

Document:-
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Summary record of the 2691st meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-

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law and embodied in the 1969 and 1986 Vienna Conventions, from which the Commission did not *a priori* wish to depart. Hence there was no alternative but to reproduce those rules and that was what guideline 2.1.7 did.

61. He had forgotten to transpose those rules to conditional interpretative declarations and it would be legitimate to instruct the Draft Committee to rectify that omission and to add a third paragraph to guideline 2.4.9, which would indicate that the provisions of guidelines 2.1.6, 2.1.7 and 2.1.8 also applied to conditional interpretative declarations. The Commission would decide at a later stage whether that provision should be retained.

62. He requested the members of the Commission to give him their opinion on six particular questions which were, of course, in no way exhaustive. First, would it be wise to specify in the Guide to Practice itself what was meant by “State or international organization entitled to become a party to the treaty”? Secondly, even if it was not of fundamental significance, could a communication relating to reservations or conditional interpretative declarations be validly confirmed or made by facsimile, as provided for in square brackets in guideline 2.1.6? Thirdly and more importantly, should reference be made to treaties creating “a deliberative organ that has the capacity to accept a reservation” (guideline 2.1.5, para. 2), in addition to the reference to the constituent instruments of international organizations? Fourthly, should the communication by the depositary of a reservation to the constituent instrument of an international organization exempt the depositary from communicating the text of the reservation to the member States or States entitled to become parties to that constituent instrument? Fifthly, was it necessary to mention in guideline 2.1.5 not only international organizations and, possibly, deliberative organs, but also the preparatory committees which were often set up pending the entry into force of a constituent instrument? Could the members of the Commission agree that the Drafting Committee should provide, at least temporarily, as he very much hoped, that the rules relating to reservations contained in guidelines 2.1.6, 2.1.7 and 2.1.8 should be transposed to conditional interpretative declarations.

63. Lastly, he drew attention to the fact that he wrote his reports exclusively in French and therefore did not understand why, since the previous session, they had been marked “Original: English/French”. According to the secretariat, the reason was that the reports contained quotations in English. Yet the four preceding reports on the subject had also done so and they had been marked “Original: French”. Furthermore, quotations might sometimes be in Spanish or Italian. A point of fundamental importance was that it was scientifically essential to cite legal theory and judicial decisions in the original language. Quotations in English were always accompanied by a translation into French which he himself had prepared with the assistance of the secretariat. For all those reasons, he very much hoped that there would be a return to previous practice so that the impression would not be given that he wrote his reports in English or, worse still, that he had passages of his report written in that language. If that were not done, he would be forced not to include any quotations in English and would therefore be unable to cite English-speaking legal writers.

64. Mr. KATEKA, supported by Mr. HAFNER, said he was surprised that, in the English version of the report, quotations which were originally in English were accompanied by a French translation and asked what the purpose of that practice was.

65. Mr. MIKULKA (Secretary of the Commission) said that a technical error had been made by the secretariat. Replying to Mr. Pellet, he explained that, if a document submitted in one language contained even one sentence in another language, the existing rules governing the editing of documents required that, when the secretariat published the document, it had to give both as the original languages.

66. Mr. LUKASHUK said that, if Mr. Pellet’s view point were accepted, some quotations would have to be published in Arabic, Chinese or Russian, which were official languages and that was likely to give rise to problems.

67. Mr. ILLUECA said that he fully agreed with Mr. Pellet’s opinion. For the sake of the scientific rigour of the work of the Commission, it was essential for quotations to be given in their original language. It was also very helpful for academics, jurists and Governments that relied on Commission documents to have the original quotations.

68. Mr. ROSENSTOCK said that silence about the distinction the Special Rapporteur wished to draw between conditional interpretative declarations and other declarations did not mean consent. The fact that the issue had not been raised for the time being should certainly not be interpreted as approval of that idea.

The meeting rose at 1.10 p.m.

