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Summary record of the 2694th meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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declaration, but also from the context in which it was to be read.

42. In contrast, the Vienna rules on object and purpose could not be transposed to the interpretation of unilateral acts because, in his opinion, they were terms specifically applicable to treaty relations.

43. A further interesting question was whether reference to any preamble or annexes was possible in the context of unilateral acts. Personally, he saw no reason why a unilateral declaration should not be accompanied by a preamble and annexes, which could be clearly identified in written declarations. Broader consideration might also be given to the introductory or preambular sections of successive or simultaneous oral declarations like those made by France and considered by ICJ in the *Nuclear Tests* case. The report also spoke in paragraph 141 of the Declaration on the Suez Canal made by Egypt.⁷ Subsequent conduct could also be a useful guide in interpreting a unilateral legal act, but no mention had been made of subsequent agreements in the draft articles in paragraph 154 of the report, as they were essentially of a treaty nature.

44. Two further aspects reflected in the draft articles were supplementary means of interpretation, in particular preparatory work and the circumstances in which a unilateral declaration was formulated which, as Mr. Pambou-Tchivounda had explained, came into play only at a later stage when the interpreter wished to confirm the results of the interpretation or his efforts to make a determination on the basis of priority elements had led to a result that was uncertain or manifestly absurd or unreasonable. Resort to preparatory work was certainly a difficult task. Could notes, internal memorandums and other forms of internal communication be regarded as preparatory work? In that connection he cited in paragraph 148 an interesting statement by the arbitral tribunal in the *Eritrea/Yemen* case. As for circumstances, paragraph 149 mentioned two decisions of ICJ that had dealt with that subject.

45. In his opinion, any doubt as to whether the rules on interpretation applied to all unilateral acts were dispelled in paragraph 152, which concluded that, irrespective of the material content of an act, those rules always applied. Paragraph 153 went on to explain the reason for the wording of the draft articles contained in paragraph 154. He looked forward to hearing the comments by the members of the Commission on his report.

The meeting rose at 12.45 p.m.

⁷ Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

2694th MEETING

Tuesday, 24 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosestock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (concluded) (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]

DRAFT GUIDELINES PROPOSED BY THE
DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft guidelines adopted by the Drafting Committee (A/CN.4/L.603 and Corr.1 and 2), the titles and texts of which read:

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3]* Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

* The number between square brackets indicates the number of the draft guideline in the report of the Special Rapporteur. Guideline 2.2.2 proposed by the Special Rapporteur was deleted.

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).

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.3.1 Late formulation of a reservation

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

- (a) interpretation of a reservation made earlier; or
- (b) a unilateral statement made subsequently under an optional clause.

2.4.3 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration**

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international

organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

2.4.7 [2.4.8] Late formulation of a conditional interpretative declaration

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2. Mr. TOMKA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had devoted six meetings to the consideration of the topic, from 28 May to 1 June and on 12 July 2001. The Committee had considered 14 draft guidelines that the Commission had referred to it at the current session. He thanked the Special Rapporteur for his guidance and cooperation and the members of the Committee for their constructive comments and active participation in its work.

3. The draft guidelines before the Commission dealt with three matters: reservations formulated when signing a treaty, late reservations and interpretative declarations. Chapter I of the Guide to Practice (Definitions) had already been completed and the Drafting Committee was currently working on chapter II (Procedure), in which the draft guidelines all began with the number 2. The second number related to the section within chapter II in which the draft guidelines were to be found: section 2 (Confirmation of reservations made when signing), section 3 (Reservations formulated late) or section 4 (Procedure regarding interpretative declarations). The draft guidelines in section 1 (Form and notification of reservations) were to be found in the annex to the Special Rapporteur's sixth report (A/CN.4/518 and Add.1-3). The last number referred to the order of the draft guidelines within a section.

4. Guideline 2.2.1 was entitled "Formal confirmation of reservations formulated when signing a treaty". During the discussion in the Commission, some interest had been expressed in combining it with guideline 2.2.2 and it had been suggested that the wording could be streamlined. After a productive exchange of views, the Drafting Committee had decided not to combine the two draft guidelines. It considered that guideline 2.2.1 constituted a separate provision, one which was in the 1969 and 1986 Vienna Conventions and which, for the sake of clarity, deserved separate treatment. Guideline 2.2.2 was, however, more problematic. Combining them would result in a provision that was so vague and general that it would not serve much purpose. In the end, the Committee had decided that any attempt to streamline the wording would mean departing from the wording of the Conventions. In keeping with what had been done for other draft guidelines, the Committee had thus decided to retain the initial wording, which was identical to that of article 23, paragraph 2, of the Conventions. That was why the words "by the treaty" had been added at the end, after the word "bound". The title had been redrafted to reflect the content more faithfully and currently read: "Formal confirmation of reservations formulated when signing a treaty".

