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Summary record of the 2737th meeting

Topic:

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

a set of guidelines on total withdrawal and two guidelines on partial withdrawal. He had considered the latter approach but did not favour it, since, as he had indicated, it was important to define what was understood by a partial withdrawal, and that was the role of guideline 2.5.11. Moreover, guidelines 2.5.7 and 2.5.8, on the effects of total withdrawal, could not be transposed, because partial withdrawals signified that the reservation subsisted and did not, *ipso facto*, evaporate the objections that other States or international organizations might have made, although it did suggest that they should re-examine whether they needed to maintain such objections. Guideline 2.5.12 defined the consequences of a partial withdrawal.

61. There remained the tricky matter of the consequences of a monitoring body's finding that a reservation was invalid, which he had discussed at length when presenting guideline 2.5.4. On that point, he wished only to draw the Commission's attention to the judgement of the Swiss Federal Supreme Court in the *F.* v. *R. and State Council of the Canton of Thurgau* case. In his opinion, the Federal Supreme Court's reasoning was based on an erroneous premise, because it accepted that the European Court of Human Rights was able to invalidate the Swiss interpretative declaration or reservation, which the European Court evidently believed it had the right to do. On that basis, the European Court considered that it was logical to think that Switzerland could not modify its reservation, but could only withdraw it. However, it was not so logical, because one could question whether Switzerland needed to do anything, since—according to that erroneous assumption—the reservation would have been invalidated by the judgement of the European Court of Human Rights in the *Belilos* case, something which he personally did not accept. While he did not propose to repeat the reasoning that was the basis for guideline 2.5.11 *bis*, he was entirely convinced that the premises of the reasoning of the European Court and the Swiss Federal Supreme Court were erroneous; that monitoring bodies, including the European Court, could only find that a reservation was impermissible; and that, following that finding, it was for the reserving State to act accordingly. The partial withdrawal of the reservation could be a way of acting accordingly, as was the more radical solution of a total withdrawal. That was what guideline 2.5.11 *bis* stated, and, as he had indicated in paragraph 216 of the report, it could be combined with guideline 2.5.4.

62. He awaited with interest the reactions of members to the numerous proposals, while freely acknowledging their technical nature. However, law was technical and it was not possible to continually gad about in the rarefied atmosphere of general ideas. Maybe the draft guidelines, which were a little pedestrian, provided an opportunity to develop real law.

The meeting rose at 1 p.m.

2737th MEETING

Friday, 26 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

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

Reservations to treaties[1] (*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]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIR invited the members of the Commission to continue their consideration of the seventh report of the Special Rapporteur on reservations to treaties (A/CN.4/526 and Add.1–3).

2. Mr. YAMADA said that he endorsed most of the 11 guidelines proposed by the Special Rapporteur, only a few of which called for comment.

3. With regard to guideline 2.5.3 (Periodic review of the usefulness of reservations), he entirely shared the view expressed by the Special Rapporteur in paragraph 102 of his report that it would be appropriate to include in the Guide to Practice a draft guideline encouraging States to withdraw reservations that had become obsolete or superfluous; and also the view, stated in paragraph 105, that such a guideline should be regarded as no more than a recommendation and that States would remain absolutely free to withdraw their reservations or not. However, as currently formulated, at least in its English version, guideline 2.5.3 seemed to go further. It placed more emphasis on the integrity of treaties, thereby shifting the balance between integrity and universality. In his view, States should not formulate reservations lightly, and reservations made after careful consideration need not be subjected to review after a short span of time. Accordingly, he supported Mr. Tomka's suggestion that the guideline should be reformulated as a recommendation.

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[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).

