

Document:-
A/CN.4/SR.2733

Summary record of the 2733rd meeting

Topic:

Extract from the Yearbook of the International Law Commission:-
2002, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-FOURTH SESSION

Held at Geneva from 22 July to 16 August 2002

2733rd MEETING

Monday, 22 July 2002, at 3 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (*continued*)* (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIR declared open the second part of the fifty-fourth session of the Commission and invited Mr. Yamada to introduce the report of the Drafting Committee on reservations to treaties (A/CN.4/L.614).

2. Mr. YAMADA (Chair of the Drafting Committee) said that the Drafting Committee had held three meetings on the topic, from 21 to 23 May 2002. It had considered 14 draft guidelines: 13 had been referred to the Committee at the previous session and one (2.1.7 *bis*) at the current session. The draft guidelines were contained in the second “chapter” of the Guide to Practice dealing with procedure. The Committee proposed 11 draft guidelines (the number

between square brackets indicates the number of a draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline).

2 Procedure

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without the person's having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of government and ministers for foreign affairs;

(b) Representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4] *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

* Resumed from the 2721st meeting.

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

1. The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 *Communication of reservations*

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization, or to a treaty which creates an organ that has the capacity to accept a reservation, must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) If there is a depositary, to the latter, which shall notify the States and organizations for which the communication is intended as soon as possible.

2. A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or, as the case may be, upon its receipt by the depositary.

3. Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification.

2.1.7 *Functions of depositaries*

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] *Procedure in case of manifestly [impermissible] reservations*

1. Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, indicating the nature of legal problems raised by the reservation.

2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 bis] *Formulation of an interpretative declaration at the internal level*

1. The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

[2.4.3 [2.4.2, 2.4.9] *Formulation and communication of conditional interpretative declarations*

1. A conditional interpretative declaration must be formulated in writing.

2. Formal confirmation of a conditional interpretative declaration must also be made in writing.

3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

4. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

3. Draft guidelines 2.1 to 2.1.4 dealt with the form and formulation of reservations. Draft guidelines 2.1.5 and 2.1.6 dealt with the procedure for communication of reservations. Draft guidelines 2.1.7 and 2.1.8 dealt with the functions of depositaries. Draft guidelines 2.4.1 and 2.4.2 dealt with the formulation of interpretative declarations. Finally, draft guideline 2.4.3 dealt with the formulation and communication of conditional interpretative declarations.

DRAFT GUIDELINE 2.1.1 (Written form)

4. Draft guideline 2.1.1 had been provisionally adopted by the Drafting Committee as originally proposed by the Special Rapporteur and without any modification. The wording was taken from article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

DRAFT GUIDELINE 2.1.2 (Form of formal confirmation)

5. The Drafting Committee had initially considered whether the wording proposed by the Special Rapporteur, which implied that formal confirmation was not always necessary, should be reviewed. It had opted for a more succinct and concise formula, which did not, of course,

imply that formal confirmation was always necessary. It simply stated that the formal confirmation should be made in writing, it being understood that such formal confirmation might not always be required. The written form of confirmation was derived from article 23, paragraphs 1 and 2, of the 1969 and 1986 Vienna Conventions.

DRAFT GUIDELINE 2.1.3 (Formulation of a reservation at the international level)

6. Draft guideline 2.1.3 had originally been presented in two versions in the Special Rapporteur's sixth report on reservations to treaties (paras. 69 and 70),³ one short and the other longer. The Drafting Committee had decided to focus on the longer version, which was more explicit and detailed. It had thought that, in view of the pedagogical and practical intention of the Guide to Practice, it was worthwhile to include clearer, more detailed guidelines.

7. In its original version, the draft guideline had mentioned "a person ... competent to formulate a reservation on behalf of a State or an international organization". As members would recall, there had been a debate in plenary about that "competence" and the use of the term in that context. The wording of the guideline derived from article 7 of the 1969 and 1986 Vienna Conventions, which was entitled "Full powers" and did not use the word "competence". It had been argued that the term "competence" might be ambiguous, since it could also refer to the internal institutions which formulated the reservation before it was expressed at the international level. Several other terms had been considered by the Drafting Committee (for example, "a person authorized", "empowered", "has the capacity", "may"), but they had all finally been discarded, since they had implications which went beyond the context of the guidelines or did not express in a satisfactory manner the very idea of the guideline.