** Guideline 2.4.6 proposed by the Special Rapporteur was deleted.

5. The Drafting Committee was of the opinion that guideline 2.2.2 should be deleted. Many members of the Commission had already expressed doubts in plenary about whether reservations formulated when negotiating a treaty actually existed. The Committee had also feared that the retention of the draft guideline might give the impression that there was a new category of reservations made when adopting or authenticating the text of a treaty, i.e. “premature” reservations, which did not entirely correspond to the definition already adopted (guideline 1.1.1). Declarations which were made when negotiating, adopting or authenticating the text of a treaty, and which expressed an intention to make a reservation should be dealt with in the commentary (probably to guideline 2.2.1). They could be mentioned in the context of the pedagogical purpose of the Guide to Practice without being the subject of a separate draft guideline, which might create more problems than it would solve.

6. There had been few comments or disagreements in the Commission on guideline 2.2.2 [2.2.3], except for the clear preference expressed by several members for the retention of the second bracketed phrase in guideline 2.2.3 proposed by the Special Rapporteur: “a treaty that enters into force solely by being signed”. During the discussion in the Drafting Committee, it had been pointed out that the first bracketed phrase, “an agreement in simplified form”, could refer to several different types of agreements, depending on individual countries and legal traditions, such as agreements concluded by exchange of notes or by the executive branch without reference to a legislative body. Other examples given were agreements applied provisionally following signature and entering into force later through ratification, as well as agreements providing for provisional application. The Committee had thought that all such cases of mixed agreements to which guidelines 2.2.1 and 2.2.3 might apply should be mentioned in the commentary. Since a treaty did not actually enter into force by the mere fact of signature, but when certain additional conditions had been met (a certain number of signatures), it had been thought preferable to replace the phrase “a treaty that enters into force solely by being signed” by “when a State or international organization expresses by its signature the consent to be bound by the treaty”. The title was changed to read: “Instances of non-requirement of confirmation of reservations formulated when signing a treaty” in order to draw attention to the specificity of such instances and to differentiate guideline 2.2.2 [2.2.3] from the next one.

7. Guideline 2.2.3 [2.2.4] (Reservations formulated upon signature when a treaty expressly so provides) was intended to cover cases when the possibility of making a reservation was provided for in a treaty. The Special Rapporteur’s proposal had been to indicate that reservations made in such cases did not require formal confirmation. The Drafting Committee had had a lengthy discussion in which two trends had taken shape. A small majority of members had supported the position of the Special Rapporteur, whereas others had thought that, even when a treaty expressly so provided, reservations made when signing should be confirmed when expressing consent to be bound. Having checked State practice, which proved to be contradictory and somewhat confusing, the Committee had concluded that the best course of action would

be to draft a guideline to give guidance to States and practitioners, all the more so in that treaties were silent on whether reservations whose formulation upon signature was provided for had to be confirmed.

8. The wording of the draft guideline was flexible and it had not been substantially changed. It did not say that reservations made when signing did not have to be confirmed when expressing consent to be bound, but rather, that such reservations did not require confirmation. States were therefore free to continue as before: nothing prevented them from confirming such reservations, but there was no uncertainty about the fate of reservations that had not been confirmed. The Drafting Committee had replaced the words “to formulate a reservation” by the words “may make such a reservation”, since that was more appropriate with reference to the distinction between the verbs “to make” and “to formulate”. The purpose of the draft guideline, like that of the entire Guide to Practice, was to provide clarification and certainty in cases that might seem borderline. How States would make use of it and what its long-term consequences were remained to be seen.

9. Guideline 2.3.1 (Late formulation of a reservation) was the first of three concerning the definition and legal effects of reservations formulated late. It focused on two main issues. The first was how States acted in practice to ensure that no party to a treaty could make a reservation after having expressed consent to be bound if one of the contracting parties objected to the reservation. The second was reflected in the words “Unless the treaty provides otherwise,” and was meant to highlight the exceptional nature of such reservations, i.e. the fact that they were not part of “normal” treaty-making practice.

10. The Drafting Committee had looked into whether late reservations were not actually an attempt by States to renegotiate the treaty and, if so, whether they should be considered true reservations. It had concluded, however, that, if the other contracting parties did not oppose the procedure, there was no reason for such declarations not to be considered reservations. Although the draft guideline might seem incompatible with the definition of reservations in guideline 1.1 (Definition of reservations), the Committee had decided not to ignore something that was tolerated under certain circumstances, but remained an exceptional practice.

11. The commentary would indicate that the draft guideline was without prejudice to the implementation of the relevant provisions of the 1969 Vienna Convention, specifically those on reservations to the constituent instrument of an international organization. In practice, the word “objection” was used to refer to two types of disagreement: with the procedure used to make a late reservation and with the content or substance of the reservation. “Objection” was an accepted term and should be retained to avoid inventing new terminology, although it could be explained in the commentary that it covered two types of opposition. The title and text of the draft guideline proposed by the Special Rapporteur had thus been retained with minor drafting changes. One member had reserved his position on the draft guideline.