4. On guidelines 2.5.4, 2.5.11 *bis* and 2.5.X, concerning withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, the first of which provisions had provoked lively debate at the preceding meeting, he wished to confirm at the outset that he supported the position expressed by the Commission in paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties,[3] that it had adopted at its forty-ninth session. That paragraph stated that, in the event of inadmissibility of a reservation, it was the reserving State that had the responsibility for taking action. That State could, for example, modify its reservation so as to eliminate the inadmissibility, withdraw it or forgo becoming a party to the treaty. Of course, he had no intention of reverting to the discussion on that preliminary conclusion, but the problem posed by guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), and in particular its paragraph 2, was that it picked up only part of the elements in paragraph 10 of those conclusions. That was probably why the Chair had said that the cardinal principle of international law was the consent of States. In paragraph 110 of his report, the Special Rapporteur stated that the finding that a reservation was inadmissible should not be deemed either an abrogation or, still less, a withdrawal of that reservation. He entirely agreed with the Special Rapporteur on that point and had no problem with paragraph 1 of guidelines 2.5.4 and 2.5.X (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty). However, paragraph 2 perhaps had no place in the guidelines, and he would favour its deletion. If it were to be retained, it needed reformulating. The Special Rapporteur stated in paragraph 110 that the reserving State (or international organization) could not, nonetheless, ignore the finding and had the duty to take action; it must eliminate the causes of the inadmissibility, and one of the ways of doing so—the most radical but the most satisfactory—was obviously to withdraw the disputed reservation or reservations. He did not contest that view but considered that the real question was who had the authority to pass judgement on the permissibility of reservations. The reservation regime of the 1969 and 1986 Vienna Conventions left it to each State party unless the States agreed otherwise. Accordingly, if paragraph 2 were to be retained, it would be necessary to determine with precision what body it was that found the reservations impermissible. It should be noted that even a decision of ICJ declaring a reservation impermissible would not have binding effect on those States parties to a treaty to which the reservation related unless they had accepted the jurisdiction of the Court in respect of the treaty in question. In any event, that paragraph must not depart from the position taken in paragraph 10 of the preliminary conclusions adopted by the Commission at its forty-ninth session.

5. In that connection, an interesting case was that of Iceland's recent adherence to the International Convention for the Regulation of Whaling. Iceland had withdrawn from that convention in 1992. It had again deposited its instrument of accession to the Convention with the depositary in 2001, with a reservation relating to a provision of the Schedule to the Convention which formed an integral part thereof. A very small majority in the International Whaling Commission had held that Iceland's reservation was impermissible and had rejected its accession, while 16 States parties to the Convention had accepted the accession with the reservation. In his view, the International Whaling Commission was a fishery management body, not an organ competent to judge the permissibility of a reservation, and it had committed a number of legal irregularities in its handling of that case in 2001 and 2002. He would be submitting details of the case to the Special Rapporteur for purposes of reference.

6. Mr. DAOUDI noted that the text of guideline 2.5.1, on withdrawal of reservations, was identical to article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions and, as the Special Rapporteur pointed out in paragraph 83 of his report, was in line with the practice of States and international organizations. The guideline must thus be retained in the form proposed, as, for the same reasons, must guideline 2.5.2 (Form of withdrawal). However, the question of implicit withdrawal of reservations, to which the Special Rapporteur devoted several paragraphs of his report before eventually dismissing it, should not be disregarded. If States could modify the provisions of a treaty by their subsequent practice, notwithstanding the theory of the parallelism of forms, a reservation could become obsolete through the subsequent practice of the reserving State. The "forgotten reservations" referred to by the Special Rapporteur in paragraph 100 of his report were one such example. Guideline 2.5.3 was important and should be retained, subject, however, to the deletion of the reference to the internal legislation of international organizations.

7. The Special Rapporteur had drafted guideline 2.5.4 with great caution, but one might have doubts as to the desirability of such a provision in the Guide to Practice. As several members of the Commission had stressed, the treaty-monitoring bodies took a variety of forms and did not all have the same powers to make findings as to the permissibility of the reservations formulated by States. Nor was it certain that a judicial body was a monitoring body within the meaning of that guideline. A monitoring body normally intervened in the event of a dispute between the reserving State and the other States parties to the treaty concerning the permissibility of a reservation. Such a provision of the Guide might be invoked by some monitoring bodies to claim a right that they did not possess. At the preceding meeting, some members of the Commission had asked on what obligations a monitoring body would base itself in order to declare a reservation impermissible and by virtue of what obligation the reserving State should withdraw it. The Special Rapporteur had rightly referred to article 19 of the Vienna Conventions, but the problem was that a monitoring body's assessment of the permissibility of a reservation was subjective, since it was a body of limited membership, composed of experts elected by States, whose judgement might be influenced by political considerations. Such a conflict of assessment could be judged only by a judicial body or, in some cases, by the States parties as a whole, when a dispute of that order arose between the reserving State and the depositary of the treaty. For the reserving State, there was no obligation to withdraw its reservation after a finding of impermissibility by a monitoring body. As the Commis-

[3] See 2734th meeting, footnote 6.

sion had pointed out in paragraph 10 of the preliminary conclusions it adopted at its forty-ninth session, the State could choose between modifying its reservation, forgoing becoming a party to the treaty and withdrawing its reservation. He thus joined with those members of the Commission who proposed that guideline 2.5.4 should not be included in the Guide to Practice.

8. Of the two versions of guideline 2.5.5 (Competence to withdraw a reservation at the international level) proposed by the Special Rapporteur, the "long version" was preferable, as it facilitated the use of the Guide to Practice. However, the entire Guide to Practice should perhaps be reviewed once completed, with a view to deciding whether it would not be better to make do with references in cases where there were identical provisions or to use the expression *mutatis mutandis* where provisions were similar.