2691st MEETING

Wednesday, 18 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdicia Sacasa, 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]

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

1. Mr. LUKASHUK said that, rather than dwell on the considerable merits of the sixth report of the Special Rapporteur (A/CN.4/518 and Add.1–3), he would make a number of substantive points. First, as between the two versions of guideline 2.1.3 (Competence to formulate a reservation at the international level), contained in paragraphs 69 and 70, his preference was for the longer one. Since the Guide to Practice was intended to be of practical use, it made sense to have all the relevant provisions to hand, rather than force the user to look up references elsewhere. Secondly, far more important than the question of competence to make a reservation was the question of the competence to accept it; yet, unfortunately, that issue, which was, moreover, relevant to guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), was not discussed at all in the report. Thirdly, with regard to guideline 2.1.6 (Procedure for communication of reservations), it would be more logical to reverse subparagraphs (a) and (b): the positive phrase “If there is a depositary” should precede the negative phrase “If there is no depositary”. He proposed the change simply for cosmetic reasons. In guideline 2.1.8 (Effective date of communications relating to reservations), the word “only” appeared, he presumed, because the same phrase was used in the 1969 and 1986 Vienna Conventions. It was, however, redundant and could be omitted. Guideline 2.2.1 (Reservations formulated when signing and formal confirmation) was, as the Special Rapporteur himself had noted, not particularly significant and it might be preferable, rather than devote a provision to the issue, merely to mention it in the commentary. 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]), the phrase “[an agreement in simplified form]” should be deleted, since the concept was extremely controversial. Support for that point of view could be found in an authoritative work by Smets,⁴ and in judicial practice, as shown by a decision of the Austrian Constitutional Court in 1973 on the validity of treaties in the *Land Sale to Alien* case. As to guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), it was admittedly possible for reservations to be formulated when signing for which the treaty made express provision, but they were in any case rare and the statement that they did

not require formal confirmation would go against all the existing rules. The Commission had no mandate to create such a rule of law: formal confirmation was always required. The definition of those competent to formulate an interpretative declaration, contained in guideline 2.4.1 (Formulation of interpretative declarations), was too narrow. In practice, such declarations were made by a wide range of representatives of a State and it was for that State to decide. He urged the Special Rapporteur to reconsider the provision. In guideline 2.4.2 (Formulation of conditional interpretative declarations), he would prefer a reference simply to an “organ”, not a “deliberative organ”. The latter phrase had presumably been taken from the usage of the Secretary-General, but it was both incomprehensible and superfluous. “Organ” on its own would suffice and would be legally precise. With regard to guideline 2.4.7 (Interpretative declarations formulated late), there was a case for saying that interpretative declarations were an integral part of the functioning of a treaty and could be made at any time. A Government could not be forbidden to express its position on a treaty at any stage. Therefore, he could see little justification for retaining the guideline. The phrase “does not elicit any objections”, in guideline 2.4.8 (Conditional interpretative declarations formulated late), should be replaced by a more precise form of words, such as “unless the other Contracting Parties express their clear or tacit consent”.

2. Lastly, he wished to raise a matter of basic legal principle. The draft provisions relating to late reservations contained substantive alterations to the existing norms of international law, departing from the regime of the 1969 and 1986 Vienna Conventions, to which the Commission frequently paid tribute. True, the Guide to Practice adopted a negative attitude to late reservations. Practically speaking, however, it legalized them. Moreover, it proposed a regime close to that governing lawful reservations: objection to the reservation within a 12-month period. The only real obstacle to a late reservation lay in guideline 2.3.3 (Objection to reservations formulated late), according to which a late reservation was not operative if just one contracting party objected. Notwithstanding his dislike for late reservations, he thought that provision, too, was not entirely justified. That an objection by one of 150 States could block the whole process hardly seemed fair. For the time being, the Commission should stop considering the question of late reservations. He wondered what the need for such provisions was or why there should be such a departure from the rules of positive law. It was not that it was warranted by extensive practice. As the Special Rapporteur had said, late reservations were a rare occurrence. Accordingly, they should not be enshrined in law. States, in any case, had legal ways of achieving agreement with the other parties. Overall, however, the draft guidelines should be referred to the Drafting Committee.

