

Document:-
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Summary record of the 2692nd meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
2001, vol. I

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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. Candiotti, 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]

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

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

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

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR
(continued)

1. Mr. HAFNER said that he would confine his remarks to the two sets of questions put to the Commission by the Special Rapporteur during his introduction of the sixth report (A/CN.4/518 and Add.1–3).

2. With regard to the first question of the first set, relating to guideline 2.1.3 (Competence to formulate a reservation at the international level), he suggested that the text could be considerably simplified by reformulating it to read:

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization”.

He could not understand—and the report gave no indication—why the guideline proposed by the Special Rapporteur mentioned persons who were not authorized to bind a State, since that could create problems. The text he had just proposed would address the first three questions put by the Special Rapporteur.

3. With regard to the fourth question, relating to whether there should be guidelines on internal procedures for formulating reservations, he would—for the reasons given by Mr. Simma (2691st meeting)—say that there should not. As for the fifth question, regarding the consequences of a breach of the internal procedure for formulating reservations, the answer was simple: if it were stated that only persons entitled to bind the State could formulate reservations, it followed that reservations made by any other person must be considered null and void, unless the State in question proved that the person making them had the authority to do so. Either way, in practice, the decision on who was entitled to formulate reservations was far less important than the decision on who was entitled to formulate objections to a reservation, the reason being that reservations were usually formulated at the time when the consent to be bound by a treaty was formulated, whereas objections constituted a separate act. The Commission would have to consider the question sooner or later.

4. The first in the second set of questions put by the Special Rapporteur related to the meaning of the expression “international organizations entitled to become parties to the treaty”, which appeared in guideline 2.1.6 (Procedure for communication of reservations). The provision was problematic, in his view, for it was often very difficult to determine precisely whether an international organization had treaty-making powers. A good illustration was provided by the European Economic Community, whose treaty-making power had been progressively extended by the Court of Justice of the European Communities, where the situation was in any case complex, since, in some areas, it had exclusive competence and, in others, concurrent competence with member States. Although, at the practical level, it might be useful to inform international organizations entitled to become parties to a treaty,

there was no legal need to do so. He therefore wondered whether it was appropriate to refer to “[other] international organizations” as well as “other States”.

5. Another question raised by the Special Rapporteur was whether to retain the words “or by facsimile” in square brackets in paragraph 2 of guideline 2.1.6. There, too, he was in agreement with Mr. Simma’s comments: what was important was that communications by electronic mail should be confirmed by some other means.

6. Turning to the question of “deliberative organs”, which he would prefer to the term “treaty organs”, he said that, in practice, it would certainly be useful to inform such organs, too, of reservations that had been made. From the legal point of view, however, the question arose as to whether they were “international organizations” in accordance with article 20 of the 1969 Vienna Convention. Neither doctrine nor practice had yet given a satisfactory answer to that question; such organs did not seem to be covered by article 20 and therefore did not have a separate standing under international law. Mention had been made in that context of the International Criminal Court, on which its statute did in fact confer the status of an international organization. The situation of another body created under the same statute, the Assembly of States Parties, was, from that point of view, far less clear. That applied with even greater force in the case of treaty organs composed of independent experts rather than of States.

7. Guideline 2.1.7 (Functions of depositaries) was rather too general, despite the fact that it was taken straight from article 77 of the 1969 Vienna Convention. A definition should be given—perhaps in the commentary—of the phrase “in due and proper form”, in order not to give the depositary too much power. In that context, he would support Mr. Gaja’s proposal (2691st meeting) that article 77, paragraph 1 (*d*), should also be added to the guideline. Moreover, a depositary should not be entitled to refuse to accept a reservation, unless it was *prima facie* absolutely clear that the reservation in question was not admissible. Thus, for example, article 120 of the Rome Statute of the International Criminal Court explicitly prohibited reservations, so the depositary was entitled to refuse to accept a reservation. The Commission should, however, be very cautious. As to whether preparatory committees should be mentioned in guideline 2.1.5 (Communication of reservations), he was dubious: such bodies were undoubtedly increasingly common, but to inform them of reservations could be risky, if they took up one position, while the international organization whose establishment they were preparing adopted a different approach once it was in existence. Either way, even if informed of a reservation, they should not be entitled to make objections.