9. Finally, guideline 2.5.5 *bis* (Competence to withdraw a reservation at the internal level), as orally revised by the Special Rapporteur, should be retained, as should guideline 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations).

10. Mr. PELLET (Special Rapporteur) asked Mr. Daoudi why he wished the reference to the internal legislation of international organizations to be deleted from guideline 2.5.3.

11. Mr. DAOUDI said that the guideline dealt with the review of reservations that had become obsolete because the internal laws of the States formulating them had changed—in other words, because legislation had been adopted that ran counter to those reservations. However, international organizations had no such laws.

12. Mr. PELLET (Special Rapporteur) said that the point at issue was not laws but internal legislation, and that international organizations might well modify their internal legislation. It was important to retain a provision of that type, at least in the case of integration organizations. There was no reason to apply double standards.

13. Mr. GALICKI said he would limit his comments to the guidelines introduced by the Special Rapporteur at the preceding meeting. As the Special Rapporteur had pointed out, provision existed in a number of treaties for the partial withdrawal of a reservation and, as the institution was thus one hallowed by State practice, the Guide to Practice should contain some provisions on the matter.

14. On guideline 2.5.11 (Partial withdrawal of a reservation), he agreed with the Special Rapporteur that the order of the paragraphs should be reversed and that the text should stress, as indeed it did, that the object of a partial withdrawal was to limit the legal effect of the reservation and ensure more completely the application of the provisions of the treaty or of the treaty as a whole. The definition provided by the Special Rapporteur was, however, somewhat idealistic, and in some cases States might use the procedure of partial withdrawal of a reservation to modify it in such a way as to extend, rather than limit, its scope. The Special Rapporteur cited the practice of the Secretary-General and of the Legal Counsel of the United Nations, but that practice should not be taken into consideration in defining a partial withdrawal, for the end result might be the formulation of late reservations, which must be subjected to the procedures applicable in that regard. For clarity, it might be advisable to add to the definition of a partial withdrawal contained in the current paragraph 2 of guideline 2.5.11 the proposal contained in the last phrase of paragraph 219 of the report, namely: "the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation".

15. Guidelines 2.5.11 *bis* (Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) and 2.5.X raised the same difficulty as guideline 2.5.4, in that they wrongly assigned the treaty-monitoring bodies certain powers over States. Yet, as Mr. Yamada had pointed out, even a judicial decision was binding only on States that had accepted the competence of the jurisdiction that had rendered it. The Council of Europe, for example, had a number of committees whose function was to monitor the application of the Council's treaties, but their opinions would not have the effect attributed to them by the two guidelines under consideration. It would thus be necessary to revert to the problem of findings of impermissibility by treaty-monitoring bodies, particularly as the formulation used in the English version of guideline 2.5.X, "must take action accordingly", was unacceptable. As Mr. Yamada had also pointed out, the guideline should refer to all the possibilities envisaged in paragraph 10 of the preliminary conclusions adopted by the Commission at its forty-ninth session.

16. Finally, the second sentence of guideline 2.5.12 (Effect of a partial withdrawal of a reservation) should perhaps be redrafted so as to cover the situation in which an objection concerned the part of the reservation that had been withdrawn, for it was debatable whether, in such a case, it was really necessary to await the formal withdrawal of the objection, since it was henceforth superfluous.

17. Ms. XUE said that she would start with general comments on all the draft guidelines relating to withdrawal of reservations. As the Special Rapporteur had explained, a number of basic principles had formed the basis for his work: the exercise was aimed at providing guidelines for State practice; the withdrawal of a reservation was a unilateral act on the part of the reserving State, which must decide whether to withdraw it and when and to what extent to do so; current practice tended to encourage States to consider withdrawing their reservations; existing conventions on the law of treaties contained very few provisions on procedures for withdrawal and were simply silent on modifications to reservations. Those were the reasons why the planned Guide to Practice could be useful.

18. In general, draft guidelines 2.5.1 to 2.5.12 reflected those basic principles, although she wondered whether it was desirable to establish procedures for the withdrawal of reservations that were as strict as those for their formulation. In withdrawing a reservation, the State undertook additional obligations or restricted more of its rights, and that served to benefit the treaty regime. That could explain why the provisions of the 1969 and 1986 Vienna

Conventions on the formulation of reservations were more detailed than those on withdrawal.

19. In drafting the Guide to Practice, emphasis should be placed on general treaty-making practice rather than on that of certain sectors or regions. Particular concerns arose in connection with human rights treaties, for example, but that was only one aspect of the topic under consideration. The same was true of regional practice. It was necessary to provide guidance that could be used by all States and for all treaties.