3. The CHAIRMAN urged members to specify which cluster of guidelines they were referring to and, unless it was absolutely essential, not to revert to texts already adopted by the Drafting Committee.

4. Mr. PELLET (Special Rapporteur) confessed himself disturbed by Mr. Lukashuk’s statement. He had taken note of the comments on guidelines 2.1.3, 2.1.4, 2.1.5, 2.4.1 and 2.4.2, but for the rest it was as though a

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).

⁴ P.-F. Smets, *La conclusion des accords en forme simplifiée* (Brussels, Bruylant, 1969).

film were being rewound. Even in an earlier statement made on the guidelines (2678th meeting), Mr. Lukashuk had adopted a less radical stance than in the statement he had just made. While it was regrettable that shortage of time had necessitated the joint consideration of two clusters of guidelines, the annex to the report was a consolidated text containing the guidelines presented in the fifth (A/CN.4/508 and Add.1–4) and sixth reports. Some guidelines had already been adopted by the Drafting Committee and others not. It would be a great mistake to revert to the consideration of guidelines already adopted.

5. Mr. LUKASHUK denied that he was reverting to old difficulties over the text: he had suggested only one change, and that of a purely drafting nature. He had merely attempted, however clumsily, to express a conceptual viewpoint, in which guidelines already adopted by the Drafting Committee were inextricably linked with those still under consideration.

6. Mr. KATEKA said that part of the confusion was due to the fact that the annex contained guidelines still under consideration as well as those adopted following the fifth report. In future, the Commission would do well to consolidate only guidelines that had already been adopted.

7. Mr. PAMBOU-TCHIVOUNDA, specifying that he was referring to chapter II of the report, said that its clarity was such that a reader might come away with the impression that the topic was simple. Any such impression would be erroneous. He fully endorsed the Special Rapporteur's approach to improving the modalities of formulating reservations and conditional interpretative declarations, even though at times the report did not go into them in enough depth. Thus, for example, in discussing the competence to make reservations or the functions of the depositary—both topics closely linked with the problem of the existence or otherwise of reservations and conditional interpretative declarations—the Special Rapporteur was apt to state the obvious and say too much, while at other times saying too little about elements that, in his view, were crucial.

8. The Special Rapporteur had hardly held to his aim, stated in paragraph 32 of the report, to restrict himself to the examination of procedural issues, to the exclusion of issues concerning lawfulness, for he had not fully explained the material significance of a number of problems arising out of the procedural questions that he had considered. For example, on the relevance of the distinction drawn in the 1969 and 1986 Vienna Conventions between contracting States and States qualified to become party to the treaty, on which the Special Rapporteur sought guidance from the Commission, he did not devote enough attention to what was perhaps of secondary importance, but ought to be considered: the formal structure that a written reservation should take in order to be identified or authenticated.

9. Again, he would have welcomed further discussion of how to manage the balance of obligations in the dialogue on reservations between the entity making the reservation and that accepting it, since proof that the communication had been received was a prerequisite for the effectiveness of the reservation. Another problem concerned the inadequacy of the discussion on the deposi-

tary's ability to monitor the validity of the reservation. It was not a mere question of procedure but—although it might have a bearing on procedure—a substantive matter. The draft should treat the matter more fully. However, whether discussed or not, the existence of such problems gave rise to the question of whether they merited impartial examination. His own reply was in the affirmative. The question of competence to formulate a reservation or conditional interpretative declaration, for instance, was one that deserved closer examination; another was the requirement—appearing in guidelines 2.1.1 (Written form) and 2.1.2 (Form of formal confirmation), which drew heavily on the *travaux préparatoires* that had led to the adoption of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions—that a reservation or its confirmation should be made in writing.

