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Summary record of the 2939th meeting

Topic:
Reservations to treaties

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in the fifth report (para. 29), he had been able to detect only one which had argued the existence of an obligation for member States that was not based on the rules of the organization. It was a comment by the Russian Federation, which had contended that States establishing an international organization were required to “give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party”.²⁸⁰ In the view of several other States, an obligation existed for the member States only if provided for in the constituent instrument or the rules of the organization. In practice, when member States did in fact provide an organization with the necessary means to make compensation, they did so expressly on the basis of the rules of the organization or else *ex gratia*, through voluntary contributions. That practice certainly did not confirm the existence of an obligation in general international law for member States to provide an organization with the means to compensate.

75. Mr. Pellet’s proposal was ambiguous because it did not make it clear that the basis of the obligation was a rule of general international law, which was necessarily implicit if the proposed draft article was added. If an additional draft article on the subject was necessary, as several members of the Commission had suggested, reference would have to be made to the rules of the organization, rules which would enunciate, either expressly or implicitly, the existence of an obligation for member States to cooperate with the organization. He therefore proposed the following draft article: “In accordance with the rules of the responsible international organization, its members are required to take all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.” He also suggested that the members of the Commission should hold consultations to see whether they could agree on a compromise solution. If that was not possible, perhaps the Commission could either take a vote or establish a working group.

76. The CHAIRPERSON endorsed the idea that the members of the Commission should hold consultations. If the consultations were not successful, Mr. Pellet’s proposal would be put to a vote.

77. Mr. PELLET said that he withdrew his proposal, since Mr. Gaja’s was perfectly acceptable. He suggested that, if there was no objection, Mr. Gaja’s proposal might be referred to the Drafting Committee; there was no need for consultations.

78. After an exchange of views on the question in which Mr. BROWNLIE, Mr. CANDIOTI, Mr. GAJA, Mr. NOLTE and Mr. PELLET took part, the CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer the additional draft article proposed by the Special Rapporteur to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2939th MEETING

Thursday, 19 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA said that the work of the Special Rapporteur on reservations to treaties was always remarkable, even when he became mired in matters of detail, or when the multiplicity of cross-references to other parts of the Guide to Practice made for difficult reading, the depth of his research and ability to organize material had to be acknowledged. He regretted having been unable to attend all the meetings on the agenda item, especially the one at which the Special Rapporteur had made his presentation.

2. In his view, the question of the formulation of acceptances of reservations was best approached by considering first the admittedly rare case in which acceptance was not simply an absence of objections to the reservation in question, as indicated in draft guideline 2.8, but instead an act through which a State or organization expressed its consent to the formulation of a reservation.

3. He was not of the opinion that the 1969 Vienna Convention allowed for such express acceptance only when the State or organization expressed its consent to be bound by the treaty. As with a reservation or objection, article 23 of the Convention did not seem to exclude the possibility of formulating an acceptance prior to the expression of consent to be bound by the treaty. Nor did article 20, paragraph 5 exclude that possibility, contrary to the assertion in paragraph 59 [239] of the report. It was clear, however, that where acceptance preceded the expression of consent, it would produce effects only when bilateral relations as between the reserving State and the accepting State were established on the basis of the treaty.

4. The Commission should place next to express acceptance, not tacit acceptance, but presumption of acceptance. Although the report used the two terms interchangeably, as in paragraph 36 [216], it was important to distinguish between them. If a State publicly criticized a reservation but omitted to formulate an objection in accordance with the procedure laid down in the 1969 Vienna Convention,

²⁸⁰ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, summary record of the 18th meeting (A/C.6/61/SR.18), para. 68.*

it would hardly be appropriate to refer thereafter to its tacit acceptance. However, the absence of objection would allow for the application of a presumption of acceptance. Accordingly, the term “tacit acceptance” should be replaced by “presumption of acceptance” in draft guidelines 2.8, 2.8.1 or 2.8.1 *bis*, and 2.8.2.

5. With regard to the choice between draft guidelines 2.8.1 and 2.8.1 *bis*, his preference was for the latter, which seemed more “user-friendly”: in a guide to practice, it was important to give the reader all the information required in as clear a fashion as possible and to avoid elaborate cross-references.

