Document:-

A/CN.4/SR.2679

Summary record of the 2679th meeting

Topic:

Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

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.

Reservations to treaties[1] (*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]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. PAMBOU-TCHIVOUNDA commended the Special Rapporteur for his excellent fifth report (A/CN.4/508 and Add.1–4) on a critical aspect of the procedure regarding reservations and interpretative declarations. In reading it, he had realized that the topic constituted a major "off-shore deposit" with regard to the great mainland deposit constituted by the law of treaties. The subject-matter was difficult to codify, as could be seen by the body of work that had emerged from the 1969 and 1986 Vienna Conventions.

3. He was grateful to the Special Rapporteur for stressing the role of time in the formation of international legal norms and addressing incidents that could have an impact on their implementation. The Special Rapporteur's seemingly commonplace report was particularly revealing for three reasons. First, it was a reminder of the dynamic nature of reservations that was virtually inherent in their formulation, because the formulation was, as stated in paragraph 228, part of a process. Secondly, it showed the relative nature of reservations, which were valid solely by virtue of the subsequent echo to which their formulation must give rise, whether the echo was positive or negative. In any case, that echo had to be viewed in a temporal context. The Special Rapporteur rightly noted that the reservation was not enough in itself. Thirdly, and above all, the report demonstrated the strategic nature of reservations. The motivations behind the formulation of a reservation did not always yield to the logic of codified time. Whereas those motivations were more a part of the legal policy of States or international organizations, a reservation lent itself instead to a discretionary definition. Such motivations were likely to lead States and international organizations to dissociate themselves from a treaty, even though they had not yet committed themselves to applying it or, if they had, to withdraw from the circle of contracting parties. The formulation of a reservation was a politically charged moment and a politically self-interested act, the relevance of which, in the eyes of the other contracting parties, must be evaluated in the light of its validity.

4. In that connection, since the fiftieth session, in 1998, the Commission had accepted the fact that the 1969 and 1986 Vienna Conventions were limited and that the regime codified by articles 19 onwards of the Conventions were very incomplete. Part II of the fifth report, which was devoted precisely to the question of the critical moment at which a reservation was formulated, highlighted the discrepancy between practice and written law. The aim of the draft guidelines was to reduce the discrepancy, but that depended largely on practice, which itself depended on how States and international organizations made use of the guidelines, something that was not unique to reservations. But it would have to be certain that the reservations concerned were those that fell in the *ratione temporis* class.

5. He had already expressed the view that the notion of reservations was unsuited to the notion of negotiation. The purpose of negotiations was to conclude a treaty, and they preceded the treaty. Conversely, since it aimed to exclude or amend the legal effect of a treaty provision, a reservation could be formulated only in relation to a treaty—or in any case to a text adopted following negotiations. Thus, the adoption of a text was the reasonable starting point for an acceptable formulation of a possible reservation. Owing to its intrinsic nature as a unilateral act, a reservation did not lend itself to negotiation. At the other extremity of the *ratione temporis* chain, the formulation of a reservation depended upon the expression of consent by the State or the international organization to be bound through the modalities set out in positive law or, in exceptional cases, after the expression of consent to be bound. That was the temporal framework of late reservations or interpretative declarations, which the Special Rapporteur agreed were admissible provided they were unanimously accepted by the parties to the treaty.

6. Personally, he was somewhat uneasy about the temporal framework of late reservations and interpretative declarations. Some difficulty was posed by the situation of late reservations formulated after the expression of consent to be bound if no account was taken of an essential factor that had not been given due attention in the report, namely, the deferred entry into force of the treaty. Must the same consequences be attributed, on the one hand, to a reservation formulated after the expression of consent to be bound but prior to the entry into force of the treaty and, on the other, to a reservation formulated after the entry into force of the treaty? The Special Rapporteur had not addressed that question, although it directly concerned the determination of the moment of formulation of reservations or interpretative declarations. That question highlighted the role of the depositaries and, had it been dealt with properly, would have resulted in late reservations being treated differently in a guideline or guidelines, namely as an absolute prohibition on reservations formulated after the entry into force of the treaty. That subject should have at least been evoked.

7. As to guideline 2.2.1 (Reservations formulated when signing and formal confirmation), he agreed with what the Special Rapporteur had suggested on the economy of the draft, provided that the terminological confusion caused by the phrase "a reservation must be formally confirmed by the reserving State or international organization" was addressed. The 1969 and 1986 Vienna Conventions did not attribute the same meaning or scope to formal confirmation. He proposed the insertion, after the words "by the reserving State" of the phrase: "in the instrument of ratification, acceptance or approval". It would distinguish between confirmation by the State and formal confirmation by an international organization, as defined in article 2, paragraph 1 (*b bis*), of the 1986 Vienna Convention, namely the "act corresponding to that of ratification . . . ,

[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).

whereby an international organization establishes . . . its consent to be bound".

8. The word "negotiating" should be deleted from the title and the text of guideline 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation). The addition that he had suggested for guideline 2.2.1 regarding the notion of the formal confirmation by the State should be inserted in guideline 2.2.2. Again, a more direct wording for the beginning of the first sentence would read: "A reservation formulated when . . . of the treaty . . . must be . . . ". He was not in favour of a condensed wording of guidelines 2.2.1 and 2.2.2 as suggested by the Special Rapporteur in paragraph 258 of the report.

9. The words in square brackets "an agreement in simplified form", in 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]), should be deleted for the sake of consistency with the usual terminology in the law of treaties. With reference to guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), he was not certain that the confirmation was not required where, or even because, the treaty made express provision for an option to formulate a reservation at the time of signature. He was not convinced about the exclusion of the confirmation requirement, because the effects of signature in the case of guideline 2.2.4 were not identical to those under guideline 2.2.3. Guideline 2.2.4 should therefore be recast to include the confirmation requirement. By and large, his comments on reservations could be transposed to interpretative declarations, with the exception of a few nuances.