8. On the other hand, article 7 of the 1969 and 1986 Vienna Conventions referred to full powers in the sense of representation of a State or an international organization by a person for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or the international organization to be bound by the treaty. Consequently, the Drafting Committee had decided to align the draft guideline (paras. 1 and 2) more precisely with the wording of article 7 of the Vienna Conventions, keeping in mind that that representation would now concern the formulation of a reservation rather than the adoption or authentication of a treaty or expression of consent to be bound by a treaty. Of course, in practice, those two functions usually merged because (except in the case of a late reservation) the formulation of reservations took place precisely at those moments and most frequently at the moment of the expression of consent to be bound by a treaty.

9. In paragraph 1, the saving clause "Subject to the customary practices in international organizations which are depositaries of treaties" had been retained in order to take into consideration any special practices of the depositaries.

10. Another question related to paragraph 2 (*d*), which had originally been in square brackets. Some doubts had been expressed in plenary about its retention. The Drafting Committee had decided to keep the paragraph, which corresponded to paragraph 2 (*d*) of article 7 of the 1986 Vienna Convention.

11. The title of the draft guideline had been changed to "Formulation of a reservation at the international level" to reflect exactly its content and the changes made to it with the deletion of the term "competence".

DRAFT GUIDELINE 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)

12. Draft guideline 2.1.4 consisted in principle of the original guidelines 2.1.3 bis (which was now paragraph 1 of the new guideline) and 2.1.4 (which was now paragraph 2), with the title of the original guideline 2.1.4 serving as the title of the new guideline.

13. Members would recall that there had been some hesitation in the plenary regarding draft guideline 2.1.3 *bis*, which several members had considered superfluous. It had also been argued that it expressed an idea not found in the 1969 and 1986 Vienna Conventions and that it stated the obvious. The Drafting Committee had decided to consider the fate of the original guideline after considering draft guideline 2.1.4.

14. Concerning that provision, two views had emerged in the Drafting Committee. According to one, it was also superfluous and should be deleted. It had been pointed out that a reservation formulated in violation of a provision of internal law could always be withdrawn and that the guideline was not needed. At most, the idea could be expressed in the commentary.

15. According to the other view, the draft guideline (which followed article 46 of the Vienna Conventions) was necessary, since it served to clarify an important point, namely, that a State or an international organization could not invoke the fact that a reservation had been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedures for formulating reservations as invalidating the reservation. The guideline was all the more useful since any internal rules concerning competence and procedure for formulating reservations were arcane and inaccessible to third parties. Moreover, even if a reservation formulated in violation of internal rules could always be withdrawn, the withdrawal would not have any retroactive effect, and consequently the need for the guideline was obvious.

16. The second view had finally prevailed, and then, when the Drafting Committee had returned to guideline 2.1.3 *bis*, the question had arisen whether it should be maintained or deleted. There had again been two views in the Committee, one opting for deleting guideline 2.1.3 *bis* and expressing the idea in the commentary to 2.1.4 and the other preferring the guideline's maintenance, arguing that, even if it appeared to be obvious, there was

³ See 2719th meeting, footnote 10.

no harm in stating the idea in the context of a practical and user-friendly Guide to Practice. Moreover, if kept, the guideline could be merged with guideline 2.1.4. The second view had prevailed.

17. The Drafting Committee had made a few changes to the original wording. Mainly it had substituted the word “authority” for the word “body” in the first sentence of draft guideline 2.1.3 *bis* and added the term “relevant rules” before the words “of each international organization”.

DRAFT GUIDELINE 2.1.5 (Communication of reservations)

18. Draft guideline 2.1.5 followed closely article 23, paragraph 1, and article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions.