6. He had some doubts as to whether draft guideline 2.8.2 was in conformity with the 1969 Vienna Convention. It covered the case in which a reservation had to be accepted by all the parties on account of the limited number of the negotiating States and the object and purpose of the treaty, as indicated in article 20, paragraph 2 of the Convention. According to paragraph 5 of the same article, the general rule relating to the presumption of acceptance was applicable even in the case referred to in paragraph 2. A State was thus free to raise an objection until the time of its expression of consent to be bound by the treaty, provided that a period of 12 months had elapsed since notification of the reservation. While he did not agree that such a rule “would have extremely damaging consequences for the reserving State, and, more generally, for the stability of treaty relations”, as asserted in paragraph 41 [221] of the report, he understood the reasons given for the solution proposed, namely to limit the scope of the presumption by stating that only the 12-month period should apply. However, in the case in question it was unlikely that the treaty could enter into force unless all the States that had participated in negotiations became parties to it.

7. He shared the doubts raised with regard to draft guideline 2.8.9, concerning which organ within an international organization was competent to accept a reservation to a constituent instrument; a simple reference to the relevant rules of the organization concerned would be preferable.

8. He also endorsed the concerns expressed about the usefulness of draft guideline 2.8.11 as currently worded. It related to the constituent instrument of an international organization or an act modifying it, which would have to be ratified by all member States or by a certain number of them. The fact that the acceptance of the competent organ within the organization was required did not necessarily imply that member States had no right to formulate objections to reservations or to accept them. If such a right existed, as the report seemed to suggest, it could not be stated in general terms that those objections or acceptances had no legal effects.

9. On the other hand, in the interest of legal security, it was necessary to state clearly, as in draft guideline 2.8.12, that once a reservation had been accepted, it could not be withdrawn.

10. In conclusion, he reiterated his view that the rule relating to the presumption of acceptance laid down in the 1969 Vienna Convention was applicable only when the reservation was deemed valid within the meaning

of article 19 of the Convention. If the reservation was not valid, there could be no acceptance or presumption of acceptance merely on the ground that the 12-month period since notification of the reservation had elapsed.

11. Mr. VÁZQUEZ-BERMÚDEZ commended the Special Rapporteur’s twelfth report, and in particular the quality of the legal analysis of the issues. States would undoubtedly find the draft guidelines useful for resolving problems that arose in practice.

12. He disagreed with the argument put forward in paragraph 11 [191], and subsequently developed in paragraphs 39 [219] and 40 [220], that it was sufficient for practical purposes to distinguish the States and international organizations which had a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time of the formulation of the reservation, had time for consideration until the date of expression of their consent to be bound by the treaty. In his view that was not always the case. Article 20, paragraph 5, of the 1969 Vienna Convention provided that

[f]or the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

He drew particular attention to the phrase “whichever is later”.

13. It was clear that only States and international organizations which were contracting parties could accept reservations. However, pursuant to article 23, paragraph 1, of the 1986 Vienna Convention, a reservation must be communicated not only to the contracting States and organizations but also to other States and international organizations entitled to become parties to the treaty. He had no problem with the argument that if a contracting State or organization received notification of a reservation and raised no objection within a 12-month period, it should be presumed to have tacitly accepted the reservation. Nor did he have any problem with the idea that if a State or organization which received notification of the reservation was not yet a contracting party and the date on which it consented to be bound by the treaty fell after the expiry of the 12-month period, the period for consideration of the reservation lapsed on the date of its expression of consent, and that if no objection had been raised, the State or organization was presumed to have tacitly accepted the reservation.

14. However, article 20, paragraph 5, of the 1969 Vienna Convention provided for a third case: a State or organization entitled to become party to a treaty might receive notification of a reservation and within the 12-month period express its consent to be bound without raising any objection to the reservation. In that case, if the expression “whichever date is later” was applied *stricto sensu*, the State or organization in question still had the remainder of the 12-month period from the date of notification of the reservation in which to raise an objection. Consequently, the fact that it had not raised an objection to the reservation at the time of expression of consent to be bound by

the treaty should not be considered as an acceptance of the reservation. The State or organization concerned might well raise an objection to the reservation after its expression of consent, but prior to the expiry of the 12-month period; that would be logical where a State or organization that had already decided to consent to be bound by the treaty did not wish to delay depositing its instrument of ratification or accession in order to analyse a reservation of which it had received notification only the day before, secure in the knowledge that it still had the remainder of the 12 months in which to raise an objection. That was a completely different scenario from the one in which the date of expression of consent came after the expiry of the 12-month period, as should be clearly explained in the draft guidelines or in the commentary thereto, preferably in connection with draft guideline 2.8.1 *bis*.