10. Lastly, with regard to conduct after the expression of consent to be bound, he was in favour of guideline 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), namely late reservations or interpretative declarations. He would simply advocate replacing the word "unless" towards the end of guideline 2.3.1 (Reservations formulated late) by "provided". He wished to join other members in proposing that the draft guidelines be referred to the Drafting Committee.

11. Mr. HAFNER said that the Special Rapporteur had made a serious attempt to address all the complex ramifications of a topic that went to the very core of treaties, in particular the basic rule of *pacta sunt servanda*, which was certainly part of *jus cogens*.

12. In his view, paragraph 248 of the report gave a wrong impression about confirmation and reservations in the case of State succession. It spoke only of the successor State as such, and the footnote thereto referred to article 20, paragraph 1, of the 1978 Vienna Convention. That was incorrect, since that article of the Convention related only to newly independent States and hence could not be generalized. To be faithful to that instrument, a clear distinction must be drawn between the two categories of States.

13. He also wondered why it was necessary to distinguish between the different occasions when a reservation could be formulated. As he saw it, a reservation could be formulated at any time prior to the expression of consent to be bound. The point was that, if it was formulated earlier, it must be confirmed. Consequently, guidelines 2.2.1 and 2.2.2 could simply be merged to read: "If formulated prior to expressing the consent to be bound, a reservation must be . . . ".

14. Again, was guideline 2.2.4 really needed? Was it necessary to reflect in the draft guidelines, which were of a general nature, every treaty possibility? Would not a reference to a *lex specialis* rule suffice? If the Commission tried to cover everything, it might forget one possibility or another, and then the question of interpretation would arise. A simple solution was therefore preferable: to say that the Commission was not dealing with *lex specialis*, but with general rules.

15. As to conditional interpretative declarations, he was compelled to confess that he had difficulty following the line of reasoning. Did an interpretative declaration become conditional only because States expressed their wish to confirm it? Who decided, for example, that the declaration by Austria[4] upon signing the European Convention on the Protection of the Archaeological Heritage was conditional? He did not recall any discussion in Austria on whether it was a "conditional" or "normal" interpretative declaration. Was an interpretative declaration conditional only because it was confirmed in the instrument of ratification? If it had not been confirmed, was it an ordinary interpretative declaration or did it not count? Paragraph 269 referred to the appropriateness of applying the regime of reservations to those declarations. Why was it appropriate?

16. As for late reservations, guideline 1.1 (Definition of reservations) implied that time was necessarily part of the very definition of a reservation. After a long discussion, the Commission had accepted the need for a definition and expressed its intention not to deviate from the 1969 Vienna Convention, a view that had been firmly endorsed by the General Assembly. That also included the article on the definition of reservations. The question thus arose as to why the Commission should care about something called a "late reservation". If the definition in the Guide to Practice was a true definition, a late reservation was either a contradiction or simply did not exist.

17. He was, of course, fully aware that a certain practice did exist. But it meant either that the definition was wrong or that the acts in question were not reservations. One could imagine that so-called late reservations were also reservations, but as such inadmissible. But that would blur the definition; such an argument was reminiscent of the earlier discussion in the Commission on the difference between definition and conditions of admissibility.

18. If the Commission altered the definition, the whole regime of reservations would apply to late reservations. There was no legal justification for another regime since the 1969 Vienna Convention did not offer one. If the definition were changed, it would be an invitation to States to make such reservations, since no treaty explicitly excluded late reservations. Hence, States could always make

[4] United Nations, *Treaty Series*, vol. 788, No. 11212, p. 240.

reservations within the limits of article 19 of the Convention. Accordingly, and given the definition provided by the Convention and the determination of the Commission to respect that definition, there was no other choice but to call the instruments in question something other than reservations. He shared the concerns expressed by Mr. Pambou-Tchivounda about late reservations. Of course, the Special Rapporteur was quite right: those instruments were in fact called reservations, but it was a matter of no relevance to the definition. There was no need to call them reservations, since the Commission did not apply exactly the same regime as it did to genuine reservations. Why could they not be to referred to as a particular form of *inter se* treaties? The Convention allowed for such a possibility. Any other solution would only complicate matters. For example, did guideline 2.3.2 (Acceptance of reservations formulated late) also apply to reservations to the constituent instruments of international organizations? Plainly, there was no need to deal with late reservations. One could imagine a guideline stating the obvious, which could already be deduced from the definition, namely: "A declaration made after expressing the consent to be bound by a treaty is not a reservation, however phrased or named."

19. With regard to late interpretative declarations, he wondered how far the relevant guidelines were in conformity with article 31, on the general rule of interpretation, of the 1969 Vienna Convention. Under paragraph 3 of that article, an agreement had to be reached in order to influence the interpretation of the treaty. The guidelines seemed to make that requirement only for so-called conditional interpretative declarations. Thus, a certain vagueness remained. Article 31 of the Convention must be taken into account in dealing with late interpretative declarations.

20. Lastly, the draft guidelines should be referred to the Drafting Committee on the understanding that the Committee addressed the problems to which he had alluded.

21. Mr. MOMTAZ, commending the Special Rapporteur for the calibre of his report, said he was in full agreement as to the utility of late reservations. Such an "institution" might simplify the search for universality in treaty instruments and broaden the scope of closed multinational treaties. They might correct a number of errors committed during the ratification of treaties and in certain cases even enable the executive to allow for a change in the policy of parliament following a change in the political majority. Thus, the use of a late reservation might possibly allow a State to avoid withdrawing from a treaty instrument. Despite its incontestable advantages, it was important not to underestimate the threat that abuses of that practice might pose to the stability of treaty relations. To allow a State that had accepted an obligation to go back on its decision was undoubtedly contrary to the principle of *pacta sunt servanda*, a norm of *jus cogens*. Consequently, such a reservation should be subject, at least where treaties with a limited number of parties were concerned, to the consent of all the contracting parties. It should in any case be emphasized that recourse to that practice was justifiable only in quite exceptional circumstances and that the State formulating such reservations must invariably justify them. The proposed guideline must in no circumstances be interpreted as an encouragement to States to have recourse to that practice. Furthermore, such reservations should perhaps go by a different name: they did not, strictly speaking, constitute reservations since the regime proposed was quite different from that of reservations or from the regime of general law.