12. Guideline 2.3.2 (Acceptance of late formulation of a reservation) was the logical consequence of the preceding provision. It had been welcomed in the Commission and found to be compatible with State practice. It dealt with the time period within which a contracting party must object to a late reservation unless it was to be considered as having accepted it. That time period, 12 months, came into play only if the treaty did not provide otherwise, in which case the period envisaged by the treaty obviously applied, and if the well-established practice of the depositary did not differ, in which case that practice prevailed. The Drafting Committee had not changed the title and text as proposed by the Special Rapporteur but for the replacement of the words “usual practice” by the words “[well] established practice”, which were used in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

13. With regard to guideline 2.3.3 (Objection to late formulation of a reservation), the main concern of the Drafting Committee had been to ensure that only one objection would suffice for a late reservation not to be established. In such a case, it could be said that the late reservation did not exist or that it was not established *erga omnes*. That was why the wording chosen was that of the Special Rapporteur: “the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established”. The word “established” had been incorporated because it was used in article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions and the English text had thus been brought into line with the French text.

14. The Drafting Committee had also decided that the inclusion of the words “Unless the treaty provides otherwise”, as in the two preceding guidelines, was unnecessary because treaty provisions on objections to the late formulation of a reservation were virtually non-existent and, where they did exist, late reservations were covered in the treaty itself and objections to them therefore came within the category of “normal” objections.

15. Guideline 2.3.4 dealt with the late exclusion or modification of the legal effects of a treaty by means other than reservations or, in other words, with the various means by which a State or international organization might seek retroactively to alter or exclude the legal effects of a treaty or of one of its provisions. In paragraphs 279 to 287 of his fifth report (A/CN.4/508 and Add.1–4), the Special Rapporteur cited many instances of such practices, which were often, but not exclusively, to be found in human rights treaties. Guideline 2.3.4 did not presuppose the existence of a court or other institution empowered to apply it, meaning that any State or international organization could do so.

16. The Drafting Committee had thought that the draft guideline was somewhat complicated and should perhaps be placed in a future part of the Guide to Practice on the interpretation of reservations. In the end, however, it had concluded that the means used “subsequently” in the life of a treaty should be mentioned in the context of the formulation of reservations in order to distinguish them from late reservations. The Committee had removed the words “Unless otherwise provided in the treaty”, since

they were unnecessary in that particular context, and had added the word “subsequent” in subparagraph (b) to make the meaning clearer. Similarly, in the title, the word “late” had been replaced by “subsequent”, which was a much more appropriate way of referring to declarations that were not reservations.

17. Guideline 2.4.3 (Time at which an interpretative declaration may be formulated) was the counterpart to guideline 2.3.1. The discussion in the Drafting Committee had brought up two questions: whether to mention the time—normally that of the adoption or authentication of the text of the treaty—after which an interpretative declaration could be formulated and whether to delete the two bracketed phrases, “unless otherwise provided by an express provision of the treaty” and “the treaty states that it may be made only at specified times”. They had been deemed unnecessary for the reasons just given for the deletion of a similar phrase in guideline 2.3.4. No overall decision had been taken on whether to include such phrases, however, and during the consideration of the draft guidelines on second reading, some thought would have to be given to that question. The first word of the title was changed from the plural to the singular.

18. The deletion of guideline 2.4.4 was the logical consequence of the decision to delete guideline 2.2.2, and was based on the same reasons.

19. Guideline 2.4.4 [2.4.5] (Non-requirement of confirmation of interpretative declarations made when signing a treaty) related to the question whether interpretative declarations made when signing a treaty had to be confirmed. Originally, drafted as applicable only to the non-confirmation of formal interpretative declarations made when signing an agreement in simplified form, i.e. one that entered into force when signed by a certain number of States or international organizations, it had been reworked to make it broader in scope. It currently covered simple interpretative declarations, whether provided for in a treaty or not, and all types of treaties (agreements in simplified form and multilateral treaties submitted for ratification, approval or accession). No confirmation was to be required for interpretative declarations made when signing a treaty, in accordance with practice and in order to keep the procedure for formulating interpretative declarations relatively straightforward. Nothing prevented a State or international organization from confirming an interpretative declaration if it so wished, however. The title had also been amended accordingly.

20. Having deleted guideline 2.4.4 proposed by the Special Rapporteur, the Drafting Committee had realized that there was nothing in the text about the formal confirmation of conditional interpretative declarations, which by their nature were closer to reservations than to interpretative declarations made when signing a treaty and were covered in guideline 2.4.4 [2.4.5]. When a State or international organization made its participation in a treaty conditional on a certain interpretation of the treaty, the other parties to the treaty had to be aware of that interpretation. Hence the need for the confirmation of such conditional interpretative declarations at the time of expression of consent to be bound by a treaty. Guideline 2.4.5 [2.4.4] (Formal confirmation of conditional interpretative declarations formulated when signing a treaty)

was thus based on guideline 2.4.4 proposed by the Special Rapporteur.

