced by a saving clause, the terms of which were still to be discussed by the Drafting Committee. Article 53 (Conditions relating to resort

to countermeasures) would be reconsidered, as many members of the Commission had cast doubt on the value of the distinction drawn between provisional and urgent countermeasures on the one hand, and other countermeasures, on the other. Among other things all countermeasures were provisional, in a sense. It had also been felt that article 53 should be simplified and brought into line with the decisions of the arbitral tribunal in the *Air Service Agreement* case and of ICJ in the *Gabčíkovo-Nagymaros Project* case. In addition, articles 51 (Obligations not subject to countermeasures) and 52 (Proportionality) stood in need of some reconsideration.

48. After discussion and clarification of those issues, the working group had agreed that an acceptable text could be developed and had suggested that the Drafting Committee be asked to give effect to the results of the discussion.

The meeting rose at 11.30 a.m.

2678th MEETING

Tuesday, 22 May, 2001 at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (continued) (A/CN.4/508 and Add.1–4,² A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,³ A/CN.4/L.603 and Corr.1 and 2)

[Agenda item 5]

* Resumed from the 2675th meeting.

¹³ For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

¹⁴ See footnote 7 above.

¹⁵ *Ibid.*

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

² See *Yearbook . . . 2000*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR
(continued)

1. Mr. GAJA said that the Special Rapporteur's in-depth analysis in Part II of his fifth report (A/CN.4/508 and Add.1-4) had shown that the practice of States with regard to reservations to treaties was actually much more complex than it might appear to be. It was probably not the Commission's task to dwell on all hypotheses, but it certainly should focus on the question of late reservations, of which practice offered many examples, even within the Council of Europe, notwithstanding the critical position on that subject adopted by the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI). Late reservations were reservations formulated after the latest possible moment, according to article 2, paragraph 1 (*d*), and article 19 of the 1969 Vienna Convention, and they were permissible, as the Special Rapporteur rightly held, only provided that the other States parties did not raise any objection. That practice was sometimes contested, but it met the need for a degree of flexibility, especially when it enabled a State to achieve the same result that the State would have reached by first denouncing the treaty and then ratifying it again with the desired reservation. In some cases, it aimed to remedy mistakes which a State might have made or hasty choices that had led it to fail to make reservations when ratifying the treaty. Reservations made late might be expressly allowed by the treaty, as in the case of the late reservations formulated by the Governments of Greece and the United Kingdom to article 1, paragraph 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴ In other words, late reservations could be perfectly permissible in terms of their content. Since the reserving State went back in a sense on its consent to be bound, it was clear that all the other contracting parties must somehow agree to the reservation being made. To that end, it was reasonable to allow the other contracting parties an appropriate period of time to evaluate the late reservation, 12 months being the current practice of the Secretary-General, during which the contracting parties might indicate whether they had an objection to both the reservation's lateness and content or simply to the latter. It was in that spirit that he endorsed the Special Rapporteur's guidelines 2.3.1 (Reservations formulated late) and 2.3.2 (Acceptance of reservations formulated late).⁵

2. If the objection related solely to the content of the reservation, it should affect only the relations between the reserving State and the objecting State. The Special Rapporteur recognized the distinction between the two types of objection. That distinction should be given greater prominence in guideline 2.3.3 (Objection to reservations formulated late). A reference should be made in the text to the objection to a reservation being formulated late, thus also bringing the text into line with that of guideline 2.3.2.

3. The permissibility of late reservations gave rise to a problem of consistency with the regime established by

the 1969 Vienna Convention. Although it could be argued that the Convention did not resolve the issue and that the draft guidelines on late reservations merely filled a gap, the definition of reservations in article 2, paragraph 1 (*d*), and the text of article 19 of the Convention remained. Moreover, the definition of reservations in guideline 1.1 excluded late reservations. The problem was thus what to call late reservations. Since the term "reservations" was used in practice and the regime of those reservations, once permitted, was the same as that for other reservations, it was difficult to propose another term, at least once the late reservation had been permitted in the absence of an objection within the allowed time limit. Perhaps it would be better to refer not to "late reservations", but to "tentative reservations" until the time limit had expired. Although that question of terminology might be elucidated in the commentary, it would be a good idea to consider whether it might not be dealt with in the part of the draft guidelines dealing with definitions.

4. Late reservations were nonetheless a factor that complicated contractual relations and, as the Special Rapporteur rightly pointed out in paragraph 311 of his fifth report, they should be avoided as far as possible. There was thus no reason for the model clause, "reservations formulated after the expression of consent to be bound", in guideline 2.3.1, in any of the three alternatives proposed by the Special Rapporteur, since it appeared to encourage the phenomenon of late reservations by providing for the possibility of the inclusion in a treaty of a clause recognizing the permissibility of late reservations in a much more general manner.