22. He fully shared the view expressed by Mr. Gaja on late interpretative declarations. Every State party to a treaty instrument was entirely free to make, at any time, declarations concerning the treaty to which it was a party. Accordingly, no restriction must be imposed on States in that regard. What was important was to avoid the increasingly frequent practice whereby interpretative declarations were transformed into disguised reservations and used to circumvent clauses in multilateral treaties restricting or prohibiting recourse to reservations.

23. Lastly, he wished to endorse Mr. Economides's comments regarding the possibility open to the parties to a negotiation to formulate reservations. He entirely agreed that a threshold should be established beyond which it would be permissible to formulate reservations. In the case of multilateral treaties, a text authenticated by the negotiators and adopted would seem an acceptable threshold. To allow reservations to be formulated at the negotiating stage would jeopardize the negotiation process and it would contravene the principle of good faith on which the negotiations must be based. In conclusion, it was his view that the draft guidelines contained in Part II of the fifth report should be referred to the Drafting Committee at the current time.

24. Mr. MELESCANU said that the hardest part of the exercise in which the Commission was engaged was to reconcile two conflicting needs. On the one hand, there was a legitimate concern to ensure the stability of international treaties and their legal effects. Clearly, a very restrictive approach to reservations was one way of securing application of the *pacta sunt servanda* principle. On the other hand, the *rebus sic stantibus* principle must also be respected: States had the right to express their wishes with a view to creating legal obligations. Consequently, too rigid an approach to the institution of reservations was undesirable, and, in his view, interpretative declarations served as the most valuable instrument available in that regard. Furthermore, while the first concern of the Commission should be to codify existing rules on the basis of the provisions of the Vienna Conventions and State practice, interpretative declarations offered fertile ground for the progressive development of international law. The Special Rapporteur deserved a special vote of thanks for his ground-breaking work on developing the institution of interpretative declarations, an institution that was to be accorded full recognition at the current time. The Special Rapporteur's proposals should be referred to the Drafting Committee for early finalization.

25. Having been absent from the previous session of the Commission, he wished to take the opportunity to make a few general comments and suggestions on the topic of reservations to treaties. First, on a drafting matter, he agreed that the term "formulation" was the one that should be applied to reservations and interpretative declarations. Secondly, he fully endorsed the view that reservations could not be formulated when negotiating an international treaty. Such reservations would, in effect,

simply be proposals to change the provisions of the treaty under negotiation. As Mr. Economides had pointed out, a reservation to a specific provision could be formulated only once the text of the treaty was open for signature. Nevertheless, to set the record straight, it should be noted that the Special Rapporteur was not proposing to extend the institution of reservations to include reservations formulated at the time of negotiation. Instead, the Special Rapporteur was proposing that, were a State to announce during the negotiation phase that it was formulating a reservation—and a State could not be prevented from so doing—that reservation must be confirmed before it could be considered a reservation within the meaning of the rules that the Commission was considering. The issue was thus essentially one of drafting, and it could be left to the Drafting Committee to find a formula that, without encroaching on the right of States to express themselves freely, took account of the fact that it was not possible to formulate a reservation to a provision that did not yet exist in final form. He thus expressed his own reservation with regard to guideline 2.2.2. Either the reference to "reservations formulated when negotiating" should be deleted, or else it should be clearly stated that it was not possible to formulate reservations before a final text had been agreed.

26. *Pace* Mr. Pambou-Tchivounda, the idea of combining guidelines 2.2.1 and 2.2.2 was attractive: the two could easily be combined into a single, unambiguous provision eliminating interpretations that had not been intended by the Special Rapporteur. He also disagreed with Mr. Economides's expressed preference with regard to the formulation of guideline 2.2.3, also supported by Mr. Pambou-Tchivounda. The generic expression "an agreement in simplified form" was greatly preferable to the variant proposed.

27. For reasons given earlier, he regarded guidelines 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 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]) and 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision) as extremely important provisions that would enable the Commission to resolve a number of problems raised by the application of a strict regime to reservations and a flexible one to interpretative declarations.

28. As for late reservations and interpretative declarations, the guidelines should be very restrictive in the case of late reservations but more flexible, indeed, perhaps very flexible, in the case of late interpretative declarations, which enabled States to express their wishes and political position on developments in application of an international agreement, while safeguarding the stability of the treaty. He urged the Special Rapporteur to consider the possibility of including a separate guideline on agreements between a limited number of parties. The consent of States parties should be required before a late reservation to such a treaty could be formulated. An obvious example was article 5 of the North Atlantic Treaty. If the possibility of formulating a reservation to that article without the consent of the other States parties was accepted, the very existence of the Treaty, or at least the continuing status of the State as a party thereto, would be jeopardized. He endorsed the view that two conditions must be met in the case of late reservations, one substantive and the other procedural. If the treaty contemplated the possibility of formulating reservations regarding certain provisions, or of formulating late reservations, flexibility should be the rule. As for the timing of the formulation, the consent of the other parties was a fundamental element that must always be taken into account.

29. Mr. ECONOMIDES said that the Commission could not prohibit States from formulating late reservations, even if it wished to do so. Late reservations were not unilateral reservations, but proposals for reservations that were subsequently accepted by all the other States parties, not expressly but tacitly, in a process whereby international agreement emerged on the proposed reservation. In such a situation, the late reservation ceased to be a unilateral act of a State, instead falling within the realm of treaty relations. Accordingly, sovereign States could not be told that they had no right to accept such a reservation.