21. The logical outcome of the adoption of guideline 2.4.5 [2.4.4] was the deletion of guideline 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision). Given that interpretative declarations did not require formal confirmation, there was no need to have a separate category for interpretative declarations made when signing and expressly provided for in a treaty.

22. Guideline 2.4.6 [2.4.7] was to some extent the counterpart to guideline 2.3.1 and had given rise to little discussion in the Drafting Committee. Clearly, when a treaty provided that an interpretative declaration could be made only at specified times, the late or subsequent formulation of an interpretative declaration must be consented to by all the contracting parties. That was the approach followed, for example, by the Secretary-General when acting as depositary. Guideline 2.4.6 [2.4.7] had remained basically unchanged, with some drafting amendments simply to clarify the meaning and bring it into line with guideline 2.3.1. The title was changed to read: "Late formulation of an interpretative declaration" in order to clarify the scope.

23. Guideline 2.4.7 [2.4.8] was largely unchanged except for minor amendments to bring it into line with guidelines 2.3.1 and 2.4.5 [2.4.4] and the consequent rewording of the title. It dealt with the special situation of the late formulation of conditional interpretative declarations. Since the regime for such declarations seemed closer to that of reservations than to that of simple interpretative declarations, the Drafting Committee had agreed with the inclusion by the Special Rapporteur of a provision similar to the one on the late formulation of reservations. Late formulation must be accepted, if only tacitly, by all of the other contracting parties. A single objection would suffice for the conditional interpretative declaration to be considered null and void.

24. In conclusion, he thanked the members of the secretariat who had assisted the Drafting Committee, which recommended the draft guidelines to the Commission for adoption.

25. The CHAIRMAN welcomed to the meeting Mr. Mahiou, former member and Chairman of the Commission, and invited the members to comment on the report by the Chairman of the Drafting Committee.

26. Mr. PAMBOU-TCHIVOUNDA, referring to the second sentences of guidelines 2.2.1 and 2.4.5 [2.4.4], said he was not sure that the words "In such a case" were necessary, but would not press for their deletion.

27. Mr. TOMKA (Chairman of the Drafting Committee) said that the possible deletion suggested by Mr. Pambou-Tchivounda could be studied during the consideration of the draft guidelines on second reading, although the words "In such a case" were used in the second sentence of article 23, paragraph 2, of the 1969 Vienna Convention.

28. Mr. HAFNER, confirming that he had expressed a reservation about guideline 2.3.1, in the Drafting Com-

mittee, said that he could not reconcile the late formulation of reservations with the definition of reservations already adopted and saw no convincing reason to depart from that definition. His assessment might have been different, however, if the entire regime applicable to reservations had been available, and that was why he would not object to the adoption of the draft guideline. If a vote had been taken on it, however, he would have abstained.

29. Mr. AL-BAHARNA suggested that, in the title of guideline 2.3.2, the words "Period required for" should be inserted before the word "Acceptance" and, in the title of guideline 2.3.3, the words "Effect of" should be inserted before the word "Objection", in order to reflect better the content of those draft guidelines. The *chapeau* of guideline 2.3.4 should be brought into line with the title and should read: "legal effects", not "legal effect". In subparagraph (a), the word "subsequent" should be inserted before the word "interpretation" to parallel the use of the word "subsequently" in subparagraph (b). In guideline 2.4.3, the number "2.3.4" should be inserted after the number "1.2.1", since guideline 2.3.4 was also relevant.

30. Mr. TOMKA (Chairman of the Drafting Committee) said that the title of guideline 2.3.2 in English was incorrect: the word "late" should be inserted before the word "formulation", in line with the French text, which was the one on which the Drafting Committee had worked. In guideline 2.3.4, subparagraph (a), the insertion of the word "subsequent" would be superfluous, since any interpretation was always done after the time when a reservation was formulated. He reserved the right to refer at a later stage to the other suggestions made by Mr. Al-Baharna.

31. Mr. SIMMA, referring to guidelines 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8], said he hoped that the last word had not been spoken on whether the final product of the Commission would deal with conditional interpretative declarations. His problem with guideline 2.3.1 was slightly different from Mr. Hafner's. He thought that late reservations were undesirable and should not be condoned by devoting a guideline to them. The fairly tortuous wording of the provision showed that the authors themselves had some misgivings. Guidelines should have some normative content, but, in guideline 2.3.1, it was minimal.