20. Turning to her specific comments, she said she had no objection to referring draft guidelines 2.5.1 to 2.5.3 to the Drafting Committee as they stood. She wished, however, to draw the Commission's attention to certain points. In his comments on draft guideline 2.5.2 (Form of withdrawal), the Special Rapporteur raised the issue of implicit withdrawal without providing any response. She thought other forms of withdrawal such as declarations should be covered in the draft guidelines, insofar as the relations of the reserving State with the other parties to the treaty were affected only once those States had received written notification of withdrawal. The withdrawing State, on the other hand, should so act from the moment it announced its intention of withdrawing its reservation, insofar as it could not go back on that decision, according to the principle of good faith, even though other States could not make claims until they had received written notice of the withdrawal. Such a procedure would be useful for strengthening the treaty regime.

21. Draft guideline 2.5.3 was valuable, but it should not refer solely to internal legislation, as there might be other circumstances that would make the reserving State withdraw the reservation.

22. Draft guideline 2.5.4 was a bit more problematic, particularly in terms of the relationship between findings of impermissibility by monitoring bodies and the subsequent actions of the reserving State. In the field of human rights, even if a monitoring body concluded that a reservation was impermissible, it was mainly at the domestic level that the reserving State must take action. In treaty relations, it was for the other contracting parties to decide whether a reservation was permissible or not. The monitoring body should not determine treaty relations among the parties. With regard to the wording of the draft guideline, the first sentence of paragraph 2 was unnecessary, as it referred to the obligations of States parties under the treaty, which had nothing to do with the withdrawal of the reservation. In addition, the logic was broken by the juxtaposition of the words "must" and "may".

23. On draft guideline 2.5.5, she wondered whether it was necessary to restate every step of the procedure for withdrawing a reservation. If the members of the Commission felt that the repetition was necessary, however, she could go along with them.

24. Turning to draft guideline 2.5.6 *bis* (Procedure for communication of withdrawal of reservations), she questioned whether forms of communication such as electronic mail and facsimile should be cited or whether only the formal presentation of withdrawal by diplomatic note should be mentioned.

25. The 1969 and 1986 Vienna Conventions made no mention of the modification or partial withdrawal of reservations. The reasons for that silence were the complicated nature of the act in practice and the different interpretations that could be given by different States parties. If the Commission thought that partial withdrawal should be covered in the Guide to Practice, it should simply be merged with withdrawal in general.

26. Finally, on draft guidelines 2.5.11 *bis* and 2.5.X, she said their wording could cause confusion, for the reasons she had adduced in connection with draft guideline 2.5.4.

27. Mr. PELLET (Special Rapporteur), referring to Ms. Xue's comments on draft guideline 2.5.2, said that the requirement that withdrawal of reservations should be in writing meant that withdrawal could not be implicit. As to statements in which a minister for foreign affairs or a Head of State announced his or her intention to withdraw a reservation, they fell under the more general heading of unilateral acts. There was no justification for Ms. Xue's suggestion that a separate provision should be devoted to such statements because withdrawal took effect only when it was confirmed in writing, given that announcements of withdrawal were not official and States could not rely on them.

28. Mr. BROWNLIE said that, having listened to the discussion on draft guideline 2.5.4, he had the impression that the problem of permissibility of reservations must be dealt with once and for all. There seemed to be some consensus on the fact that monitoring bodies, generally speaking, did not have the power to oblige States to withdraw their reservations. As the Special Rapporteur had pointed out, withdrawal was merely one of the ways in which a State could respond to a finding of impermissibility.

29. He believed there was a case for including a proviso clearly stating that the Guide to Practice had absolutely no effect on the powers of a monitoring body to determine the treaty relations of States.

30. The CHAIR, speaking as a member of the Commission, said that he did not think it advisable to deal simultaneously with the authority of monitoring bodies and the obligations that a contracting State would or would not incur as a result of their activities. To do so would be to prejudge the existence of such authority.

31. Ms. XUE, referring to her comment on draft guideline 2.5.2, said that the provision was not only formulated correctly but also entirely in line with the law of treaties. The 1969 and 1986 Vienna Conventions dealt with treaty relations between States parties, and in that context the requirement of written form was fully justified, since States needed legal certainty. On the other hand, the Guide to Practice was aimed at providing guidance to States on the procedures they should follow in such matters. It would therefore be useful to make it clear that, when a State decided to withdraw a reservation, it should act in line with this decision, even before it confirmed it in writing.

32. She agreed with Mr. Brownlie and the Chair on the powers of monitoring bodies and thought it should be made clear that the Guide to Practice had no effect on such powers.