30. Mr. CRAWFORD said he agreed with Mr. Economides and, indeed, would go further. There were severe risks in assimilating late reservations to reservations proper, given the extremely liberal regime that had developed in the context of reservations to the law of treaties. A late reservation was in effect a proposal to amend the treaty. It also posed the serious difficulty that it was not enough merely to give an objecting State the right to exclude the effect of the late reservation in its relations with the late-reserving State; there were existing treaty relations, and other States were entitled to the benefit of the *pacta sunt servanda* principle vis-à-vis the other parties to the treaty in the absence of general agreement to the contrary.

31. Mr. KAMTO said that the Special Rapporteur was to be congratulated on Part II of his fifth report, which cast new light on an austere and potentially arid topic. Nonetheless, the Special Rapporteur's commendable wish to treat the topic exhaustively risked sowing confusion in the minds of the ultimate addressees of the draft guidelines, namely, States.

32. Guideline 2.2.1 posed no problem. The difficulties commenced with guideline 2.2.2, which appeared to modify the regime of the Vienna Conventions. It was doubtful whether the provision was in fact modelled on article 23, paragraph 2, of the 1986 Vienna Convention, as the Special Rapporteur claimed in paragraph 257 of his report, for it referred to reservations formulated "when negotiating, adopting or authenticating" the text of the treaty, whereas the article cited referred only to reservations formulated "when signing the treaty subject to ratification . . . ". It had been pointed out that what could be called a reservation formulated at the negotiating stage was generally only a negotiating position, often one abandoned before the conclusion of the treaty. However, it sometimes happened that, during the negotiations at a diplomatic conference at which the provisions of the treaty were subsequently adopted by consensus without the treaty itself being adopted as a whole, a State formu-

lated a reservation regarding a specific provision whose adoption by consensus it did not wish to block. An example was the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that had led to the adoption of the Rome Statute of the International Criminal Court, where precisely such reservations had been formulated in the interests of preserving consensus. Nonetheless, it had to be acknowledged that the concept of a "reservation" was premature at the negotiating stage, a stage at which the text of the treaty remained provisional pending the adoption of the treaty as a whole. The draft guidelines would thus benefit from the exclusion of reservations formulated at the negotiating stage.

33. He had no strong views on merging guidelines 2.2.1 and 2.2.2. Mr. Hafner's proposal was attractive, but the pedagogical considerations underlying the draft guidelines perhaps pleaded in favour of keeping the two separate.

34. With reference to guideline 2.2.3, the expression "an agreement in simplified form" was well established in doctrine, yet its precise meaning might not be apparent to all. Nor was the second option, the expression "a treaty that enters into force solely by being signed", entirely acceptable, as such treaties in fact entered into force only when a specified number of signatures had accumulated. The best formulation would thus be "a treaty not subject to ratification, act of formal confirmation, acceptance or approval".

35. While conceding that some State practice did exist with regard to late reservations, he was of the view that the elaboration of a guideline on the question fell within the realm of progressive development of international law. The guideline clashed with the *chapeau* of article 19 of the 1969 Vienna Convention and also conflicted with a substantial body of doctrine. But the Special Rapporteur's explanation argued in favour of the Commission looking into the matter in greater depth. The real and serious risk of destabilization of the treaty posed by such a practice had been sufficiently stressed: the legal security of the States parties to a system of multilateral treaty obligations was at stake. Accordingly, late reservations could be admissible only if more rigorous conditions were set for their formulation.

36. The condition contained in guideline 2.3.1, mentioned in paragraph 310, was not entirely satisfactory. To reflect the requirement of unanimity—rather than the acceptance or otherwise of its content—on which the principle of the formulation of a late reservation was conditional, the Special Rapporteur used the formulation "unless the other contracting Parties do not object to the late formulation of the reservation". The absence of an objection as a condition for the formulation of a late reservation meant, *a contrario*, that the silence of a party to the treaty would be interpreted as acquiescence. Yet, for a variety of reasons, many States were unable to monitor meticulously the life of treaties, even those by which they were bound. The absence of an objection could result in the surreptitious acceptance of late reservations to which those States would probably be opposed. Thus, the mere absence of objections would not suffice: each and every party to the treaty must give its express consent to the formulation of the late reservation. In that connection he endorsed Mr. Gaja's suggestion concerning dispensatory agreements, which would amount to a series of bilateral agreements between the various parties to the treaty on the one hand, and the State wishing to formulate the reservation on the other. In no circumstances must unanimity be taken for granted. Provided there were such express unanimity, a late reservation might appear in some cases to be an offer of revision or amendment, and might well be interpreted as such. In any case, the regime governing the principle of late reservations could be a special agreement concerning the original convention, whereby States were enabled to state their position. That could serve to limit the risks mentioned by members of the Commission. He agreed that the regime for late reservations must be the same as for ordinary ones, but it was reasonable to argue that an objection to a late reservation could itself be made late, rather than at the time the reservation was made. It was not clear from guideline 2.3.1 whether a late reservation was possible when the treaty was the constituent instrument of an international organization. In that case, he wondered whether the acceptance in principle of such a reservation would be the prerogative of the international organization, as would be the case for ordinary reservations under article 20, paragraph 2, of the 1969 Vienna Convention, or whether each member State of the organization had to be consulted individually. That question warranted examination.

37. As for conditional interpretative declarations, he had concluded that many of them, in practice, were really disguised reservations, and he supported the Special Rapporteur's efforts to place them in the same framework, especially as they posed a real threat to the principle of *pacta sunt servanda*. That was not the case with late reservations, which, because of the manner of their acceptance, were treaty-based and did not infringe the principle.

38. Mr. GAJA said that, according to Mr. Kamto, express consent should be required for late reservations, although in practice it was not. If a hundred or so States were required to express a positive attitude towards a late reservation, the risk would be too much flexibility, allowing late reservations with regard to the accepting States. The unanimity rule as framed in guideline 2.3.1 was much stricter than that. Referring to paragraph 304 of the fifth report he explained that his position had been misunderstood: the original text from which the quotation was drawn referred to the unanimity of other contracting States in acquiescing to late reservations.