8. Lastly, he wished to comment on the question of interpretative declarations. Such declarations did not need to be communicated, but article 31, paragraph 2 (*b*), of the 1969 Vienna Convention, relating to interpretation, stated that the context for the purpose of the interpretation of a treaty included “any instrument which was made by one or more parties in connection with the conclusion of the treaty”. That did not mean, however, that it was necessary to derive from that provision a duty on the declaring State to inform all the other parties to the treaty of

an interpretative declaration before it could be taken into consideration in cases where the treaty needed interpretation. In practice, it was in the declaring State's interest to bring its declaration to the attention of the other States parties and there was therefore no need to spell out the obligation. The Commission could return to the question when it considered the effects of interpretative declarations.

9. Mr. HERDOCIA SACASA began by making a few comments on the matters concerning which the Special Rapporteur had requested members' views, before going on to give a brief presentation of the practice followed by the Inter-American system.

10. With regard to guideline 2.1.5, he endorsed the idea of expressly stating therein that reservations must be communicated "in writing"; although that was not explicitly stated in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions. In addition, the phrase specifying the recipients of communications, namely, "the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty", should be retained. It remained to be established what States and organizations were so entitled. In his view, they included States that had participated in the negotiations. The Secretary-General, as a depositary, also seemed to interpret the word "entitled" very broadly. Be that as it might, it was better to retain the formulation used in article 23, paragraph 1, of the Conventions.

11. With regard to paragraph 2 of guideline 2.1.5, he considered that the communication must be addressed to the "competent organ" of the international organization concerned, as provided for in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, on the understanding that the competent organ could vary from organization to organization. Consideration should perhaps be given to mentioning that point in paragraph 2 of guideline 2.1.5. On the question whether the same rule should apply to "deliberative organs" created by a treaty, there was no clear answer. It was true, however, that some treaties, in areas such as disarmament or environmental protection, created *sui generis* organs, which did not necessarily rank as international organizations, as indeed the Special Rapporteur pointed out in paragraph 125 of his report. The Special Rapporteur had retained the expression "deliberative organ", used by the Secretary-General in connection with the reservation by India to the constituent instrument of the Intergovernmental Maritime Consultative Organization,⁴ but if one were to opt for another term such as "entity", it could then be stated at the end of the guideline that the reservation must also be communicated to the "competent organ of such organization or entity".

12. Nor did he see any benefit in mentioning "preparatory committees" in the guideline. Lastly, he considered that reservations to the constituent instrument of an international organization must be communicated both to the organization concerned and to the contracting organizations and States, as well as to States and organizations entitled to become parties to that constituent instrument. It was important that the latter category should be informed

of the reservation, to enable them to object to it if they so wished.

13. Concerning the functions of depositaries (guideline 2.1.7), he endorsed the views of Mr. Gaja and favoured adding a guideline stating that the depositary could express a value judgement regarding the incompatibility of a reservation in cases where reservations were prohibited by the treaty or where the treaty provided that only specified reservations, which did not include the reservation in question, could be made (thus reflecting article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention).

14. As to the effective date of communications relating to reservations (guideline 2.1.8), that date should coincide with the date of receipt of the reservation by the depositary, as provided for in article 78, subparagraph (b), of the 1969 Vienna Convention. The guideline should therefore be amended, by adding, at the end, the words "or, as the case may be, by the depositary".

15. Lastly, he understood and supported the reasons for the Special Rapporteur's proposal to retain conditional interpretative declarations for the moment and to expand guideline 2.4.2 (Formulation of conditional interpretative declarations) on the basis of elements taken from guidelines 2.1.5, 2.1.6, 2.1.7 and 2.1.8. If a complete text were available, it would be easier to compare the effects of conditional interpretative declarations with those of reservations and to take a decision on the question.

16. Further consideration should be given to guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). Article 46 of the 1969 Vienna Convention provided for cases where the State could invoke a violation of its internal law as invalidating its consent: the violation must have been manifest and must concern a rule of its internal law of fundamental importance. Article 27 provided that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". But care must be taken not simply to reproduce the provisions of the 1969 and 1986 Vienna Conventions verbatim, dissociating them from their general context.

17. He went on to give a brief presentation of OAS practice concerning reservations, having regard to guidelines 2.1.5, 2.1.6, 2.1.7 and 2.1.8.

18. With regard to guideline 2.1.5, reservations were communicated to all OAS member States, whether or not parties to the convention in question, since they might subsequently accede to that convention. On the other hand, reservations were not communicated to observers, although there were some exceptions, for instance, in the field of human rights. Thus, any reservation concerning human rights was communicated to the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. In the case of conventions open to other States, reservations were not communicated to States not members of OAS, as all States of the international community were affected. States intending to become parties to such conventions would presumably take care first to inquire about the status of signatures, ratifications and reservations.