33. Mr. TOMKA said that, in his view, the question of impermissibility had been introduced somewhat artificially into the text, which ought to be dealing broadly with the withdrawal of reservations. He could not understand why particular stress was laid on cases in which a monitoring body came to the conclusion that a reservation was impermissible. To avoid difficulty, the question should be left to one side, and the Commission could return to it when it came to study the impermissibility of reservations as such in detail; so far it had considered only certain procedural aspects. It had not yet been given an analysis of article 19 of the Vienna Conventions. The issue before the Commission was implicit withdrawals; and extreme caution was in order, given that implicit withdrawals were impermissible and not even all explicit withdrawals were permissible. A reservation took legal effect only when it was made in writing. He knew of no case, in practice, where the withdrawal of a reservation had not been followed by a written formulation. A good example was provided by the cases of Czechoslovakia and Poland, whose parliaments, in 1929 and 1931, had approved, and whose Heads of State had signed, the declaration accepting the jurisdiction of PCIJ,[4] as provided for under Article 36, paragraph 2, of its Statute. The declarations had never been deposited with the depositary. In his view, neither State had therefore recognized the jurisdiction of the Court as being binding, since the declarations, although approved by the parliaments and signed by the Heads of State, had not been deposited. They had had no legal effect, and no State could have relied on them in bringing a case against Poland or Czechoslovakia before the Court. A similar situation occurred when a Head of State announced at a summit that his country was going to withdraw a reservation: if that announcement was not followed by written notification of the withdrawal, the reservation had effectively not been withdrawn. That was quite clear from the Vienna Conventions, and the Commission should not introduce misunderstandings or doubts in the minds of the legal community by the back door with regard to the regime of the withdrawal of reservations.

34. Mr. CHEE pointed out that the Commission was engaged in drawing up not a law-making treaty, but a guide to practice, which by definition was not binding. It should therefore avoid using excessively rigid terminology, such as "the State must"; wording along the lines of "States are urged to comply" would be preferable. Moreover, monitoring bodies should not see themselves as holding extraordinary powers not authorized by a treaty. If a monitoring body exercised mandatory power, it was actually acting without the consent of States, which was a crucial aspect of treaty relations. He therefore urged the Commission to focus on adopting terminology appropriate for draft guidelines of a recommendatory nature.

35. Mr. Sreenivasa RAO said he agreed with Mr. Tomka that no value should be placed on implicit reservations. It sometimes happened, however, that, having made a reservation, a State might not insist on maintaining that reservation in a given bilateral or multilateral relationship, or might even abandon it for any of a number of reasons. The question arose whether there were any precedents or practice that could give the Commission some guidance in that regard. A useful analogy might be made with reservations to declarations of compulsory jurisdiction, which, in specific cases, were often not enforced for a fairly long time. If a State behaved in such a way as to show that it was not insisting on the reservation, it might be that at some point it could take advantage of the fact that the reservation had not been made in writing in order to avoid any estoppel procedure against it.

36. Mr. PELLET (Special Rapporteur) said that he welcomed Mr. Sreenivasa Rao's analogy, which showed that the oral withdrawal of a reservation had no legal effect. He could not imagine that ICJ, in the case mentioned by Mr. Tomka, would consider a State bound by a mere declaration that it was going to accept its jurisdiction. As Ms. Xue had said, the announcement was not operative until there had been written confirmation. He himself did not consider that oral declarations had any effect, at any rate as far as the law of reservations to treaties was concerned. He considered that he had responded to the idea underlying Ms. Xue's proposal in draft guideline 2.5.3, which clearly attempted to encourage States to withdraw their reservations. He was glad that the draft guideline had been well received, but it was not enough to tell States that they were taking the right course of action when they withdrew reservations. That did not lead anywhere, since States were in danger of no longer knowing quite what to do. The Commission must decide on the limit, or border area, between the law of reservations, which was covered by the law of treaties, and other aspects of international law, such as the law of good faith or unilateral acts, which seemed to involve a different set of problems.

37. Ms. XUE said that she agreed with the comments made by the previous speakers on draft guideline 2.5.2, especially with regard to the various examples that had been given. If the aim was to establish a hard rule, there was no doubt that the withdrawal of a reservation should be in writing, as provided for under the 1969 Vienna Convention. In that case, however, draft guideline 2.5.2 did not go far enough. It should take its logic through to the end and should not state only that notification must be in writing, but should specify the date on which the withdrawal took effect: it was essential to do so, since the whole point of the guideline was the written notification, not the withdrawal itself. Mr. Tomka's examples illustrated the point well. A State might very well announce in writing that it was withdrawing its reservation, but the announcement alone was not effective. The point at issue was not the withdrawal but the written notification, which gave effect to the treaty relations among the contracting parties. When a State assumed an obligation, it was bound by the principle of good faith, but the hard legal effect did not occur until the other contracting parties had received notification in due form, namely, in writing. That was the point she had been trying to make, but she repeated that she had no objection in principle to the wording of the draft guideline. She simply considered that, if retained as

[4] *Collection of Texts Governing the Jurisdiction of the Court, PCIJ, Series D, No. 6*, 4th ed. (Leiden, Sijthoff, 1932), pp. 47 and 54.

it stood, it would not add much to the text by way of recommendation.