5. He also did not see why the rule of the unanimity of the other contracting parties should also be applicable to simple interpretative declarations formulated late. The wording of guideline 2.4.7 (Interpretative declarations formulated late) was modelled on guideline 2.3.1, whereas, in general, there was no time limit for formulating an interpretative declaration and there could thus be no such thing as a late interpretative declaration. Although some treaties did set time limits, the draft guideline should cover only normal cases, with the usual wording "Unless the treaty otherwise provides". The unanimity of the contracting parties should be required only in cases in which a time limit had been set in the treaty itself.

6. In conclusion, he said that he generally agreed with the Special Rapporteur's proposals on late reservations and conceded that some of his comments were more a matter for the Drafting Committee, although they also related to substance.

7. Mr. HE said that the fifth report further clarified and supplemented the regime of reservations provided for by the 1969 and 1986 Vienna Conventions. Received with considerable interest by States and the Sixth Committee, the draft guidelines submitted so far successfully combined the regime of reservations of the Conventions with their application in practice. Although Part II of the report under consideration dealt with procedural questions regarding reservations and interpretative declarations in an in-depth, lucid and logical manner, the draft guidelines contained therein called for a number of comments.

⁴ *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December 2000* (ST/LEG/SER.E/19) (United Nations publication, Sales No. E.01.V.5), vol. II, pp. 254, 257 and 259.

⁵ See 2677th meeting, footnote 9.

8. The content of guidelines 2.2.1 (Reservations formulated when signing and formal confirmation) and 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation) did not give rise to any problem, but, as they both related to the same issue, namely, the formal confirmation of each reservation, it would be appropriate to combine the two in a single guideline, despite the reasons given by the Special Rapporteur in introducing his fifth report at the previous session.⁶ With regard to guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), he thought that the words in the first brackets should be deleted because the concept of “agreement in simplified form” was not commonly used in State practice. The second phrase in brackets should be retained. The same comment applied to guideline 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]).

9. The question of late reservations was extremely delicate and was the focus of discussion in literature and practice. The general view was that it should be strictly regulated; otherwise, the principle of *pacta sunt servanda* could be undermined and the stability of the international legal order endangered. As no fewer than four draft guidelines dealt with that issue, namely, guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), he wondered whether it was not possible to combine and reduce them to, say, two draft guidelines. As a general rule, a State could not formulate a reservation to a treaty after expressing its consent to be bound by it. But it should also be acknowledged that that rule was not absolute. If the permissibility of a late reservation was subject to strict conditions, such as unanimous or tacit acceptance by all the States parties or international organizations parties to a treaty, that would be a sufficient guarantee to prevent any abuse. In any case, the issue should be examined in depth, particularly in the Drafting Committee, bearing in mind the potential consequences for current law and State practice.

10. In closing, he said that he was in favour of referring the draft guidelines contained in Part II of the fifth report to the Drafting Committee.

11. Mr. LUKASHUK said that he welcomed the progress made in codifying the rules on reservations to treaties and supported the Special Rapporteur’s decision to rely on the provisions of the 1969 Vienna Convention. However, he was not convinced that there was any great significance in the distinction between the verbs “formulate” and “make”. Although it seemed more appropriate to say that a reservation was “formulated” rather than “made” at the time it was entered, in practice the two terms were used interchangeably, as, for example, in articles 19 and 20 of the Convention.

12. Commenting on the draft guidelines contained in the fifth report, he said that guideline 2.2.2 seemed to

be self-evident and would be better placed in the commentary. Concerning guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), he found the idea that such a reservation did not require confirmation unacceptable from a legal point of view. Reservations made in those circumstances were no less important than the others and, in any case, the idea was not borne out by practice.

13. He also suggested that guidelines 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.5 and 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision) should be combined and replaced by a single provision stating that interpretative declarations could be made at any time if they were not conditional. That possibility was provided for in the 1969 Vienna Convention. He was not convinced by guideline 2.4.7 because, if such declarations could not be formulated at any time, the treaty could not exist. Guideline 2.4.8 (Conditional interpretative declarations formulated late) dealt with the exception rather than the rule. Like the Special Rapporteur, he believed that, in such a case, the unanimous consent of the States concerned would be required. Pointing out that the Convention included a special regime for reservations to multilateral agreements endorsed by a limited number of States, he wondered whether it might be desirable to make it compulsory in such a case to have prior approval for reservations.