⁴ See 2690th meeting, para. 56.

19. Concerning the content of guideline 2.1.8, the reservation was deemed to be effective on the date on which it was communicated to the depositary of inter-American treaties, namely, the General Secretariat, which was then required to circulate it to the other OAS member States. In general, reservations were made at the moment of signature or of deposit of instruments of ratification.

20. On guideline 2.1.6, OAS worked only with originals, never with facsimiles or electronic messages.

21. On guideline 2.1.7, as a general rule the General Secretariat gave no opinion on reservations, except in cases where the treaty in question expressly prohibited them.

22. Mr. LUKASHUK drew attention to what he considered to be a formal incoherence in guidelines 2.3.1 and 2.3.2. But since the Drafting Committee was already seized of them he would await its report before making any detailed observations.

23. Mr. MELESCANU said that the Special Rapporteur's extremely detailed report was all the more commendable since practice in the area was far from being abundant and in any event was difficult to gain access to.

24. Generally speaking, the approach taken by the Special Rapporteur was welcome in both form and substance. In terms of form, the didactic approach of setting out the problem in its entirety and then proposing a draft text facilitated its consideration by members. In terms of substance, as the Commission had wanted, he had avoided departing from the regime established by the 1969 and 1986 Vienna Conventions by restricting himself to clarifying or supplementing points that were not clear. From the point of view of method, while noting the comments by Mr. Rosenstock and Mr. Simma, he agreed with the Special Rapporteur that the Commission should complete its study of the effects of reservations and conditional interpretative declarations before deciding whether the latter had a place in the Guide to Practice.

25. Turning to more specific comments, he shared the general opinion concerning written form (guideline 2.1.1): all reservations must be formulated in writing apart from non-conditional interpretative declarations. The guideline therefore posed no problem.

26. On the other hand, difficulties could arise regarding competence to formulate a reservation at the international level (guideline 2.1.3). In that connection, Mr. Hafner's proposal was interesting, namely, that those who were competent to engage a State in the framework of international conventions also had competence to formulate reservations; that solution offered the advantage of being simple and of enabling other problems to be solved. Before taking a definite stand, he would nevertheless like to know the Special Rapporteur's reaction. On the other hand, he strongly supported Mr. Hafner's proposal that consideration should be given to the possibility of dealing with the question of competence to formulate objections to reservations. In practice, it was that competence which gave rise to difficulties. Competence to formulate reservations was well defined by the law and practice of ministries of foreign affairs, but that was not the case with the formulation of objections.

27. As for the text of guideline 2.1.3, he preferred the long version, basically for practical reasons. Since the purpose was to draw up a guide, it was better to explain the rule as much as possible so that users did not have to refer to the 1969 and 1986 Vienna Conventions. The safeguard clause with which paragraph 1 began was perfectly acceptable. In paragraph 2, heads of diplomatic missions should be excluded from the list of persons competent to formulate a reservation. Interpretation of the Conventions in fact clearly limited the number of persons who could assume international obligations on behalf of the State. On the other hand, heads of diplomatic missions should be given the possibility of submitting simple interpretative declarations because it was they who had the most direct relations with the international organizations.

28. Guideline 2.1.3 *bis* (Competence to formulate a reservation at the internal level) in its current wording did not say a great deal about competence to formulate a reservation at the internal level. Practice was so diverse that it was difficult to draw up a very detailed guideline. It would, however, be useful to give some indication in the matter to the staff of ministries of foreign affairs who were responsible for treaties, either in a guideline or perhaps in the commentary. The link between guidelines 2.1.3 and 2.1.3 *bis* remained to be defined. Guideline 2.1.4 defined the relationship between "internal" competence and the validity of the reservation, but, if the Commission decided to retain two distinct guidelines relating, in the one case, to "international" competence and to "internal" competence in the other, a link between the two would of necessity have to be established.

29. As to the communication of reservations, he was in favour of the confirmation by post of any communication transmitted by electronic mail or facsimile. Like the Special Rapporteur, he thought that the functions of the depositary should be limited to the role assigned to it by the 1969 and 1986 Vienna Conventions. But what should be specified was the States and international organizations to which the depositary must communicate reservations and objections and, in particular, which States and organizations were entitled to become parties to the treaty. Mention should not, however, be made in guideline 2.1.5 of preparatory committees.