15. He was in favour of retaining the bracketed references to express and tacit acceptance in the text of draft guideline 2.8 so that the subject matter of the draft guideline would immediately be clear to the reader. His preference would be for draft guideline 2.8.1 *bis*, which duly reflected the text of article 20, paragraph 5, of the 1969 Vienna Convention and was easier to understand at a glance than draft guideline 2.8.1.

16. As for draft guideline 2.8.2, he agreed that it was necessary in order to ensure stability in treaty relations. He endorsed the Special Rapporteur's view that the existence of the presumption relating to the tacit acceptance of a reservation in article 20, paragraph 5, of the 1969 Vienna Convention did not preclude States or organizations from expressly accepting a reservation. He also agreed that there was nothing to prevent States and organizations that had raised an objection to a reservation from expressly accepting it at a later date.

17. Given that article 23, paragraphs 1 and 3, of the 1969 and 1986 Vienna Conventions explicitly provided for express acceptance of reservations, draft guideline 2.8.3 was useful. However, the word "contracting" should be inserted before "State or international organization" for the sake of consistency with article 20 of the Conventions. Draft guideline 2.8.4 was a useful reminder of a requirement of article 23, paragraph 1, of the Conventions.

18. He drew attention to an apparent contradiction between draft guideline 2.8.8, according to which acceptance by the competent organ of the organization should not be presumed, and the last sentence of paragraph 71 [251], which referred to cases in which the organ implicitly accepted the reservation. With regard to draft guideline 2.8.10, he concurred with other members that the phrase "all the States and international organizations concerned", in paragraph 85 [265] of the report, required clarification.

19. As for draft guideline 2.8.12, while he understood the Special Rapporteur's concern to promote legal certainty in treaty relations, it was necessary to provide for the possibility that a State or international organization might wish to change its mind; following its acceptance of a reservation, it might subsequently decide to enter an objection, even one which might prevent the entry into force of the treaty as between the reserving party and itself.

20. Mr. PELLET (Special Rapporteur) said he had some sympathy with Mr. Gaja's argument that it would be more appropriate to refer to "presumption of acceptance" rather than "tacit acceptance". He wondered whether, if draft guidelines 2.8, 2.8.1 and 2.8.2 were amended along the lines suggested by Mr. Gaja, that might meet the concerns of Mr. Vázquez-Bermúdez regarding the third possibility provided for under article 20, paragraph 5, of the 1986 Vienna Convention, namely, that the State or organization could still raise an objection during the remainder of the 12-month period. That might obviate the need for an explicit reference in the draft guidelines; some mention in the commentary should suffice.

21. He also wondered whether the insertion of the word "contracting" before "State or international organization" in draft guideline 2.8.3 would meet some of the other concerns raised by Mr. Gaja.

22. Mr. VÁZQUEZ-BERMÚDEZ reiterated that the presumption in question arose only upon the expiry of the 12-month period or at the time of expression of consent to be bound by the treaty, provided that it came after the 12 months had elapsed: article 20, paragraph 5, of the 1969 Vienna Convention provided that the later date was the one applicable. Furthermore, the Special Rapporteur seemed to have been thinking along the same lines, as was borne out by his statement in the last sentence of paragraph 40 [220]: "In any case, the phrase 'whichever is later [the end of the period of 12 months or the date on which it expressed its consent to be bound by the treaty]' ensures that States and international organizations have at least one year to consider reservations."

23. Mr. GAJA said that he had no objection to draft guideline 2.8.3 as currently worded. Contrary to what was stated in the report, neither article 20, paragraph 5, nor article 23 of the 1969 Vienna Convention laid down the condition that only contracting States and contracting organizations could formulate acceptances of reservations.

24. Ms. JACOBSSON thanked the Special Rapporteur for an enlightening presentation. Few members could have foreseen that so many booby traps surrounded the form and procedure for the formulation of acceptances and reservations. On the whole, she was in favour of the draft guidelines and of their referral to the Drafting Committee. She nonetheless wished to make a few comments.