39. Mr. CRAWFORD said that, in appearing to tolerate late reservations, the Commission must be careful not to contradict article 41 of the 1969 Vienna Convention, on the modification of multilateral treaties between two or more parties. Even where two parties entered into an express agreement that had the effect of modifying a multilateral treaty, they could do so only in the circumstances laid down in that article. A general right of a State to enter a late reservation on condition of passive acquiescence by other States could easily contradict the principles of the Convention, and especially article 41, paragraph 1 (*b*) (ii), since it would not relate to a provision derogation from which was incompatible with the object and purpose of the treaty as a whole. There was an important connection

between the question of late reservations and the question of the compatibility of reservations generally. If late reservations were equated with reservations made at the time, following the understandable argument that a State was under no obligation to become a party to a treaty and was therefore entitled to insist on something, the same argument lost all its force when applied to late reservations. In the case of late reservations, there must be some objective test or the principle of *pacta sunt servanda* would be abrogated.

40. Mr. PELLET (Special Rapporteur) said that, although one could agree that a late reservation was an offer to amend a treaty, it was not an offer to amend the substance of the treaty, merely to amend the reservation clause, whether such a clause existed or not. That was why he had drawn a careful distinction between objection or the absence of objection to the principle of late reservations, and the situation that arose once that principle was accepted. A reservation did not in itself amend a treaty.

41. Mr. HAFNER said he was anxious to clarify the distinction drawn by the Special Rapporteur. Was the first of the cases to which he was referring an agreement to modify a treaty so as to make late reservations admissible, and the second an agreement on the late reservation itself? There was a difference. He was very much in favour of considering late reservations as *inter se* agreements in accordance with article 41 of the 1969 Vienna Convention. However, if it was said that there was an agreement on late reservations, did that mean that other States could also make use of such an agreement, or did the agreement in question relate only to a specific case of a specific late reservation?

42. Mr. KAMTO explained that by a "bilateral agreement" he had meant that if unanimity was required, in practical terms a single objection would scupper acceptance of the principle of a reservation. As he understood it, the global agreement on acceptance would comprise a series of bilateral agreements, like some multilateral treaties which themselves consisted of a set of bilateral obligations. Thus a general agreement, if unanimously achieved, would constitute a series of bilateral agreements among the reserving States and each of the parties to the convention in question. Logically speaking, therefore, the result would be a new agreement offering to amend or revise it. He agreed with the Special Rapporteur that such an agreement would relate only to the principle of the reservation or the reservation clause. Mr. Hafner had asked whether any other State could use the agreement to formulate a reservation. The answer must be in the affirmative; otherwise, it was difficult to see how special status could be granted to any State, which had requested a revision, and not to others.

43. Mr. RODRÍGUEZ CEDEÑO said he agreed that the procedure for making reservations and interpretative declarations could not be regarded as analogous to the conclusion of treaties, the two being distinct in a formal sense. Reservations and interpretative declarations were independent unilateral acts in the context of treaty relations, even though they required the consent of other parties to the treaty, or their subsequent acceptance, in order to have legal effect.

44. In referring to reservations and interpretative declarations, the Special Rapporteur used the term "formulate" rather than "make" as sometimes used in the 1969 and 1986 Vienna Conventions. Such acts, being dependent on the consent of others, did not take legal effect until authorized by the treaty, whereas independent unilateral acts took effect from the time of their formulation, although they could not be concretized until the addressee made use of the right granted by the author of the act. A distinction should be drawn between the origin or formulation of a unilateral act and its concretization, which occurred when the relationship became a bilateral one outside the treaty framework. The use of the term "formulate" in the draft guidelines submitted by the Special Rapporteur was appropriate, except in guidelines 2.3.1, 2.4.7 (Interpretative declarations formulated late) and 2.4.8 (Conditional interpretative declarations formulated late), which spoke of the formulation of reservations or declarations if they did not elicit objections from the other parties. There appeared to be a confusion between "formulation" and "concretization". The State or an international organization could formulate a reservation at any time; the question was whether it was admissible or accepted and produced its legal effect. He would prefer to redraft those guidelines to say, "the formulation of a reservation or interpretative declaration will not produce effects . . . ". However, with reference to guideline 2.2.2 he fully agreed with the remarks of other members, including Mr. Economides and Mr. Pambou-Tchivounda, about the formulation of reservations during the negotiation phase. At that stage, the legal act had not been concluded; the "reservation" would be formulated in relation to a legal instrument in the drafting stage and could not produce any legal effects. It would have political implications that could not go beyond the negotiating process. The reservation would have to be reiterated—not confirmed—at the time of signing or ratification, when the consent of the State to be bound became complete. He approved of the wording of guideline 2.2.1. If the treaty was formally ratified or confirmed, the reservation should be regarded as being formulated at that time. However, in the case of agreements in simplified form, reservations or interpretative declarations could be formulated when signing and did not require subsequent confirmation, as made clear in guidelines 2.4.5 and 2.2.3. He also agreed with guideline 2.2.4: a reservation formulated at the time a treaty was signed, and for which express provision was made in the treaty, should be regarded as being valid from that time. As for ordinary and conditional declarations, a State could make the former at any time, but for the reasons explained by the Special Rapporteur, the latter could be made only at the time of signature or of expression of consent to be bound.

45. In a footnote to paragraph 268 of his fifth report, the Special Rapporteur raised the question whether confirmation of an interpretative declaration made when signing constituted an indication of its conditional nature. He doubted whether such a conclusion could readily be drawn. Venezuela had made an interpretative declaration[5] relating to the entry into force of the United Nations Convention against Illicit Traffic in Narcotic Drugs and

[5] See *Multilateral Treaties* . . . (2678th meeting, footnote 4), vol. I, p. 400.

Psychotropic Substances. Its intention in doing so was merely to align the Convention with its own domestic law, not to place conditions on its participation.