14. He agreed that the sixth report (A/CN.4/518 and Add.1–3) should be better focused. Establishing cooperation between the Special Rapporteur and the Special Rapporteur of the Subcommittee on the Promotion and Protection of Human Rights seemed a legitimate aim, but since work on the question of reservations was only in its early stages, it was not essential for the moment. In conclusion, he noted that the report reflected the view he had himself expressed and the observations made by the Sixth Committee.

15. Mr. DUGARD said that he did not agree with the view Mr. Lukashuk had expressed on the work on reservations to human rights conventions. Mr. Pellet had referred to developments in that field, including the decision of the Human Rights Committee in the *Rawle Kennedy* case. The Commission could, of course, adopt a wait-and-see approach, but, in a field where things were developing quite rapidly, it could find itself overtaken by events. He thought that it would be better to encourage Mr. Pellet to adopt a proactive approach and cooperate from now on with the bodies concerned in order to reach an early joint decision on the matter.

16. Mr. ECONOMIDES, referring to the draft guidelines submitted in the report, said that he supported guideline 2.2.1 as to substance, but, from the drafting point of view, he would prefer the words “the treaty subject to ratification” to be replaced by the words “the treaty being ratified”. In guideline 2.2.2, he wondered whether reference could be made to a “reservation” in connection with a text in the negotiation stage. The legal concept of a reservation applied to a text which had already been drafted, adopted and authenticated. At the time of negotiation, there were no reservations in the legal sense of the term, but only political positions. The wording of

⁶ *Ibid.*

that guideline and of the other guidelines that referred to negotiations, especially guideline 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), was open to criticism in that regard. Like the Special Rapporteur, he believed that guidelines 2.2.1 and 2.2.2 could be combined.

17. With regard to guideline 2.2.3, he agreed with Mr. He's preference for the second of the two bracketed expressions, which was more commonly used. He proposed that that guideline should be combined with guideline 2.2.4, the substance of which he also found satisfactory.

18. Guidelines 2.4.5 and 2.4.6 were also acceptable in substance. In guideline 2.4.3, the words "at any time" could be misleading and perhaps a starting point should be given to make it clear that the interpretative declaration could be formulated at any time after the final completion of the text.

19. Guideline 2.3.4 did not seem to fit into the Guide to Practice, since it was not useful and only complicated matters without adding anything new.

20. He agreed with the Special Rapporteur that late reservations should not be ruled out altogether, but should be placed in a strict framework, and the one proposed by the Special Rapporteur seemed reasonable and in line with international practice. Guidelines 2.3.1, 2.3.2 and 2.3.3 were therefore satisfactory. However, he did not think it wise at the present stage to insert model clauses, such as the one in guideline 2.3.1, which complicated the drafting of the text. Room could be made for such clauses later, when the work had been finished.

21. He had nothing to add on the substance of guidelines 2.4.7 or 2.4.8.

22. Mr. PAMBOU-TCHIVOUNDA said he agreed with Mr. Economides that it was necessary to specify the moment from which reservations could first exist and that such a concept should be included in the draft guidelines. At the time of the negotiation of a treaty, there could not be any reservations in the true sense; like interpretative declarations, reservations could come into play only from the time when the parties had, without yet committing themselves, reached agreement on the text of the treaty.

23. Mr. SIMMA said he agreed with Mr. Economides and Mr. Gaja that late reservations were undesirable in principle. He was not sure that that was made clear in the proposals by the Special Rapporteur. It was vital to avoid encouraging late reservations.

24. He also objected to the use of the term "authenticating" in the draft guideline that was proposed in paragraph 258 of the report as a merger of guidelines 2.2.1 and 2.2.2 and was to be entitled "Reservations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation", as well as in guideline 2.4.4. Article 10 of the 1969 Vienna Convention made it clear that signing was one of a number of procedures for authentication, so that signing and authentication should not be treated as equivalent. It would be helpful if the Special Rapporteur could clarify that point.

25. He agreed with Mr. Economides that reference could not be made to reservations at the negotiating stage and that in order to exist, a reservation must be expressly stated at the time of signature or ratification. The definition of a reservation should not be stretched beyond its ordinary meaning.

26. He encouraged the Special Rapporteur to follow closely the practice of reservations to human rights treaties and the work being done in that regard in the relevant treaty bodies as well as in the Sub-Commission on the Promotion and Protection of Human Rights. He also urged him to carry on with his in-depth work on those treaties.

The meeting rose at 11.05 a.m.

2679th MEETING

Wednesday, 23 May 2001 at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 1]

1. Mr. TOMKA (Chairman of the Drafting Committee) said that, following consultations, the Drafting Committee for the topic of reservations to treaties would be composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Al-Baharna, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Hafner, Mr. Kamto, Mr. Melescanu, Mr. Rosenstock, Mr. Simma and Mr. He (*ex officio*).

* Resumed from the 2676th meeting.