19. The Drafting Committee had discussed at length the use of the term “deliberative” in paragraph 2. The term was found in the report of the Secretary-General “Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization”,⁴ and the Special Rapporteur had used it in the original drafting of the guideline. It had been argued, however, that the term raised questions, especially concerning its exact meaning when taken together with the previous phrase (“a treaty in force which is the constituent instrument of an international organization”). It should be recalled in that connection that some delegations in the Sixth Committee had already asked for a clarification (see the topical summary of the discussion held in the Sixth Committee during its fifty-sixth session prepared by the Secretariat (A/CN.4/521, para. 50)). Consequently, the Drafting Committee had decided to delete the word “deliberative”, and the phrase now read “or to a treaty which creates an organ that has the capacity to accept a reservation”. The words “to a treaty” had also been added after the word “or” for the sake of clarity.

20. It should be recalled that the words “a treaty in force” would seem to preclude communication of reservations to preparatory commissions. That reflected the general feeling on that point in the debate in plenary.

DRAFT GUIDELINE 2.1.6 (Procedure for communication of reservations)

21. Draft guideline 2.1.6 followed closely article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention. Paragraph 1 of the draft guideline followed paragraph 1 of article 78 of the 1986 Vienna Convention, which was entitled “Functions of depositaries”.

22. Subparagraph (a) of paragraph 1 also followed draft guideline 2.1.5 in its reference to “contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. Subparagraph (b) remained unchanged and as originally proposed by the Special Rapporteur.

23. The Drafting Committee had also thought that the last paragraph of the draft guideline proposed by the Special Rapporteur should be kept in order to give clear guidance to the users of the Guide to Practice. It had been slightly amended to better reflect the current practice of depositaries. When a communication was made by electronic mail or facsimile, it had to be confirmed by diplomatic note or depositary notification.

24. Paragraph 2 of draft guideline 2.1.6 had originally been draft guideline 2.1.8. The Drafting Committee had thought that the two guidelines could be merged, since both referred to the procedure for communication of reservations. The only modification in the original text (as it had appeared in the former draft guideline 2.1.8) was the addition of the words “or as the case may be, upon its receipt by the depositary”. That addition had been considered to be necessary in order to align the wording with that of article 79, paragraph (b), of the 1986 Vienna Convention and, of course, to include the case when there was a depositary.

DRAFT GUIDELINE 2.1.7 (Functions of depositaries)

25. Draft guideline 2.1.7 was based on article 77, paragraph 2, of the 1969 Vienna Convention and article 78, paragraph 2, of the 1986 Vienna Convention. The first paragraph was based on article 77, paragraph 1 (d), of the 1969 Vienna Convention and article 78, paragraph 1 (d), of the 1986 Vienna Convention. There was a distinction between the group of States and organizations (the signatory and contracting States and organizations) to the attention of which a difference between a State or an organization and the depositary was brought and the group of States and organizations to which the reservation was communicated (contracting States and organizations and other States and organizations entitled to become parties to the treaty).

26. That distinction stemmed from the Vienna Conventions themselves and was justified by the fact that such a difference between the depositary and a State or an international organization concerning the performance of the depositary’s functions pertained only to the narrowly defined “treaty community” established by the treaty, namely, the signatory and contracting States and international organizations. That explanation could also appear in the commentary.

27. The wording of the draft guideline remained practically unchanged from what had been originally proposed by the Special Rapporteur. In a note on paragraph 1 of draft guideline 2.1.7 adopted by the Drafting Committee (A/CN.4/L.623), the Special Rapporteur made some new proposals on draft guideline 2.1.7 for consideration in plenary.

DRAFT GUIDELINE 2.1.8 (Procedure in case of manifestly [impermissible] reservations)

28. Draft guideline 2.1.8 was guideline 2.1.7 *bis*, as originally proposed by the Special Rapporteur in his seventh report (para. 46). It would be recalled that the Commis-

⁴ A/4235, para. 21.

sion had had an extensive debate on that draft guideline in plenary before referring it to the Drafting Committee.

29. One major issue was the expression “manifestly impermissible”, which appeared in the title and in the first paragraph. In the course of a lengthy discussion, two views had emerged in the Drafting Committee. According to the first view, which had finally prevailed, the term “manifestly impermissible” should be kept, although the word “impermissible” should be placed in square brackets. The significance of the square brackets was that there should be further discussion of that word and its French equivalent, *illicéité*, before a decision was taken on which term should be finally used in both French and English. The main problem, particularly with the French term *illicéité*, was that its use should not imply any relation with international responsibility in the context of which the term *illicéité* was used. That problem had already been raised in plenary. It had been suggested that other terms could be used, such as “invalid”, “unacceptable” or “inadmissible”, but the Committee had finally decided to provisionally retain the current terminology, subject to further reflection. Of course, it should be noted that the term “impermissible” (*illicite* in French) was placed in square brackets in both the title and the first sentence; the word “impermissibility” (*illicéité*) at the end of the first paragraph was therefore also placed in square brackets.