46. Lastly, he wished to express concern at the formulation of late reservations and interpretative declarations, which affected the stability of legal relationships among States and undermined the *pacta sunt servanda* principle. Legal theory and jurisprudence were at one in saying that once a legal instrument had entered into force no reservations could be admitted, and the same applied to interpretative declarations. States were not entitled under international law to modify their obligations unilaterally by means of such acts, which imposed on other States obligations to which they had not consented. The ordinary regime of reservations, by comparison, occurred in a treaty context and required the participation of the other parties for the reservation to come into force. The question of late reservations was a very delicate one that must be studied in a balanced manner to avoid the adoption of any rule that might undermine inter-State relations. Indeed, the express consent of other States was fundamental for reservations or interpretative declarations to take effect. He agreed with Mr. Economides that such unilateral acts could not be prohibited, but they were distinct legal acts and must be duly regulated.

47. Mr. YAMADA, referring to guideline 2.2.2, said that, according to several members of the Commission, reservations could not be formulated in the course of negotiating a treaty, because the text of the treaty was not yet finalized. That was true in theory. However, the practice of formulating reservations at the negotiating stage did exist. A reservation was by definition a unilateral statement by a State and in some cases a State would present its reservation to the other parties to the negotiation in order to secure their consent. Such a reservation was part of the negotiation package. When the Special Rapporteur had been dealing with "substitute" reservations, which had resulted in guideline 1.1.6 (Statements purporting to discharge an obligation by equivalent means), he had himself referred to a reservation by Japan to the Food Aid Convention, 1971,[6] a reservation that currently fell under guideline 2.2.2. Japan had sought to ensure that other parties to that Convention would not object to its reservation to providing assistance to developing countries in the form of rice and fertilizer rather than wheat and for that purpose had formulated the reservation during the negotiations, a successful move which was afterwards confirmed when Japan consented to be bound by the Convention. The Special Rapporteur had cited other examples in support of guideline 2.2.2.

48. He agreed with other members that late reservations destabilized the treaty regime and should be discouraged. On the other hand, reservations in themselves afforded a degree of flexibility that helped to secure wider participation in a treaty and to deter parties from withdrawing. He recommended the practice of the United Nations Secretary-General, as depositary for multilateral treaties, which was based on the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of the agreement. That statement placed a stringent condition of unanimity on the acceptance of late reservations, and he saw no harm in such acceptance provided the unanimity rule was applied. According to Mr. Hafner, a late reservation was no reservation at all. That might be true, and it might have to be called something else, but he would prefer the term "late reservation" to "amendment".

49. The question of impermissible reservations had been raised by Mr. Crawford and must be dealt with, and the point concerning the legal consequences of late reservations was in fact germane to reservations in general. He therefore supported guideline 2.3.1. However, he was hesitant in supporting the Special Rapporteur's proposal, in paragraphs 311 and 312, for a model clause to be included in the treaty. Such a clause might help to avoid ambiguity, but might also give the impression that the Commission was condoning the practice of late reservations. He would prefer to decide upon the issue in connection with other model clauses the Commission might formulate.

50. The Special Rapporteur was endeavouring to formulate guidelines on State practice in respect of reservations which had developed since the 1969 Vienna Convention and did not always comply with the regime on reservations in the Convention itself. It was important to deal with such "irregular" reservations.

51. Mr. ROSENSTOCK said that some of the present difficulties in dealing with the topic were due to the use of terms that were slightly odd, such as "a reservation in the negotiation". The starting point on reservations was the freedom of States to opt in or out of agreements, and the principle of *pacta sunt servanda*. Almost everything else followed, as a matter of common sense, from there. Mr. Kamto wanted to reverse the principle of non-objection by insisting on express and unanimous acceptance of a late reservation. Late reservations were not the end of the world: they reflected a State's capacity to opt out of a treaty and then to opt back in by negotiating conditions amounting to reservations. That was a cumbersome way to do business, however. The risk to *pacta sunt servanda* was reduced if what would normally be regarded as a reservation after the fact was permissible, as long as nobody objected. Acceptance of a late reservation could be signalled by the absence of objection or, more rigorously, by the agreement of all concerned. What would be most useful, in terms both of preserving the integrity of *pacta sunt servanda* and of permitting States to find a way to record and maintain existing agreements, was a largely practical matter. The sooner the Commission began inching its way through the problem, point by point, the better.

52. Care should be taken about making excessive refinements that caused non-existent distinctions to be drawn. He found it hard to understand the difference, in terms both of the intent and of the effect, between a conditional understanding and a reservation.

53. The Commission should at some early point turn its attention once again to the unity of the treaty regime. It had already expressed a preliminary reaction that must eventually become its considered view, and the end of the quinquennium was perhaps appropriate for that purpose.

[6] See *Yearbook . . . 1999*, vol. I, 2597th meeting, para. 9.

54. Mr. KAMTO said that Mr. Yamada's comments aptly illustrated the point that he himself had made earlier. During the negotiation of a treaty, and especially when it was to be adopted by consensus, a State could make what could be called a reservation but was in fact a negotiating position. The Japanese reservation had been discussed and negotiated, and perhaps because no agreement had been reached on its content, it had had to be confirmed later. As long as the provisions of the treaty were evolving and until the treaty was definitively adopted, one could not speak of reservations.

55. As to Mr. Rosenstock's comments, while acceptance of late reservations was primarily a practical matter, all of the practical consequences had to be examined. If one State asked to make a late reservation and was permitted to do so, that meant that all the other States parties could do likewise. The late reservation could thus scuttle the entire treaty. What was the objective of the Commission, to preserve the stability of treaties, or to condone the renegotiation or even negation of a treaty by devious means? Hence the need to strengthen the rules and regulations governing the formulation of late reservations.

56. Mr. AL-BAHARNA said he was grateful to the Special Rapporteur for the thorough analysis in his fifth report. Citing paragraph 220 of the report and the summary of the Special Rapporteur's introduction,[7] he said that the 14 draft guidelines were acceptable on the whole, insofar as they were modelled on the 1969 and 1986 Vienna Conventions. Guideline 2.2.1, for example, followed article 23, paragraph 2, of the 1986 Vienna Convention. It provided that a reservation concerning a treaty that was subject to ratification required formal confirmation at the moment of signature, even if confirmation had been expressed on the occasion of the adoption of the treaty. In such a case, the date of formal confirmation of the reservation was to be considered as the moment of signature or expression of consent to be bound by the treaty.