32. Mr. KATEKA said that he had strong objections to the inclusion of guidelines on late reservations, which appeared to indicate some tolerance of the practice by the Commission. There was nothing about late reservations in the Vienna regime. Like Mr. Simma, he thought that the stance taken by the Commission was unfortunate.

33. Mr. ROSENSTOCK said that he had serious difficulties with the inclusion of guidelines on conditional interpretative declarations, which merely complicated the rules on reservations. The text could be fully evaluated only when it had become available in its entirety. Passing judgement on individual components of a very interesting, but incomplete, exercise was extremely difficult. He was also concerned about the extremely detailed nature of some of the provisions.

34. Mr. LUKASHUK said that he fully endorsed the comments made by Mr. Kateka.

35. Mr. MOMTAZ said that he did not agree with Mr. Al-Baharna's proposal that the *chapeau* of guideline 2.3.4 should be brought into line with the title by amending the words "legal effect" to read "legal effects". The phrase in the title was in the plural because it covered two separate actions, those described in subparagraphs (a) and (b), whereas the *chapeau* referred to a single action. He fully agreed with Mr. Kateka's comments.

36. Mr. GALICKI said that he wished to join the club of members who had problems with the late formulation of reservations. He agreed with Mr. Hafner that guideline 2.3.1 contradicted the definition of reservations already adopted. The fact that no time limits were set for such modifications created a dangerous practice and deprived treaty relations of stability. The job of the Commission was not to codify rare practices that were not suitable for the development of international law and he fully agreed with Mr. Simma that such practices should not be tolerated, even tacitly. Guideline 2.3.1 should be reconsidered in conjunction with guidelines 2.3.2 and 2.3.3. If the late formulation of reservations was to have a place in treaty relations, it could be dealt with in guideline 2.3.4. On the whole, however, he was against mentioning the late formulation of reservations in a set of guidelines that were intended to describe model practices to be followed by States.

37. Mr. ELARABY said that he still had difficulties with the topic of reservations to treaties and particularly with the late formulation of reservations and conditional interpretative declarations, the concept of which was hard to grasp. He associated himself with the members who had expressed misgivings on those points.

38. Mr. MELESCANU said that he also agreed with those members. For him, late reservations were an element of uncertainty in international law. The concept itself was at variance with the concept of reservations as embodied in the 1969 and 1986 Vienna Conventions. But much depended on how one looked at public international law and, in his opinion, the will of States was its fundamental component and indeed the very source of legal obligations. Mr. Galicki was wrong in thinking the Commission was encouraging a dangerous practice. It was simply being realistic by taking account of what States actually did. If the practice was deemed to be contrary to the idea of reservations, that could be made clear, but it would be wrong to close one's eyes to it. Regarding Mr. Simma's interesting argument about the lack of normative content, he said the Guide to Practice was not a work of codification and did not set strict and precise standards. The purpose of the exercise was, by drawing on State practice, to form the basis for recommendations that might help those who dealt with late reservations, particularly in foreign ministries. He certainly did not approve of late reservations, but, since they existed, they should be acknowledged and an attempt should be made to limit their adverse effects.

39. Mr. YAMADA said that he also had difficulty with the concept of conditional interpretative declarations and hoped that the Commission would come back to it dur-

ing the consideration of the draft guidelines on second reading. He shared the misgivings expressed by many members about the late formulation of reservations and thought that the practice should not be encouraged, but, if a contracting party that had accepted a treaty without any reservations later found itself unable to implement a certain provision of the treaty, what could it do? It could make a late reservation or withdraw from the treaty. The whole purpose of a reservation was to provide flexibility in the interests of universality. A balance had to be struck between the unity and the universality of a treaty.

40. Mr. SIMMA, referring to his point that guideline 2.3.1 lacked normative content, said the "sandwich" technique of placing a prohibition between an "Unless" clause and an exception had the cumulative effect of saying very little. He was not suggesting that the Commission should overlook the practice of making late reservations, however deplorable it might be, but, rather, that more thought should be given to the whole matter and to the wording of any draft guideline that might relate to it.

41. Mr. CANDIOTI said that the Spanish text of the draft guidelines needed polishing. He shared the doubts expressed about including provisions on late reservations in the Guide to Practice and thought that more consideration should be given to the matter. In its report to the General Assembly, the Commission should request the views of States. He welcomed Mr. Yamada's remarks on how provisions on late reservations might affect the necessary balance between the unity and universality of a treaty. Like others, he had doubts about whether a guide to practice should simply reflect reality. It was not a phenomenological investigation, but an attempt to put order and provide guidance in a field where practice was fairly confused.