10. There was a universal desire for certainty, stability and access to all the available information. The requirement for the written formulation of a reservation paralleled the written nature of the treaty itself, showing the will of one or more of the contracting parties to limit the scope of the treaty *ratione personae*. The requirement was therefore of a technical nature, with the aim of establishing not merely the physical existence of the reservation but its legal existence. The logic of requiring a written formulation should be seen in the context of uniting the validity and the opposability of the two functions; that logic should be reflected in guideline 1.1 (Definition of reservations) with a reference to the structure or formal conception of the reservation, namely that it should be in writing.

11. In his opinion, competence was a question of less importance in respect of the formulation of reservations. The amount of space devoted to the subject in the report would have been justified only if the Special Rapporteur had thought that such competence had a bearing on the admissibility of the reservation, since it would then have been an essential component of the regime of reservations and failure to comply with the rules on competence would nullify the act by which a reservation was made, something which would mean that the reservation itself would cease to exist. While Georges Scelle would have ventured to argue that it was so, the Special Rapporteur had espoused the position of Paul Reuter, in considering that the international phase of the formulation of reservations was only the tip of the iceberg and the culmination of an internal process, which might be highly complex. The Special Rapporteur had therefore held that international law did not impose any specific rule with regard to the internal process for the formulation of reservations, whereas the conclusion he should have drawn was that the authorities competent to formulate the reservation at international level were the same as those competent to adopt or authenticate the text of a treaty or to express consent to be bound thereby.

12. Personally, he believed that guideline 2.1.3 should be divided into two succinct paragraphs, the first of which should contain the wording of guideline 2.1.3 *bis* (Competence to formulate a reservation at the internal level) and the second that of the first variant of guideline 2.1.3, but deleting the first part, namely “subject to the ... of treaties”. The second variant was not apposite, because the notion of representation, expressed through the

instrument of full powers, provided a sufficiently strong basis for the competence of persons other than those who possessed full powers under the law of treaties.

13. As to the question of the communication of reservations and conditional interpretative declarations and the need first to clarify the categories of contracting States and States entitled to become parties to a treaty, as well as the role of a depositary seized of a reservation to a constituent instrument of an international organization, he endorsed the sentiments expressed in paragraph 109. The entitlement of a third State to become a party to a treaty presupposed that the treaty itself allowed for such a possibility. In that case, those third States would have the special status of potential contracting parties and might be more inclined to accede to a treaty if they had full knowledge of the background to its implementation and had been apprised of the reservations made by other States. The notion of *qualité* found in the French version of guidelines 2.1.5 *et seq.* and in the provisions of the 1969 Vienna Convention on the process of communication would be better rendered by the term *vocation*. He was not unduly worried by the query contained in paragraph 123, subparagraph (c), and was in favour of the action advocated by the Special Rapporteur in the last sentence of paragraph 126, save that once again it should speak of *vocation* rather than *qualité* in French.

14. Mr. ECONIMIDES said that his comments would be confined to the draft guidelines concerning the form of reservations and interpretative declarations. The content of guideline 2.1.1 was axiomatic. Guideline 2.1.2 could be simplified to read: "The formal confirmation of a reservation must be made in writing", it being understood that the guideline applied only when formal confirmation of a reservation was necessary. He preferred the shorter variant of guideline 2.1.3, although it should be accompanied by a footnote referring to article 7 of the 1969 and 1986 Vienna Conventions. There was no need for guideline 2.1.3 *bis*, for the reply to the issue it raised was given in guideline 2.1.4. While he was basically in favour of the latter, subject to a minor drafting correction, he considered that the term "invalidating" was inappropriate, because a State was always free to withdraw a reservation which had not been formulated in accordance with its municipal law, or it could remedy that situation and present the reservation as a late reservation. He had no objections to the substance of guidelines 2.4.1 and 2.4.2, but thought that guideline 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level) was pointless and superfluous.