57. Guideline 2.2.2 related to a reservation formulated during the negotiation of a treaty and indicated that in such a case, in order to be considered valid, the reservation had to be confirmed at the moment of expression of consent to be bound. That, too, was acceptable, on the grounds that a reservation could be made during the stage of negotiation of a treaty. Guidelines 2.2.1 and 2.2.2 should not be combined, because they were of a different nature, for the cogent reasons set out in paragraph 257 of the report and such a course would make the formulation unnecessarily confusing.

58. Guideline 2.2.3 stated that subsequent confirmation of a reservation was not required when the reservation was formulated at the moment of signing a treaty that entered into force upon signature, i.e. without the requirement of ratification. Paragraph 259 of the report referred to such treaties as agreements in simplified form. It went without saying that a reservation made during the process of negotiation or adoption of a treaty required confirmation at the moment of signature. He preferred the second bracketed phrase for both the title and the text of the guideline, "a treaty that enters into force solely by being signed", or an alternative formulation such as "a treaty that enters into force solely on the date of its signature".

59. Guideline 2.2.4 concerned a treaty that expressly provided for the formulation of a reservation upon signature. In such a case, even if formal ratification was required, the reservation did not need formal confirmation upon the expression of consent to be bound. He could not see, however, why a reservation could not also be made at the time of ratification.

60. Guidelines 2.4.4, 2.4.5 and 2.4.6 concerned similar cases relating to interpretative declarations and called for no comments. As for guideline 2.4.3, the first bracketed phrase would be preferable. Guideline 2.3.1 posed no difficulties.

61. Mr. TOMKA said that the Commission had spent several years building solid foundations for the draft guidelines and was currently working on the ground floor. In the case of late reservations and reservations formulated during the negotiation of a treaty, however, he wondered whether the floor was properly nailed to the foundations. In view of the expectations of practitioners, he thought that the first reading of the Guide to Practice should be completed at the fifty-fifth session, in 2003, and the final reading at the fifty-seventh session, in 2005. The Commission should not attempt to reformulate the provisions of the 1969, 1986 (and 1978) Vienna Conventions, but rather to provide clarification of them. He agreed with the Special Rapporteur's opinion, set out in the first footnote to paragraph 259 of his fifth report, about the advantage of deviating as little as possible from those instruments.

62. While he saw no specific problems with guideline 2.2.1, he had serious doubts about guideline 2.2.2. No examples of State practice were provided and the guideline was contrary to the basic provision on reservations in article 19 of the 1969 Vienna Convention. During the negotiation of multilateral treaties, States quite frequently made statements or declarations, but they were not to be viewed as reservations. If a State wished such an utterance to be regarded as a reservation, it had to formulate it when formally signing or acceding to a treaty. There were practical problems as well. The publication entitled *Multilateral Treaties Deposited with the Secretary-General* reproduced no statements or declarations made during the conferences at which conventions or treaties were adopted. Indeed, it would be difficult for it to do so, as the verbatim records and other documents of conferences were as a rule published only after several years had elapsed. He did not think guideline 2.2.2 should be sent to the Drafting Committee, and the Special Rapporteur himself, in paragraph 257 of his report, admitted that the provision was tantamount to adding to the text of the Vienna Conventions a possibility that they did not contemplate.

63. Guideline 2.2.4 gave an interpretation of article 23, paragraph 2, of the 1969 Vienna Convention as being ap-

[7] See 2677th meeting, footnote 9.

plicable only where a treaty was silent about the possibility of making reservations. The Special Rapporteur's argument was that, otherwise, a treaty provision envisaging the possibility of reservations upon signature would have no useful effect, but that was not true: the effect would be to avert a discussion of whether a reservation was or was not admissible. He doubted whether the guideline was firmly grounded in international law and whether it was wise to propose such a "liberal" interpretation of article 23, paragraph 2, of the Convention. It would be better to require formal confirmation of a reservation on the occasion of ratification.

64. Late reservations had occurred in State practice, as pointed out by the Special Rapporteur, but the phenomenon should be avoided to the extent possible. The Commission should not encourage States to make them and therefore the Guide to Practice should not contain any model clauses on reservations formulated after the expression of consent to be bound. Accordingly, he did not endorse any of the three model clauses proposed by the Special Rapporteur.

65. Guideline 2.3.1 posed some drafting problems, since the combination of the clauses "unless the treaty provides otherwise" and "unless the other contracting parties do not object" was awkward. To conform to the definition of a reservation already adopted by the Commission and to reflect the unanimity regime, the text should read: "A declaration intended to have the legal effect of a reservation formulated by a State or international organization after expressing its consent to be bound by the treaty is null and void if any of the other contracting parties has objected to such a declaration."

66. Mr. KATEKA said he agreed with other members that reservations could not be made during the negotiation of a treaty. They could be made only when the text of the treaty was adopted. Guideline 2.2.2 might therefore need to be reviewed. The term "late reservations" was a misnomer. Referring to the definition by the Commission of reservations, which had been borrowed from the 1969 Vienna Convention, he said that "late" reservations were not reservations in the true sense. True, the practice did exist, but it should be discouraged. Consequently, he did not support the inclusion of model clauses on the subject. Late reservations were meant to give States an escape route so that they did not have to opt out of treaties because of a change of Government or some other reason. If provisions on late reservations were included, they should be subjected to a unanimity rule so as to discourage their use.

67. All references to "agreement in simplified form" should be deleted from the guidelines and replaced by references to entry into force on signature, which was the standard formulation. As the Special Rapporteur pointed out in his report, the Commission should not try to rewrite the regime of the Vienna Conventions when formulating guidelines, and the same should hold true for the *travaux préparatoires*. He did not agree with the Special Rapporteur's interpretation of the verbs "to formulate" and "to make" and was among the impatient members of the Commission who wanted to proceed to the study of the legal effects of reservations. While commending the Special Rapporteur for his intellectually stimulating study of the topic, therefore, he appealed to him to follow the course outlined in paragraph 35 of his sixth report (A/CN.4/518 and Add.1-3).