38. Mr. DAOUDI invited the Commission to consider, by way of example, a situation in which a treaty of establishment had been concluded among a number of States, but one State had made reservations on the application of certain provisions of the treaty and, although it had subsequently actually adopted legislation in line with the provisions concerning which it had made a reservation, had failed to withdraw the reservation. Meanwhile, the other States had also applied the provision in relation to that State. Such a situation amounted to a substantial change in the application of the treaty, and it was really a typical case of the implicit withdrawal of a reservation. He was fully aware that the requirement in the 1969 Vienna Convention and draft guideline 2.5.2 that the withdrawal should be in writing was perfectly normal, since it provided an assurance of legal certainty. The situation that he had tried to outline, however, could actually occur, and provisions should perhaps be made for it. The Special Rapporteur had said that such a situation arose at the point of intersection between the law of treaties and other institutions of international law, but that was precisely why he himself had tried to highlight that aspect of the matter.

39. Mr. MANSFIELD said that he was still struggling to understand what Ms. Xue was trying to say. He unreservedly endorsed the general intention of attempting to strengthen the international treaty regime, and, as far as he understood, Ms. Xue thought that the draft guideline should state that, when a State publicly announced that it was going to withdraw a reservation, there should be an internal effect, even if it had no legal effect with regard to the States parties to the instrument in question. The difficulty that he saw in that approach was that, in parliamentary democracies, it was perfectly possible that the government in power, having reached the conclusion to withdraw a reservation to a particular treaty, was, before it could do so, replaced by a new government with different views on the question which believed that the previous government had been wrong to withdraw—or declare that it would withdraw—the reservation in question. It was hard to see how the new government could be considered in any way bound by the decision of the outgoing government from the point of view of the law or of internal politics, let alone inter-State relations, which were not obviously affected by the decision, inasmuch as the withdrawal had not been formally put in writing. The question was, however, an interesting one, and Ms. Xue might perhaps clarify what she had in mind.

40. The CHAIR said that the lapse of time that passed while an action was considered in and of itself should be considered inadequate. The situation was different from that in which, after a relatively brief period of time, which should not be considered to justify estoppel, the State changed its mind before taking final action.

41. Mr. PELLET (Special Rapporteur) said that it was hard to understand how what Ms. Xue seemed to have in mind could be included in a draft guideline. He thought that she was mistaken when she said that the issue related simply to written notification. The procedure for the withdrawal of reservations exactly followed that for the formulation of reservations. A reservation must be formulated in writing, and so, therefore, must its withdrawal. Problems with notification were dealt with later, in draft guidelines 2.5.6, 2.5.6 *bis* and 2.5.6 *ter*, which related to the written communication of reservations, but the two situations were entirely different.

42. Ms. XUE said she wished to make it clear that she was not talking about the implicit withdrawal of reservations. There was no doubt that the withdrawal of reservations should be expressed without any ambiguity, in writing. She shared the concerns raised by Mr. Mansfield. The fate of the withdrawal of a reservation following a change of government applied equally, however, to the signature of a treaty. A new government could refuse to sign a treaty, a convention, a protocol or any other instrument, or it could even declare that it would never ratify it. The principle of article 18 of the 1969 Vienna Convention thus applied, and she was following the logic of that article. She was merely pointing out that, as it stood, draft guideline 2.5.2 stressed the importance of a withdrawal in writing. In practice, the emphasis should be placed on the written notification of withdrawal.

43. Mr. TOMKA said that, according to his understanding, the withdrawal of a reservation was a legal act, and the legal act took a written form. So long as the act was not in writing, no legal act had been performed. An oral declaration alone could very well be interpreted as being an intention to perform a legal act, but such an intention was of no consequence under the 1969 Vienna Convention. It might be possible, in some cases, to find an infringement of the good-faith principle, but the Convention was not concerned with that. To have a legal effect, or to constitute a legal act, the withdrawal of a reservation must be in writing, as the Convention clearly stated.