15. Mr. GAJA said that the Special Rapporteur had highlighted a number of pertinent issues and expressed some apt criticism of certain provisions of the 1969 and 1986 Vienna Conventions.

16. The title of the two variants of guideline 2.1.3 might be confusing, for the guideline did not in fact relate to competence to formulate a reservation at the international level. The text was clearly modelled on article 7 of the 1969 Vienna Convention, which did not use the word "competence" but related to full powers and dealt in essence with the question of whether an organ was expressing a State's position. For example, under article 7, a minister for foreign affairs was entitled to express con-

sent, even if he had no competence in the formation of the State's will. Similarly, he could express a reservation, but did not have competence to make it. Competence to make reservations fell in effect under article 46 of the Convention, as an analogous rule.

17. Municipal law and even the rules of international organizations did offer some solutions with regard to competence to make reservations. Guideline 2.1.4 suggested, however, that the infringement of provisions of domestic law on the formulation of reservations might not affect their validity, which meant that even if the rules on competence had been violated, that would have no implications for the validity of a reservation. If a minister added a reservation without the authorization of the competent constitutional organ, or forgot to express a reservation proposed by that organ, that could also have consequences on the validity of consent to the treaty itself. In his opinion, a more detailed examination of the question of the validity of consent and the validity of a reservation should be made in the light of the apportionment of competence. At all events, it should be made clear in the commentary that guideline 2.1.4 related solely to the validity of reservations and left open the question of the validity of consent to a treaty because of the presence or the absence of reservations demanded by the competent constitutional organ.

18. Guideline 2.1.8 introduced a modification to the regime under article 78, subparagraph (b), of the 1969 Vienna Convention in that it referred to receipt by the State or organization to which the reservation had been transmitted but made no mention of receipt by the depositary. It was true that, according to article 20, paragraph 5, of the Convention, the deadline for objecting to a reservation was determined by the date of its notification. However, the reservation had already been made at the time of ratification. If other dates were mentioned, that might give the wrong impression that the reservation was late and for that reason it would be wise to retain the principle contained in the Convention.

19. As for guideline 2.1.7, the Special Rapporteur had made it clear that the idea of limiting the depositary's role to that of a letter box was political in origin because States did not want active depositaries. Accordingly, it would be difficult to change that practice. On the other hand, it would be useful to confirm the practice whereby depositaries use the provisions of treaties expressly prohibiting reservations in order to reject instruments of ratification containing prohibited reservations, as that would be a way of preventing those provisions from being swept away by a very liberal policy on the admissibility of reservations. States had to abide by the text of the treaties to which they were parties. The role of depositaries in refusing reservations could be upheld without amending the 1969 Vienna Convention. In that case, as well as when the reservation was not made in due and proper form, the depositary should bring the matter to the attention of the State in question, as stipulated in article 77, paragraph 1 (d), of the Convention. In the event of a divergence of opinion, the matter might be brought to the attention of the other States or international organizations. Paragraph 1 of guideline 2.1.7 should therefore be supplemented with the language of the Convention.

20. The Special Rapporteur had proposed that nothing be said about the communication of simple interpretative declarations. A State could give whatever publicity it liked to such declarations. But once a declaration had been communicated to the depositary, it seemed reasonable to give the depositary the same function of communication that it had with respect to other notifications and communications, as stipulated in article 77, paragraph 1 (e), of the 1969 Vienna Convention, because it obviated the need for the depositary at that stage to ascertain whether the declaration was a simple interpretative declaration, a conditional interpretative declaration or a reservation.