68. The Special Rapporteur had expressed some concern about the work of Ms. Hampson, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights on reservations to human rights treaties, and specifically, that her study might go beyond a survey of State practice and the practice of human rights treaty monitoring bodies. He could understand the reason for such concern and the need for coordination, but thought the Commission should not try to circumscribe Ms. Hampson's work and did not need to write to her.

69. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the 14 draft guidelines contained in the fifth report of the Special Rapporteur to the Drafting Committee.

It was so agreed.

70. Mr. PELLET (Special Rapporteur) said he wished to offer some spontaneous reactions to the interesting discussion by the Commission on the topic of reservations to treaties. The decision to refer the guidelines to the Drafting Committee did not, in his opinion, extend to the model clauses that he had proposed for guideline 2.3.1, about which there had been little enthusiasm. In fact, his purpose in proposing them had been simply to illustrate the concept of model clauses, which he saw as examples of clauses that States might use.

71. He concurred with the view expressed by members of the Commission that the inclusion in the Guide to Practice of the specific model clauses proposed would not be a good thing, as it might be seen as encouraging the use of late reservations. Like others, he wanted late reservations to be kept to a minimum. To limit them was one thing, but to deny their existence on grounds such as those advanced by Mr. Hafner which, while intellectually convincing, were completely divorced from practice, would be to defeat the purpose of the Guide. Late reservations was one of two key issues addressed so far, the other being across-the-board reservations. The job of the Commission was to indicate to States what to do in difficult situations, which definitely included that of late reservations. Treaties making provision for late reservations were conceivable. Mr. Hafner had contended that late reservations not expressly provided for in treaties were *lex specialis*, but if that was true, then they were *lex specialis generalis*, since the phenomenon was such a common one.

72. Mr. Melescanu had drawn a distinction between the stance that should be taken in respect of late reservations, which most members agreed should be held to a minimum, and late interpretative declarations, which most agreed could be treated with greater flexibility. It would be hard to find a position on simple interpretative declarations that was more flexible than the one incorporated in the draft guidelines, and conditional interpretative declarations so closely resembled reservations that

their use by States to get around the strict restrictions on late reservations must not be allowed.

73. Mr. Rosenstock was surely doing himself an injustice by claiming not to comprehend the distinction between reservations and conditional interpretative declarations. The two types of unilateral statements served different purposes, and that difference had already been incorporated in the definitions in chapter 1 of the Guide to Practice. On the other hand, his failure to grasp the difference between the relevant legal regimes was understandable. The more he himself delved into the topic, the more strongly he became convinced that the legal regime for conditional interpretative declarations was probably identical, with one or two small exceptions, to that of reservations. Nevertheless, he proposed to stick to the empirical approach used so far, namely to continue to study reservations and interpretative declarations and to try to uncover State practice, and if at the end of the day there seemed to be no need for separate provisions on conditional interpretative declarations, then they could be removed from the Guide.

74. Mr. Economides had raised a very valid point concerning guideline 2.2.2. One could not really say that "reservations" were made at the time of negotiation of a treaty, but there must be a draft guideline to cover the situation. If statements made at that time were not reservations, then they were at least expressions of intent to make a reservation: Sir Humphrey Waldock had spoken of embryonic reservations.[8] The Drafting Committee could certainly recast guideline 2.2.2 to speak of intentions to formulate reservations.

75. Mr. Lukashuk's doubts about the verbs used in connection with reservations were groundless: they were formulated, not made. He understood some members' doubts about guideline 2.2.4 but believed that the phenomenon it addressed should be drawn to the attention of States. The Drafting Committee should consider the matter further. Mr. Lukashuk and many others had said a distinction must be made between open and closed treaties, but he himself had wondered how. Then he had had an idea, while listening to Mr. Kamto and Mr. Melescanu. The requirement of active unanimity was perhaps too rigorous in general terms, but for truly closed treaties, those that were reserved for a limited number of participants, it might be retained.

76. Lastly, he thanked the members of the Commission who had spoken on the topic and expressed the firm conviction that the Drafting Committee would be able to make substantial improvements on the draft guidelines.

The meeting rose at 1.05 p.m.

[8] See paragraph (16) of the commentary to article 18 of the draft articles on the law of treaties (*Yearbook . . . 1962*, vol. II, p. 180, document A/5209).

2680th MEETING

Friday, 25 May, 2001 at 10.05 a.m.

Chairman: Mr. Peter KABATSI

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

Diplomatic protection[1] (A/CN.4/506 and Add.1,[2] A/CN.4/513, sect. B, A/CN.4/514[3])

[Agenda item 3]

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR

1. Mr. DUGARD (Special Rapporteur) said that, at its fifty-second session, the Commission had considered chapters I (Structure of the report) and II (Draft articles) of his first report on the topic (A/CN.4/506 and Add.1), which contained articles 1 to 8, but had been unable to consider chapter III (Continuous nationality and the transferability of claims) containing article 9. His introduction would thus deal only with that subject, although it was to be hoped that the Commission would find time, during the second part of the session, to consider his second report (A/CN.4/514), which focused largely on the subject of the exhaustion of local remedies.

2. The law of diplomatic protection was an area in which there was a substantial body of State practice, jurisprudence and doctrine and was thus a field one might suppose to be relatively non-controversial and to have produced many widely accepted rules of customary law, so that his task would simply be to choose and formulate those rules that were backed by considerable authority. Unfortunately, that was not the case, as the abundant sources of that law all seemed to point in different directions. In respect of diplomatic protection, the Commission was in the same position as a judge, who was asked not to formulate new rules, but to choose among them, discarding those that had little support in State practice, jurisprudence and doctrine and, where there were competing or conflicting options each backed by authority,

[1] For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

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

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