44. As for Mr. Daoudi's example of a State that made reservations to a treaty but later adopted internal legislation in conformity with that treaty, which could be considered an implicit withdrawal of the reservation, he himself believed that there was a fundamental difference between the legal position of States that ratified a treaty without any reservation and those which ratified it with reservations. The latter could always amend their legislation in the future if the reservations had not been withdrawn, so they had good reason not to withdraw their reservations in order to keep their options open with regard to their internal law. The fact that a State had adopted legislation in conformity with the treaty to which it had made reservations which it had not formally withdrawn gave it the opportunity to make further amendments to its legislation in the future, with the result that its legislation would not be fully in line with the provisions to which it had previously made reservations. It would be far too radical to interpret that as the implicit withdrawal of a reservation.

45. Mr. KOSKENNIEMI said that he was in favour of referring draft guidelines 2.5.1 to 2.5.3 and 2.5.5 to 2.5.10 to the Drafting Committee, but he considered that draft guidelines 2.5.4, 2.5.11 and above all 2.5.11 *bis* posed a substantive problem, and that partly explained the lack of clarity in their wording. Draft guidelines 2.5.4 and 2.5.11 *bis* related to the powers of bodies that monitored the implementation of a treaty and to the effect of the exercise

of those powers from the viewpoint of the obligations of the reserving State or international organization. Paragraph 1 of draft guideline 2.5.4 was unnecessary because it was inconceivable that the finding of a monitoring body might constitute the withdrawal of the reservation. However, it would be useful to include a provision that defined the relationship between the finding by a body monitoring the implementation of a treaty that a reservation was impermissible and the withdrawal of the reservation by the reserving State or international organization. To that end, it would have to be assumed that the content of the guidelines would not have any effect on the nature of the powers of the monitoring bodies, and a distinction would therefore have to be made according to the three types of power that they might have. In the first case, the finding by the monitoring body that the reservation was impermissible made it null and void and, in the most extreme case, in a self-executing way, on the understanding that the Commission would not take a position on the question whether a monitoring body could in fact have such power, something which could not be decided at present. In the second case, the finding of impermissibility by the monitoring body created an obligation for the State to take measures, for example, to withdraw the reservation in whole or in part. In the third case, the finding of impermissibility amounted to a recommendation to the reserving State or international organization to take appropriate measures. He considered it unnecessary to make a distinction between the withdrawal of the reservation in whole or in part and agreed with the structure proposed by the Special Rapporteur in paragraph 216 of his report, namely that guidelines 2.5.4 and 2.5.11 *bis* should be merged into a new guideline which would be placed at the end of section 2.5 of the Guide to Practice. The new guideline could read:

> "The finding by a body monitoring the implementation of a treaty that a reservation is impermissible may, depending on the powers of the body:
>
> (a) Make such a reservation null and void;
>
> (b) Create an obligation on the reserving State or international organization to withdraw the reservation in whole or in part; or
>
> (c) Constitute a recommendation for the reserving State or international organization to withdraw the reservation in whole or in part."

46. Paragraph 2 of the current draft guideline 2.5.4, which stated that the reserving State or international organization "must act accordingly", would then be unnecessary. On reflection, it appeared that guidelines 2.5.4 and 2.5.11 *bis* related not to withdrawal of reservations, which was only a secondary aspect of the issue, but to the consequences of the finding by a body monitoring the implementation of a treaty that a reservation was impermissible, on the understanding that the monitoring bodies in question could vary widely from ICJ to small groups of experts in the case of technical treaties between a small number of States. That matter was important, but it related to problems that would be dealt with later in the discussion, and it was not appropriate to settle it at the current stage.

47. Mr. FOMBA, referring to draft guidelines 2.5.7 to 2.5.10, said that there appeared to be some contradiction in the explanations provided by the Special Rapporteur in paragraph 152 of his report, which stated: "it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself" and "the effect of a withdrawal may be viewed simply as a matter of form, thus precluding the need to go into the infinitely more complex effect of the reservation itself". He also noted that the word "effect" was used in both the singular and the plural in the report, and he therefore wondered whether the withdrawal could have several autonomous types of effects. However, what was involved was the legal effect of the withdrawal, which could be reflected in several ways, as was indicated in paragraphs 179 to 182 of the report. Moreover, the wording used in paragraph 152, which stated that the withdrawal "cancels out" the reservation, should be qualified in order to take account of the difference between a partial withdrawal and a total withdrawal, which did not have the same legal effect. Draft guidelines 2.5.7 (Effect of withdrawal of a reservation) and 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization) did not give rise to any particular problems. With regard to draft guideline 2.5.9 (Effective date of withdrawal of a reservation), he supported the choice of reproducing article 22, paragraph 3 (*a*), of the 1969 and 1986 Vienna Conventions and was also in favour of the idea that the Guide to Practice should include model clauses A, B and C, which reflected the concerns expressed during the work of the Commission at its seventeenth session. He also agreed with the idea of maintaining the date of receipt of notification of the withdrawal by the depositary, rather than by the other contracting parties (para. 165 of the report). In the case of draft guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), he shared the opinions expressed in paragraphs 167 and 168 of the report establishing the possibility (in the absence of model clause C) for the reserving State to set freely the time at which the withdrawal of a reservation became operative. Having said that, he thought the limits to the decision taken unilaterally by the reserving State should be clearly defined and should not prevail over the provisions of the Vienna Conventions if the other contracting parties objected. Last, he did not understand the specific content of 2.5.10, subparagraph (*b*). On the whole, however, he was in favour of referring the draft guidelines to the Drafting Committee.