30. As Mr. Gaja had suggested, a recommendation should be added on the competence of the depositary to communicate simple interpretative declarations. There was, however, no reason to be concerned about the competence of the depositary to admit non-authorized reservations, first, because that function went beyond the classic notion of the depositary's role and also because, if the treaty in question prohibited reservations, any reservations were null and void. It would be worth describing the role of the depositary in greater detail in the commentary by stating that the depositary could advise States and contracting organizations, but was not entitled to reject an instrument of ratification on the ground that it was accompanied by a reservation.

31. Mr. GAJA said he did not think that the competence referred to in guideline 2.1.3 could be limited to those who were entitled to express the consent of the State to be bound, as Mr. Hafner was advocating in his proposal. In fact, article 23 of the 1969 Vienna Convention clearly

stated that, even when a treaty was subject to ratification, a reservation could be formulated at the moment of signature subject to being confirmed subsequently. That was the reason for retaining the longer and more complex version, so as to take account of all possibilities, including those envisaged by the Convention.

32. Mr. CANDIOTI asked Mr. Melescanu, who favoured Mr. Gaja's proposal that the depositary should be entitled to communicate simple interpretative declarations, how he thought the depositary should proceed in publicizing a simple interpretative declaration that had been formulated orally.

33. Mr. MELESCANU said that his approach to the system of communicating interpretative declarations was exactly the same as Mr. Gaja's and he had nothing to add to it. In his opinion, the Secretary-General of the United Nations or any other depositary of an international multilateral convention had the obligation, once a simple interpretative declaration had been addressed to him, to communicate it to the other States parties to the treaty. A practical problem arose when simple interpretative declarations were not sent to the depositary. However, no one was required to do the impossible and the depositary could not be obliged to establish a cumbersome system intended to verify whether or not States made oral declarations. In any event, he considered that Mr. Gaja was more qualified than he to answer the question.

34. Mr. ECONOMIDES, completing the statement he had made the day before on the draft guidelines relating to publicity of reservations and interpretative declarations, said that paragraph 1 of guideline 2.1.5, which was based on article 23, paragraph 1, of the 1986 Vienna Convention, contained ambiguous elements which the Special Rapporteur had pointed out, but without clarifying them, thus remaining faithful to the letter of the provisions of the Convention. For his part, he considered that there should be no hesitation in further defining the treaty provisions in force whenever possible. On the other hand, he gave his full approval to paragraph 2.

35. As for guideline 2.1.6, he considered that the wording of paragraph 1 (a) should be simplified, as had been done for paragraph 1 (b) by explaining in the commentary exactly what was meant by the expression "States and organizations for which it is intended". With regard to paragraph 2 of the guideline relating to the confirmation of a communication made by electronic mail, he thought that current practice should be followed, i.e. that of the depositary international organizations.

36. He entirely shared Mr. Gaja's view on guideline 2.1.8 and he supported the idea of encouraging depositaries not to accept reservations that were prohibited under article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions.

37. Mr. LUKASHUK, referring to guideline 2.2.1 (Reservations formulated when signing and formal confirmation), which indicated that a reservation was considered as having been made on the date of its confirmation, asked Mr. Pellet what procedure had been provided for when the reservation was formulated when the treaty had entered provisionally into force.

38. Mr. PELLET said that the elements of an answer to that question had already been communicated to the Drafting Committee and the question was thus no longer within his own competence, but that of the Chairman of the Drafting Committee.

39. Mr. TOMKA said that he would reply to the question when submitting the report of the Drafting Committee. As to the form of reservations and interpretative declarations, he endorsed guideline 2.1.1, which indicated that a reservation must be formulated in writing. The provision was a faithful copy of article 23, paragraph 1, of the 1969 Vienna Convention. Everything relating to treaties—declarations, reservations, objections—must be formulated in writing, if only to avoid potential problems.

40. Guideline 2.1.2 (Form of formal confirmation) had its place in the Guide to Practice. As had already been suggested, the text could be shortened to read: "Formal confirmation must be made in writing".

41. Referring to guideline 2.1.3, he said that he endorsed Mr. Gaja's comment on the *chapeau*. He preferred the second alternative proposed by the Special Rapporteur, except in respect of paragraph 2 (d) since, in his opinion, reservations were tied to the scope of the obligation assumed. Consequently, if a representative could not accept an obligation on behalf of the State he represented, he could also not formulate a reservation. He endorsed the proposal by a number of members of the Commission that the subparagraph should be deleted.