21. Mr. PELLET (Special Rapporteur) said that he had two questions to put to Mr. Gaja. Did he wish it to be stated in paragraph 1 of guideline 2.1.7, in the same way as was stipulated in article 77 of the 1969 Vienna Convention, that the depositary should bring any problems that might arise to the attention of the author of the reservation? Before, he had said something different: that the practice of the depositary to refuse a prohibited reservation should be confirmed. Did he want that to be expressly stated in guideline 2.1.7 or referred to in the commentary as an example of a problem that could arise? Secondly, had he understood Mr. Gaja to say that, when a State notified or formulated an interpretative declaration to the depositary, it should be explicitly stated that the depositary must pass the declaration on to the contracting States or those States entitled to become parties? If so, did he want that statement to appear as a formal draft guideline?

22. Mr. GAJA said that in both cases he wished the points to be made in the body of the text. In the first case, if the majority of members agreed, it could be specified that a depositary when faced with a reservation that was expressly prohibited by the treaty itself, should refuse it, which was what depositaries usually, though not always, did. If the majority of the Commission did not agree to going so far, the point should be made in the commentary, and more clearly than it currently was in the report. As for guideline 2.1.8, it was true that one could imagine cases in which States would notify many interpretative declarations to the depositary. In practice that was, however, unlikely, because it was normally at the moment of ratification or signature that such declarations were made. The general principle should be established that any communication that came from a State, especially at such moments, should be transmitted to the other States so that they were in a position to understand what the declaration meant.

23. Mr. PELLET (Special Rapporteur) said that *a priori* he was prepared to think over both Mr. Gaja's proposals, but support from members of the Commission was necessary.

24. Mr. GOCO said that it had to be accepted that in practice the person authorized and able to formulate a reservation could be a country's minister for foreign affairs, and that the reservation could be expressed before the treaty in question was ratified by the country's constitutional body and was thus binding upon the State. In such a case, the constitutional body ratified the treaty containing the reservations that had been made. But in the case of a reservation that was formulated late, after completion of the ratification process, it still had to be

submitted to the ratifying body and had also to be subject to the consent of the other parties to the treaty. He requested clarification from the Special Rapporteur or Mr. Gaja as to which of those two procedures came first.

25. Mr. GAJA said that what happened in practice with a late reservation was that it was assumed to have been made only after it had been given the green light by the constitutional body competent to make it. If there were no objections from the other contracting parties the reservation would stand.

26. Mr. Sreenivasa RAO, referring to the question raised by Mr. Gaja about the role of the depositary in rejecting a prohibited reservation, said the Special Rapporteur had expressed his willingness to look into the matter if there was a general desire on the part of members for him to do so. Personally, he believed that it was a substantive issue. If a treaty stated that reservations must not be made and a reservation was in fact made, the question was straightforward. However, where reservations were allowed, the matter of whether they were prohibited or not in respect of conformity with the object and purpose of the treaty was more difficult, and the guidelines were not the right place to deal with it. It was an area which should not be entered. If it was the intention of the Special Rapporteur and Mr. Gaja to deal in guidelines with the broader question of all types of prohibited reservation, and the depositary would arrogate to himself the right to reject reservations, he himself would not be happy to endorse such a course.

27. Mr. GAJA explained that his proposal concerned only cases that arose under article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention and not those that arose under article 19, subparagraph (c), where the reservation was incompatible with the object and purpose of the treaty. Those much more contentious matters were not for the depositary to deal with. He fully agreed with Mr. Sreenivasa Rao, and apologized if he had misled him.

28. Mr. SIMMA said he agreed with Mr. Gaja in respect of paragraphs 53 *et seq.*, on competence to formulate a reservation, that a differentiation had to be made between formulation and expression of a reservation vis-à-vis other countries. In paragraph 77, the Special Rapporteur asked for the point of view of the Commission as to whether a rule should be stipulated on the competence to form a reservation at the internal level, and his own answer was firmly in the negative. As to paragraphs 81 and 82, he had been impressed by the comments of Mr. Economides, who had asked why the rule set out in guideline 2.1.4 was needed if a State was free to withdraw a reservation, probably without giving any explanation in the first place. Perhaps the Special Rapporteur could clarify whether the situation would be different and more complicated if a State were to rely on the fact that its reservation had been formulated in violation of internal law not in order to withdraw the reservation, something which would be much simpler to do, but in order to propose a late reservation in the hope that it could be made without fulfilling the conditions established in an earlier guideline.