48. Mr. PAMBOU-TCHIVOUNDA, referring to draft guideline 2.5.4, said that, like Mr. Koskenniemi, he considered that a withdrawal was only one aspect of the consequences of the finding that a reservation was impermissible and it would have been interesting to study other aspects of the question and discuss the various possible types of conduct when it had been found that a reservation was impermissible. He supported Mr. Koskenniemi's proposal to reformulate the guideline and make distinctions according to the nature and powers of the monitoring body. He also questioned whether the distinction made in article 19 of the 1969 and 1986 Vienna Conventions between reservations prohibited by the treaty, reservations that did not appear among those reservations authorized by the treaty and reservations incompatible with the ob-

ject and purpose of the treaty had an impact on the consequences of the impermissibility of the reservation.

49. Mr. KOSKENNIEMI, replying to Mr. Pambou-Tchivounda on the general consequences of a finding that a reservation was impermissible, said that the question could not be dealt with at present, as it was very complex and might, in some cases, relate to State responsibility. The Special Rapporteur could deal with the subject later. By proposing a new formulation for the draft guideline, he had intended to establish a link between the finding that a reservation was impermissible and a possible obligation for the reserving State or international organization to withdraw it. On the question of the three types of impermissible reservations identified by article 19 of the 1969 and 1986 Vienna Conventions and the consequences of that classification, he presumed that the consequences of impermissibility would not differ according to the type of reservation in question. However, that was perhaps not true for every possible type of consequence.

50. Mr. CANDIOTI suggested that all the proposed draft guidelines should be referred to the Drafting Committee, with the exception of the two guidelines on monitoring bodies, the study of which could be postponed until later, when the question of the impermissibility of reservations was examined. The withdrawal of a reservation was a possible consequence of a finding by a monitoring body that a reservation was impermissible, but it could also simply be the consequence of an objection by another State.

The meeting rose at 12.40 p.m.

2738th MEETING

Tuesday, 30 July 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, 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. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Reservations to treaties[1] (*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]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MOMTAZ said that he endorsed the very pertinent remarks of Imbert, emphasized by the Special Rapporteur in paragraph 193 of his seventh report (A/CN.4/526 and Add.1–3), on the need to encourage partial withdrawals of reservations, which was a procedure that could enable States to gradually adapt their participation in a treaty to the evolution of their national law.[3] However, it raised the question of whether the States parties to a treaty that had not objected to the initial reservation could object to a partial withdrawal. It seemed the Special Rapporteur had not answered that question and had merely dealt with the case of States that had made objections to the initial reservation. The reference in paragraph 201 of the report to "some of the other parties" was confusing: Did it refer to States that had made no objections to the initial reservation? In any event, he considered that, in order to favour the integrity of the treaty and encourage partial withdrawals, while awaiting complete withdrawal of the reservation, States should tolerate such partial withdrawals and waive the exercise of their right to object to them.

2. Guideline 2.5.11 (Partial withdrawal of a reservation) confirmed the merits of that option. At least, that was the logical conclusion to be drawn from the reference to the rules of form and procedure applicable to a total withdrawal in paragraph 1. It was inconceivable that a State party to a treaty should object to a total withdrawal of a reservation by another State party.

3. Paragraph 2 of the guideline defined what was understood by a partial withdrawal and appeared to consider that partial withdrawal of a reservation and modification of a reservation were synonymous. That assimilation could lend itself to misunderstandings. Indeed, as the Special Rapporteur pointed out in paragraph 207 of the report, the Secretary-General of the United Nations made a clear distinction between partial withdrawal of a reservation and modification of a reservation, reserving the latter expression for cases in which a withdrawal strengthened the scope of the reservation. That was evidently not the case envisaged in guideline 2.5.11.

4. It might therefore be advisable to eliminate any reference to the word "modification" in paragraph 2, for example, by eliminating the phrase *est la modification de cette réserve par l'État ou l'organisation internationale qui en est l'auteur, qui* in the French version and the correspond-

[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).

[3] See P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), p. 293.