30. According to the other view, paragraph 1 of the guideline should avoid the expression “manifestly impermissible” and reflect more closely the wording of article 19, subparagraphs (a) and (c), of the 1969 and 1986 Vienna Conventions. It should simply mention prohibited reservations or reservations incompatible with the object and purpose of the treaty. That view had its merits and had been carefully considered by the Drafting Committee, but the first proposal, which was simpler and more economical, had ultimately prevailed.

31. In paragraph 2, it would be recalled that the issue which raised several questions and on which views had diverged was the last phrase, “attaching the text of the exchange of views he has had with the author of the reservation”. The Drafting Committee had thought that the original text could have far-reaching implications or become the subject of controversy. Consequently, it had decided to replace the phrase with the more cautious one “indicating the nature of legal problems raised by the reservation”. It had been felt that that wording struck a good balance between, on the one hand, the traditional role of the depositary and, on the other, the position of States and the integrity of the treaty.

32. The title of the draft guideline was now “Procedure in case of manifestly [impermissible] reservations”, which corresponded more closely to the content of the guideline and the section in which it was placed.

DRAFT GUIDELINE 2.4.1 (Formulation of interpretative declarations)

33. As the Special Rapporteur had pointed out, the formulation of interpretative declarations was not dealt with in the Vienna Conventions. Consequently, the guideline usefully filled a certain gap in those conventions. The

Drafting Committee had decided, insofar as possible, to align the guideline with draft guideline 2.1.3.

34. However, some differences existed in the sense that the procedure for interpretative declarations was more flexible and less formal. The Drafting Committee had decided, for the same reasons that had been taken into consideration in the case of draft guideline 2.1.3, that the word “competent” should be replaced by the words “considered as representing”. A similar expression was used in the first sentence of article 7, paragraph 1, of the Vienna Conventions. It should also be noted that the guideline included both simple and conditional interpretative declarations. The title of the draft guideline remained unchanged.

DRAFT GUIDELINE 2.4.2 (Formulation of an interpretative declaration at the internal level)

35. Draft guideline 2.4.2 had formerly been draft guideline 2.4.1 *bis*. Several members had questioned its utility. It had been pointed out that its relevance related to possible conditional interpretative declarations that might also be included, since the guideline spoke in general about “interpretative declarations”. The Drafting Committee had finally decided to adopt it, but had placed it in square brackets. The significance of the square brackets was that if, in the future, conditional interpretative declarations were found to “behave” exactly like reservations, so that they could be assimilated to them, guideline 2.4.2 and the one that followed would no longer have any *raison d’être*.

36. The title had been amended to read “Formulation of an interpretative declaration at the internal level”, while the text remained unchanged.

DRAFT GUIDELINE 2.4.3 (Formulation and communication of conditional interpretative declarations)

37. Draft guideline 2.4.3 was the result of a merger of draft guidelines 2.4.2 and 2.4.9. The two guidelines were very similar, and consequently the Drafting Committee had considered that they could easily and economically constitute one guideline. The guideline was now entitled “Formulation and communication of conditional interpretative declarations”.

38. Paragraph 1 remained unchanged and was aligned with draft guideline 2.1.1. Paragraph 2 had been amended to correspond to draft guideline 2.1.2. The last two paragraphs had also been changed to correspond to draft guideline 2.1.5. Guideline 2.4.3 had also been placed in square brackets, for the same reason as guideline 2.4.2; its maintenance would depend on the subsequent decision of the Commission on the whole issue of draft guidelines pertaining to conditional interpretative declarations, depending on whether it decided that they could be entirely assimilated to reservations.