42. Mr. GALICKI said that Mr. Melescanu appeared to have misconstrued his earlier statement. He agreed, of course, that the Commission was not creating norms, but simply reflecting certain practices in the draft guidelines. In so doing, however, it was "ennobling" those practices to some extent. What was said in guideline 2.3.1 about late formulation of a reservation indirectly created the impression that the draft guidelines contained some rules on that subject. He was fearful of giving that impression and therefore reaffirmed his objection to the inclusion of guideline 2.3.1 in its current form. Consideration should be given to his earlier suggestion that the phenomenon should be mentioned somewhere else in the text. The Commission was not closing its eyes to reality, but keeping a balance between certain phenomena and the definitions and rules that it had already adopted. He was very much in favour of Mr. Candiotti's suggestion that more information should be requested on the practice of States.

43. Mr. ECONOMIDES said that he was among those who had difficulty with the question of conditional interpretative declarations. He had understood that it was to be reconsidered at the close of the work of the Commission and that the relevant provisions had been accepted only provisionally. On late reservations, he entirely agreed with Mr. Melescanu. The practice ran counter to the 1969 Vienna Convention and should be discouraged, but it existed, had long existed in fact and had been applied by major international organizations serving as depositar-

ies. A guide to practice could not simply ignore it. In the commentary to the relevant draft guideline, however, the Commission should express its disapproval of the practice and say that it must be treated as an exception. The rules envisaged were extremely strict, since, in order for a late reservation to be accepted, the unanimous agreement of all the other States concerned was required. Adequate guarantees and precautions thus had to be provided for.

44. Mr. KAMTO said that he had a question of principle relating to the legal basis for the work of the Commission. Many members had argued that the Commission could not ignore practice. But neither could it mechanically go along with practice, especially if it was contrary to the principles of international law. The important thing was to determine whether the practice in question was in harmony with international law. It was true that the will of States was the cornerstone of international law, but it was equally true that, in certain cases, such as bilateral relations, it could be contrary to certain international legal principles and rules. As a member of the Drafting Committee, he had seen the efforts made to avoid a fundamental contradiction between the draft guidelines and the 1969 Vienna Convention. If such a contradiction existed, however, the duty of the Commission was to draw attention to it, if only by noting in the commentary that the practice was contrary to the established rules of international law.

45. Mr. AL-BAHARNA said that, although many misgivings had been expressed about guideline 2.3.1, he thought that it was well balanced, particularly in the way it reflected State practice. The main question was whether the rule it embodied was compatible with the 1969 Vienna Convention and he thought that it was, even though the Convention did not specifically state such a rule. The draft guideline established certain conditions, one of which was reflected in the phrase “Unless the treaty provides otherwise”. That phrase had been questioned, but it was generally accepted and commonly found in treaty texts. The guidelines would be of little use if they failed to include rules that had been consolidated by State practice and did not contradict the Convention.

46. Mr. GAJA said the original discussion in the Commission had not revealed the strong opposition to guideline 2.3.1 that was becoming apparent. The argument that late reservations were not a widely known phenomenon overlooked the fact that they had been accepted by major depositaries of treaties, including the Secretaries-General of the United Nations, IMO and the Council of Europe. Everyone agreed that it was an undesirable phenomenon, although in some cases it met certain needs on the part of States. With regard to Mr. Simma’s objection to the “sandwich” technique, he said that double negatives were frequently used for precisely the purpose intended in the current case, namely, to show that certain acts should not be encouraged, but simpler, more positive wording, such as “. . . may only formulate a reservation if none of the other Contracting Parties objects . . .”, could easily be used. It had been argued that the draft guideline conflicted with the 1969 Vienna Convention, but that was not true. It did not say that late reservations were reservations from the time they were made, but that they were treated as reservations once they had been seen to give rise to

absolutely no objection. That point could be clarified in the commentary.

47. Mr. HERDOCIA SACASA said his understanding from the very start had been that the controversial elements in the draft guidelines would be reconsidered at the end of the exercise. He agreed with Mr. Rosenstock that the overall picture had to be visible before the unity of treaties could be properly balanced with their universality. It was true that the late formulation of reservations and conditional interpretative declarations could pave the way for legal uncertainty and other problems. He therefore endorsed the suggestion by Mr. Candioti that States should be asked to comment on those two issues, after which the Commission would have a fuller perspective on the matter.

48. Mr. RODRÍGUEZ CEDEÑO said that many doubts had been expressed as to whether draft guidelines on late reservations and conditional interpretative declarations should be included, particularly because of the possible destabilizing effect on treaty relations. That was a valid argument, but equally valid was the point that the Commission could not afford to ignore an existing practice. The wording of guideline 2.3.1 left the door wide open to the expression of opposition to a late reservation, since all the parties to a treaty had to agree to it. Different wording might help to dispel doubts and offset any disadvantages the practice might have. The Commission should follow Mr. Candioti’s suggestion and ask the General Assembly whether the two draft guidelines should be included, but some attention should be paid to how the question was phrased.