25. First, her preference was for draft guideline 2.8.1 *bis*, despite the fact that to some extent it duplicated draft guideline 2.6.13. Repetition could sometimes be useful. Draft guideline 2.8.1 *bis* spelled out clearly the conditions for the procedure of tacit acceptance, and, as Mr. Gaja had said, was more "user-friendly".

26. Secondly, she agreed with several other members that the text of draft guideline 2.8.2 needed to be clarified with respect to States and organizations which were not yet parties to the treaty.

27. Thirdly, she was inclined to agree with Ms. Xue that application of the very strict rule contained in draft guideline 2.8.4 might pose problems in practice. However, given the requirements of article 23, paragraph 1,

of the 1969 Vienna Convention, she doubted whether the problems could be resolved in the Drafting Committee, although she was willing to engage in a discussion on the matter.

28. Several members had suggested that draft guideline 2.8.12 should be reformulated. She too could foresee situations in which the irreversible nature of acceptances of reservations could do more harm than good where preserving the integrity of treaty relations was concerned. Moreover, there was a slight imbalance in that the reserving State could withdraw its reservation but the accepting State could never withdraw its acceptance. However, in the light of the arguments of the Special Rapporteur and other members, she was in favour of retaining the current wording of the draft guideline for the time being, but suggested that the text should be the subject of further discussion in the Drafting Committee.

The meeting rose at 10.40 a.m.

2940th MEETING

Friday, 20 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (concluded) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur on reservations to treaties to sum up the debate on his twelfth report (A/CN.4/584). He informed the members of the Commission that the Enlarged Bureau had recommended the appointment of Mr. Kolodkin as Special Rapporteur on the topic entitled “Immunity of State officials from foreign criminal jurisdiction”. He took it that the Commission agreed to that recommendation.

It was so decided.

2. Mr. PELLET (Special Rapporteur) said that, as he had feared, only a few members of the Commission had expressed their views on the first part of his twelfth report, which dealt with a very technical and dry subject. He was thus all the more grateful to those who had

taken the trouble to read the report carefully and comment on it. A number of other members had let him know informally that they had not taken the floor because the proposed draft guidelines had not posed any particular problems for them, apart from possible drafting questions. Although doubts had been expressed as to the utility of draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), all speakers had been in favour of referring draft articles 2.8 to 2.8.12 to the Drafting Committee. Two points, however, had given rise to criticism or suggestions that went beyond simple drafting problems. He wished to stress that, notwithstanding the recent misguided practice of the Commission, which, when unable to take a decision, had often left it to the Drafting Committee to do so, the Drafting Committee’s role was to draft and not to decide questions of principle. The Commission should therefore put an end to that regrettable practice. If any members were opposed to drawing conclusions from the debate, which they had every right to do, then he would ask the Chairperson to take a vote—at least an indicative one—to ensure that the Drafting Committee did not yet again replace the plenary in deciding questions of principle.

3. He would first address the suggestions of Commission members which he felt were primarily of a drafting nature and on which the Drafting Committee was competent to decide. The clumsy wording of the draft articles concerned might have suggested that there had been disagreement, although no principle had been at issue and it should be possible to find a solution that satisfied all members. For example, it had been noted that the English translation of draft guideline 2.8 (Formulation of acceptances of reservations) posed problems. That was certainly true for the translation of the French word “*objection*”, which appeared in the plural in the English text although it should be in the singular, since it was in the singular in the sole authentic, authoritative version of the draft guideline, namely the French. If there were other problems, whether in the English or in the other language versions, the Drafting Committee could easily deal with them, too.

4. Another question raised did not concern the draft guideline itself but the explanation of it given in paragraph 17 [197] of the report, where he had written that “tacit acceptance [was] the rule and express acceptance the exception”. He had had a purely quantitative statement in mind and did not think that, legally speaking, express acceptance was an exception to a principle of tacit acceptance that was obligatory for States. He thus believed that he could fully reassure those who had expressed concern in that regard; once again, the problem seemed to be one of translation.

5. With one exception, all speakers had been in favour of including the phrase that had been left in square brackets in the text of draft guideline 2.8. One member of the Commission had made a useful proposal for new wording which would surely make it possible to incorporate the words “tacit acceptance” and “express acceptance” more harmoniously in the second paragraph of draft guideline 2.8, which would then read: “Express acceptance arises from a unilateral statement in this respect and tacit acceptance from silence kept ...”. Yet again, the problem was mainly one of drafting.