39. In conclusion, he thanked the Special Rapporteur for his advice and cooperation and all the members of the Drafting Committee for their constructive suggestions,

their spirit of cooperation and their participation in the Committee's work. The Committee recommended that the Commission should adopt the draft guidelines which were before it.

40. Mr. PAMBOU-TCHIVOUNDA, referring to draft guideline 2.1.8, repeated his doubts concerning the use of the words "manifestly impermissible", since the word "manifestly" raised the question of the evidence for the non-conformity of a reservation, and the concept of the impermissibility of a reservation did not appear in the 1969 and 1986 Vienna Conventions. He therefore suggested using the expression "manifestly inadmissible reservations", which would be understood to mean "reservations not in conformity with article 19 of the 1969 and 1986 Vienna Conventions".

41. With regard to draft guideline 2.4.1, he suggested that, for the sake of simplicity and clarity, the first part of the guideline should be amended to read: "An interpretative declaration must be formulated by any person duly representing a State or an international organization...". The rest of the guideline would remain unchanged.

42. Mr. DAOUDI said that the phrase "by diplomatic note or depositary notification" in paragraph 3 of draft guideline 2.1.6 ("Procedure for communication of reservations") seemed rather unclear. He also noted that, while it was stated that a communication made by electronic mail must be confirmed by diplomatic note or depositary notification, the text did not specify whether the 12-month period mentioned in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions began on the date of receipt of the electronic mail or the date of the subsequent confirmation.

43. Mr. GAJA said that it was important to distinguish between the date on which the communication relating to a reservation was made and the date marking the start of the 12-month period during which States could, under article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, raise objections to the reservation. In the interest of greater clarity, the following phrase could be added at the end of paragraph 2 of the draft guideline: "However, the period for raising an objection to a reservation shall not commence, for a State or an organization, until the date on which that State or that organization has received notice of the reservation." With reference to draft guideline 2.1.6, it seemed to him that, according to the text, a communication by electronic mail took effect on receipt of the electronic mail.

44. Mr. PELLET (Special Rapporteur), replying to Mr. Pambou-Tchivounda's first comment, said that it would be better not to take a final decision on the word "impermissible", appearing in square brackets, in draft guideline 2.1.8. There would be an opportunity to find a satisfactory term once the Commission had discussed the effect of non-compliance by States with the rules contained in article 19 of the 1969 Vienna Convention. As for draft guideline 2.4.1, the wording suggested by Mr. Pambou-Tchivounda was undoubtedly more elegant, but it was important for consistency's sake to reproduce the wording of draft guideline 2.1.3, which had come straight from the Vienna Conventions.

45. In response to Mr. Daoudi, he said that the phrase "depositary notification", which was indeed rather disconcerting, was the official phrase for that kind of communication. It would be defined in the commentary. He also endorsed Mr. Daoudi's suggestion that it should be made quite clear whether the 12-month period began from the communication of the reservation or its confirmation. As for Mr. Gaja's comment, the Special Rapporteur's understanding of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions was that it provided that a reservation was considered to have been accepted by a State or an international organization if it had raised no objection within the 12 months following the date on which it had been notified of the reservation or the 12 months following the date on which it had expressed its consent to be bound by the treaty, if that date was later. In the first case, therefore, the receipt of notification marked the time at which the 12-month period began, as draft guideline 2.1.6 omitted to state. This should be spelled out.

46. Introducing his note on paragraph 1 of draft guideline 2.1.7 adopted by the Drafting Committee, he said that his text of the draft guideline was based on a misunderstanding which he wished to correct. Draft guideline 2.1.7, relating to the functions of depositaries, was closely modelled on article 78, paragraph 1 (*d*), of the 1986 Vienna Convention, under which, if there was any problem with the form of any communication relating to the treaty, the depositary was to bring the matter to the attention of the State or international organization in question. Paragraph 2 stated that, in the event of any difference appearing between a State or an international organization and the depositary, the latter should bring the question to the attention of the signatory States and organizations and the contracting States and contracting organizations or, where appropriate, the competent organ of the international organization concerned. He had taken it that the two provisions were repetitious, but, in fact, the first was directed at the reserving State or international organization, while the second was directed at the other States or organizations concerned. In draft guideline 2.1.7, the first scenario was not mentioned. That was why, in paragraph 6 of his note, he had suggested that wording based on article 78, paragraph 1 (*d*), of the Convention should be adopted. It was logical, given that the text was systematically modelled on the Convention, to reproduce its wording in the current case, too.