42. He saw no particular reason for including guideline 2.1.3 bis in the Guide to Practice, since the matter came within the context of the internal law of each State. On the other hand, he was in favour of retaining guideline 2.1.4.

43. With regard to interpretative declarations, he pointed out that guideline 2.4.1 (Formulation of interpretative declarations) was largely modelled on guideline 2.1.3, with the exception of the title, and he proposed that it should be called "Competence to formulate interpretative declarations". As to guideline 2.4.1 bis (Competence to formulate an interpretative declaration at the internal level), he thought there was no justification for including it in the Guide to Practice.

44. Mr. KATEKA said that, generally, he had no problem with the draft guidelines.

45. With regard to paragraph 2 of guideline 2.1.6, which provided that "Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or facsimile]", he believed that some caution must be exercised with regard to the new technology currently available. Perhaps codes should be used, as in electronic banking, in order to ensure the authenticity of communications concerning reservations transmitted by electronic mail. If that was not possible, such communications must be confirmed by regular mail.

46. Mr. CANDIOTI said that the statement by Mr. Tomka that any instrument relating to a treaty must be formulated in writing was to some extent a reply to the question he himself had asked Mr. Melescanu about the

form in which simple interpretative declarations should be communicated. He wondered if, in the context of a guide intended to advise on practice, there should at least be some indication of the desirability for simple interpretative declarations to be formulated in writing.

47. The question of formal confirmation, as referred to in guideline 2.1.2, was not touched on in the context of competence to formulate or communicate a reservation. It might be useful to specify, within the framework of the Drafting Committee, that for formal confirmation it was also necessary to take into account the rules relating to competence and communication.

48. With regard to the doubts about guideline 2.1.4 expressed by Mr. Hafner, Mr. Herdocia Sacasa and other members of the Commission, which he shared, he thought that perhaps the question related more to the effects of reservations than to the subject under consideration. His own substantive objection derived from the fact that a reservation was an integral part of the consent to be bound of the State that formulated it. On that point, the spirit of article 46 of the 1969 Vienna Convention should be taken into account in order to avoid creating a derogation to that article. As Mr. Herdocia Sacasa had said, further consideration should be given to the inclusion of such a draft guideline.

49. Mr. TOMKA, referring to Mr. Candiotti's statement about article 46 of the 1969 Vienna Convention and the breach of internal rules concerning the power to formulate reservations, said that, in principle, reservations were to be made at the moment of signing or of the expression of consent to be bound or, in other words, the moment of ratification or accession. The issue of reservations was thus linked closely to that of expression of consent and to the scope of the obligation that was thereby assumed. The issue should therefore be carefully considered on the basis of the rules concerning the power of constitutional bodies to express the consent of the State to be bound. The only problem in that connection was "late reservations". They had been introduced into practice only in the 1970s, in a specific case when the Legal Counsel of the United Nations had, at the request of a State, indicated the procedure to be followed. In his view, the power to make reservations was linked to the power of the constitutional body to assume an international obligation on behalf of the State.

50. Mr. GALICKI said that he shared the doubts expressed by a number of members of the Commission about guideline 2.1.3. He had doubts as to whether representatives accredited by States to an international organization and heads of permanent missions to international organizations should have the right to formulate a reservation. It must be recalled that, in accordance with article 19 of the 1969 and 1986 Vienna Conventions, a reservation could be formulated "when signing, ratifying, accepting, approving or acceding to a treaty . . .", whereas, under article 7 of the Conventions, the persons mentioned in the draft guideline had the right to represent States for the purpose of "adopting" the text of a treaty. He therefore fully agreed with Mr. Tomka that it should be those bodies that had the competence to formulate reservations to a treaty that had the right to express the consent of the State to be bound by a treaty. He was not in favour of

copying mechanically the articles of the Conventions that dealt with full powers, not, at least, for reservations. Reservations were not included in the text of a convention but were rather included within its context. Since adopting a text and formulating reservations were two different things, those problems should be reconsidered.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission wished to refer guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.3 *bis*, 2.1.4, 2.1.5, 2.1.6, 2.1.7, 2.1.8, 2.4.1, 2.4.1 *bis*, 2.4.2 and 2.4.9 to the Drafting Committee.

It was so agreed.

The meeting rose at 11.40 a.m.

2693rd MEETING

Friday, 20 July 2001, 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candiotti, 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. Rosenstock, 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 RAPPOREUR
(*concluded*)

1. Mr. ILLUECA thanked the Special Rapporteur for his extremely valuable sixth report (A/CN.4/518 and

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).