29. In paragraph 81, the Special Rapporteur stated that it was unlikely that a violation of internal provisions

could be “manifest”, but then drew the conclusion that reference to internal law should never be allowed. The two did not fit together because it was possible to imagine cases where a reservation was declared by a minister for foreign affairs without due regard for internal procedures, for example the participation of Parliament.

30. As for paragraphs 83 *et seq.*, regarding the form of interpretative declarations, he sided with what Mr. Rosenstock had said (2690th meeting), namely, that his silence should not be regarded as agreement to keep the category of conditional interpretative declarations in the final version of the draft. The matter called for further thought. The Special Rapporteur expressed doubts in paragraphs 94 and 95, as to whether it was necessary to draft a guideline on the competence to formulate interpretative declarations at the internal level. His own view was that no such guideline was needed.

31. As to the question of publicity to be given to reservations, paragraphs 100 *et seq.* dealt with the issue of other States and organizations entitled to become parties. The Special Rapporteur had asked (*ibid.*) whether he should go on to draw up further specifications of what the terms State and international organization meant in that context. In his view, the Commission should not go into such matters. As to the range of States that would have to be notified of reservations, the Special Rapporteur had referred to a differentiation that might be useful between restricted multilateral treaties, in which case notification would not be difficult, and treaties which were open to everyone. In that regard, he agreed with the Special Rapporteur’s proposals in guideline 2.1.5, paragraph 1.

32. Paragraphs 115 *et seq.* dealt with the question of whether reservations made to a multilateral treaty establishing an international organization or something similar would have to be accepted also by deliberative organs. Since there would probably be disagreement as to what constituted an international organization, he disagreed with the Special Rapporteur, who had explained (*ibid.*) that the deliberative bodies having a secretariat, created by certain treaties, were legal constructs that did constitute international organizations. He himself did not share that opinion. The footnote in paragraph 125 said that some authors also argued that the International Criminal Court was not, strictly speaking, an international organization. However, its statute contained a provision whereby the Court would have international legal personality, which as far as he was concerned, proved that that particular legal construct was an international organization. In all likelihood, there would never be a consensus as to whether certain organizations—for example, environmental institutions—were or were not international organizations, he very much favoured retaining the reference to deliberative organs in guideline 2.1.5.

33. In paragraph 126 the Special Rapporteur stated his belief that a reservation to a constituent instrument should be communicated not only to the organization concerned but also to all other contracting States and organizations and to those entitled to become members thereof, and he fully agreed with the Special Rapporteur’s proposal in paragraph 2 of guideline 2.1.5.

34. He was unable to answer the question as to whether a reservation made by e-mail should be confirmed by fax and preferred to leave to the experts the question of whether the Special Rapporteur’s proposal about deliberative organs and assemblies of international organizations should also encompass preparatory committees. With regard to the question of whether guidelines 2.1.6 to 2.1.8 should also be applied and crafted for conditional interpretative declarations, in his earlier statement he had said that, for the time being, conditional interpretative declarations should be kept in square brackets.

35. Mr. PELLET (Special Rapporteur), referring to Mr. Rosenstock’s position, which had been mentioned by Mr. Simma, said that the estoppel principle did not apply in the Commission. He understood members’ doubts regarding the usefulness of keeping references to conditional interpretative declarations throughout the draft. He too had doubts, but would like to retain them for the time being.

The meeting rose at 11.35 a.m.

2692nd MEETING

Thursday, 19 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, 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]

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

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