49. Mr. HE said that a heated debate had already taken place on late reservations and it was obvious that many difficulties still had to be resolved. On the one hand, the Commission should not encourage the use of late reservations, but, on the other, it needed to recognize that it was part of State practice. A number of countries, as well as the Secretary-General, had already accepted it. In such circumstances, he suggested that the draft guidelines on late reservations should be retained through the first reading and that guidance from the Sixth Committee and written comments by Governments should be requested with a view to arriving at more satisfactory wording of the draft guidelines for consideration on second reading.

50. Mr. BROWNIE said that he had a certain preference for the views expressed by Mr. Al-Baharna and Mr. Gaja, as opposed to those of Mr. Simma and others, but, ultimately, he agreed with Mr. Rosenstock that no appropriate solution to the problem could be found until the overall purpose and rationale of the project was revisited. There had always been a strong element of exposition, and therefore a certain neutrality, in the draft guidelines. Thanks to the Special Rapporteur, the Commission was involved in a cartographic exercise, but it had not said whether or not it liked the terrain.

51. Mr. LUKASHUK said the fact that the Commission had not reached a consensus and that two opposing positions prevailed had to be acknowledged. He proposed that the provisions on late reservations should be placed in square brackets and submitted to the Sixth Committee in order to ascertain the views of States. In the meantime,

the Special Rapporteur could be asked to draft a compromise solution that was not at variance with the Vienna regime.

52. Mr. ADDO said that guideline 2.3.1 must be retained. The fact that some States made late reservations and some States did not object to them could not be gainsaid. The business of the Commission was not to do away with the practice, but to draft provisions on it while indicating how deplorable it was. The decision as to whether the practice should be abolished should be left up to the Sixth Committee. On that score, he was inclined to endorse the views of Mr. Al-Baharna and Mr. Gaja.

53. Mr. SIMMA said that he supported Mr. Candiotti's suggestion, which Mr. Galicki seemed to have interpreted as being to gather more information about State practice. That was not what was needed, however, because such information was already plentiful and, unfortunately, it was not good news. The Sixth Committee should be asked whether it wanted the Commission to codify the practice of late reservations and establish rules like those proposed in the draft guidelines. A compromise solution as suggested by Mr. Lukashuk would be hard to achieve. Late reservations had to be accepted as a fact of life and an appropriate regime for them developed. Otherwise, they had to be rejected and done away with.

54. Mr. TOMKA (Chairman of the Drafting Committee) said that the Drafting Committee had worked on the basis of the Commission decision to refer the draft guidelines to it. Clearly, the Commission was currently in the first stage of the drafting of the text and could reconsider some provisions later, on the basis of comments to be made by Governments.

55. The CHAIRMAN, summing up the discussion, said that there were opposing views on two issues: late reservations and conditional interpretative declarations. Those views had to be reconciled; square brackets were not an option. States could, however, be asked for their opinions. It could be argued that the draft guidelines that had been questioned should be deleted, but he would prefer to see them adopted, on the understanding that the Commission would discuss the two problematic issues later. After all, the debate in the Commission had shown that there was support for the referral of the provisions to the Drafting Committee, which had approved them, subject to a reservation by one member. Even the members who strongly objected to the inclusion of draft guidelines on the two issues had acknowledged that the practices existed. He therefore suggested that States should be asked to give their reaction and that the Commission should come back to the issues at a later stage, perhaps during its consideration of the text on second reading.

56. Mr. ROSENSTOCK said that a more appropriate reflection of the centre of gravity of the Commission might be to simply take note of the report of the Drafting Committee. There was no need to take a position at the current time because the first reading had not even been completed. He did not think it useful to ask the Sixth Committee for its opinion on guideline 2.3.1. It could not be said to be wrong in law, but how it fit in to the draft could be perceived only in the context of the wider exercise.

57. The CHAIRMAN pointed out that, if the Commission simply took note of the report of the Drafting Committee, the draft guidelines would not be incorporated in the report of the Commission to the General Assembly and States would not have an opportunity to react to them. In addition, such a procedure had no precedent in the past practice of the Commission.

58. Mr. ROSENSTOCK said that the Commission had not yet concluded its own consideration of the draft guidelines, so there was nothing wrong with keeping the discussion *en famille* at the current early stage. If it strongly wished to share the news about where it stood so far, however, it could take note of the report of the Drafting Committee and include it in its own report to the General Assembly, as it had done in similar situations in the past.

59. Mr. KATEKA said that the course of action suggested by Mr. Rosenstock could be combined with the compromise solution proposed by Mr. Candiotti. The Commission could thus request the views of the Sixth Committee on whether the contents of guideline 2.3.1 were suitable for codification and, at the same time, take note of the report of the Drafting Committee. He saw no reason why it should hesitate to consult the Sixth Committee or adopt something on which there was clearly no agreement.

60. Mr. PAMBOU-TCHIVOUNDA, referring to the suggestion by Mr. Rosenstock, asked when the consideration of the Commission of the draft guidelines on first reading could go forward if it simply took note of the report on them.