47. The CHAIR said that the proposed amendments were fully justified. Since they were matters of drafting and had no fundamental effect, they could, if the Commission was agreeable, be addressed at an informal meeting of the Drafting Committee.

48. Speaking as a member of the Commission, he noted that, according to the commentary by the Drafting Committee concerning draft guideline 2.4.2, in square brackets, it would be virtually essential to prove that conditional interpretative declarations were similar to reservations. Care must be taken, however, to avoid opening the door to disguised reservations, which would not be desirable. It would be preferable simply to state that conditional interpretative declarations had substantially the same effect as reservations.

49. Mr. MANSFIELD said that he shared the Chair's concern in that regard and that further thought should be given to the question whether it would be useful to permit disguised reservations. The issue was an important one.

The meeting rose at 4.45 p.m.

2734th MEETING

Tuesday, 23 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Tomka, Mr. Yamada.

Tribute to the memory of José Sette Câmara

1. The CHAIR said he had sad news to announce: José Sette Câmara, Brazilian scholar, diplomat and international lawyer, had passed away a month ago. He had served his country as ambassador, as permanent representative to the United Nations and in many other posts and would be remembered as the author of various publications on international law. He had been a member of the International Law Commission from 1970 to 1978 and a judge at the International Court of Justice from 1979 to 1987. His passing away was a great loss for international law and for all who had known him personally.

At the invitation of the Chair, the members of the Commission observed a minute of silence.

2. Mr. BAENA SOARES thanked the Commission for the sentiments expressed and undertook to convey them to the family of José Sette Câmara.

Reservations to treaties¹ (continued) (A/CN.4/526 and Add.1–3,² A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

REPORT OF THE DRAFTING COMMITTEE (concluded)³

3. Mr. YAMADA (Chair of the Drafting Committee) said that, pursuant to the Commission's instructions at the previous meeting, the Drafting Committee had held informal consultations to consider a number of issues raised. First, it had considered the Special Rapporteur's proposal for the addition of a phrase to draft guideline 2.1.7 (Functions of depositaries). The Committee had felt that the addition was thoroughly justified and therefore recommended the adoption of guideline 2.1.7 in its amended form as set out in the Special Rapporteur's note on paragraph 1 of draft guideline 2.1.7 adopted by the Committee (A/CN.4/L.623).

4. Second, the Drafting Committee had considered guideline 2.1.6 (Procedure for communication of reservations) in the light of proposals regarding clarification of the period of time during which an objection could be made and the precise moment at which a communication was considered to have been made. The Committee thought the proposals had the merit of further clarifying and refining a few difficult issues pertaining to the communication procedure. It therefore recommended the adoption of guideline 2.1.6 with some amendments. After paragraph 2, ending with the phrase "upon its receipt by the depositary", a new paragraph 3 would be added, to read: "The period during which an objection to a reservation may be formulated starts at the date on which a State or an international organization received notification of the reservation." The current paragraph 3 would become paragraph 4, and the following final sentence would be added: "In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile." That wording conformed to the majority view, although one member would have preferred the communication to be considered as having been made on the date of the diplomatic note or depositary notification.

5. The Drafting Committee recommended the adoption of the draft guidelines with the amendments he had read out.

6. Mr. BROWNLIE, referring to the proposal for a new paragraph 3 in guideline 2.1.6, said that the word "formulated" sounded somewhat abstract. The word "made", used elsewhere in the text, would be preferable.

7. Mr. PELLET (Special Rapporteur) drew attention to article 20, paragraph 5, of the 1969 Vienna Convention, in which the English term used was "raised" and the French *formulé*. Since the Commission's objective was to achieve alignment with that Convention, he proposed that that wording should be adopted.

8. Mr. YAMADA (Chair of the Drafting Committee) said he fully endorsed that proposal.

Draft guideline 2.1.6 as a whole, as amended, was adopted.

The titles and texts of draft guidelines 2.1.1 to 2.4.3 were adopted as amended.

³ See 2733rd meeting, para. 2.