61. Mr. TOMKA (Chairman of the Drafting Committee) said that the Commission might be adopting an undesirable course of action. Its established practice was to adopt texts on first reading, add commentaries to them and then submit them to Governments for comments. That practice had prevailed for more than 50 years, even when there had been a clear division of views on individual articles and they were put to a vote. The only exception had been made recently for the draft articles on State responsibility. He urged the members of the Commission to go along with the adoption of the draft guidelines in order to allow the Special Rapporteur to add commentaries to them in the context of the first reading. Once that had been done, the Commission could ask Governments, through the General Assembly, to submit written comments and, on that basis, begin the second reading.

62. Mr. GALICKI said that, in view of the need to reach a compromise, perhaps the draft guidelines could be adopted on the understanding that the list of questions to be addressed to Governments would be accompanied by an account of the difficulties and doubts the Commission had experienced during its work.

63. The CHAIRMAN confirmed that that would be done in chapter III of the report of the Commission to the General Assembly (Specific issues on which comments would be of particular interest to the Commission). He said that, if he heard no objection, he would take it that the Commission wished to take note of the draft guidelines as contained in the report of the Drafting Committee.

It was so agreed.

64. Mr. PELLET (Special Rapporteur) said that he had remained silent throughout a discussion that he had found shocking. During the adoption of the report of the Drafting Committee, it was perfectly natural for its members to outline the positions they had taken. On the other hand, it was not at all acceptable for the discussion to be reopened after the Commission had unanimously referred a text to the Committee. The draft guidelines had emerged intact from the work of the Committee, but, when they had been referred back to the Commission in plenary, they had been treated much differently than during their initial consideration. To take revenge at the current stage for an earlier failure of minority views showed a lack of fair play.

65. For reasons he had given in detail, he believed that the Commission should exercise caution and not decide once and for all that conditional interpretative declarations came under the legal regime of reservations. It was wrong to affirm, as some members did, that the Commission had not accepted the idea of conditional interpretative declarations. They were the subject of a draft guideline that had been adopted with no objection.

66. It might come as a surprise to the members of the Commission to hear that he entirely agreed with those who thought that the late formulation of reservations was a deplorable practice. He was also not fully convinced that, because the practice existed, it should be accepted. But that position was at variance with the very clearly stated policy of the Secretary-General, to which no country had objected. He would be surprised if, when the Sixth Committee was asked what it thought about guideline 2.3.1, many States would object to the established practice of the Secretary-General.

67. In his report, he stated not that the late formulation of reservations was a practice, but that it was a new procedure, which was in keeping with the law because no one could dispute the fact that the States parties to a multilateral treaty were entitled to derogate from the Vienna definition. That meant that, in some specific cases, States agreed to consider that a reservation could be formulated late, even though that was normally prohibited. The only valid point raised during the discussion was that it was open to question whether the late formulation of reservations should be included in the Guide to Practice. He considered that the Commission should not bury its head in the sand, but should firmly state that the practice should be subject to certain limitations. He disagreed with Mr. Simma about the lack of normative content in guideline 2.3.1. A double negative had been used precisely to show that the practice must not be considered as anything more than an exception and to indicate that the Commission was not at all happy about it.

68. In any event, the draft guidelines were only at the stage of the first reading and a different approach could be adopted at the next stage. It was rather irritating to hear that a position could not be taken until the entire text had been made available because the entire text was never available on first reading, by definition. It was unreasonable to say that the Special Rapporteur, who himself was discovering more about reservations as he went along, should hand over the entire text right away.

69. He thanked the Chairman of the Drafting Committee for his excellent report, which accurately reflected the discussions of the Committee.

70. Mr. SIMMA, noting that the Special Rapporteur had disagreed with his earlier comments, recalled that what he had said about conditional interpretative declarations had simply been that the last word had not yet been spoken, something with which the Special Rapporteur would surely agree.

71. Mr. LUKASHUK said that he could not fail to take up the accusation of the lack of fair play on the part of the critics of some of the draft guidelines. There was no impropriety in the way the Commission had proceeded. During the discussion in the Commission in plenary, some provisions in the draft guidelines had been criticized. The draft guidelines had been referred to the Drafting Committee, which had failed to take account of those criticisms and had returned the draft guidelines to the Commission virtually unchanged. The fact that members who had made critical remarks earlier had repeated them at the current time was in no way an instance of improper procedure.

72. Mr. TOMKA (Chairman of the Drafting Committee) pointed out that the opinions expressed by the members of the Commission during the discussions of the Special Rapporteur's fifth and sixth reports and of the report of the Drafting Committee would be reflected in the report of the Commission to the General Assembly, in accordance with the usual practice.

The meeting rose at 1 p.m.

2695th MEETING

Wednesday, 25 July 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.
