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Summary record of the 2936th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
2007, **vol. I**

against or opposed. She was, however, sympathetic to the gist of the proposed text, which would be improved if the onus were placed on the organization rather than its members. A text should be drafted calling upon international organizations to make provision in their budgets for such contingencies, which could then be met without recourse to additional contributions from members.

83. Mr. GALICKI said he was strongly in favour of the proposed additional draft article. Failure to adopt such a provision would make the Commission's text less effective. Draft article 39, for example, would lose all its force if compensation for the damage exceeded an organization's budget or other financial resources. An organization's status as a subject of international law was not original, but derived from the status of its member States as subjects of international law. It followed that its international responsibility also derived from the responsibility of States, and a proper balance should be struck between the two. States establishing an international organization should provide for the organization's ability to be not only fully but also effectively responsible, financially and otherwise. Moreover, some special regimes contained provisions similar to the proposed additional draft article. The 1972 Convention on the international liability for damage caused by space objects contained provisions on joint and several liability for damage caused by an international organization's space activities, liability which was to be shared with member States. A general regime such as that envisaged in the draft articles should not prevent claimants from receiving satisfaction purely owing to the organization's inability to pay compensation. The proposed draft article seemed to meet the basic requirements of common sense and justice. It was also sufficiently general as to give States some leeway in fulfilling their obligations.

84. Mr. PETRIČ, after welcoming Mr. Pellet's assurance that he did not advocate the direct obligation of States to provide compensation, said that, nonetheless, he could not support the proposed additional draft article, on the grounds that it would set the dangerous precedent of relieving international organizations of their legal responsibility, in the belief that States would always act as a safety net. Many different factors were involved in the discharge of liability, and an international organization should not necessarily feel that it could turn to its members for extra funds. As one who in his diplomatic role often had to deal with large budgets, he knew that a political process was involved in an organization's efforts to find ways and means of meeting its financial obligations. How it did so was up to the individual organization. He was absolutely opposed to the establishment of an obligation on member States to make special, separate provision for the possible consequences of an organization's wrongful acts. At the same time, the subsidiary organs and the agents of an organization had to be aware that they themselves bore responsibility. While he did not dismiss the proposed draft article out of hand, he had serious reservations about the current text and urged the Commission to give it further consideration so that a common position could be adopted.

The meeting rose at 1 p.m.

2936th MEETING

Friday, 13 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, 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

1. The CHAIRPERSON invited the Special Rapporteur to introduce his twelfth report on reservations to treaties (A/CN.4/584).

2. Mr. PELLET (Special Rapporteur) said that his twelfth report dealt with the procedure for acceptances of treaties, which was the subject of 13 draft guidelines. He drew attention to the footnote on page 1, which indicated that the twelfth report in fact constituted the second part of his eleventh report,[269] from which it carried on. In producing it, he had proceeded on the basis of a number of provisions of the 1969 and 1986 Vienna Conventions of relevance to the formulation of objections and had analysed their scope, attempted to fill their lacunae and discussed their implications.

3. Logically, the point of departure of the current study was article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, which draft guideline 2.8 (Formulation of acceptances of reservations) did not reproduce word for word, for the sake of coherence, although it reflected the paragraph's main idea. Draft guideline 2.8 introduced the principle—probably the most important one of the report—that "[t]he acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of the contracting State or contracting international organization". That was the principle of the tacit acceptance of reservations. The second paragraph of the draft guideline set out the conditions in which the absence of objections was established, either because the contracting State or international organization had made an express statement in that respect, or because the State or international organization had kept silent.

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[*] Resumed from the 2930th meeting.

[269] Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

4. As noted in paragraph 8 [188][270] of the report, there was no need to speak of "early acceptance" in the case of treaty clauses that expressly permitted a reservation. Those were special clauses which precluded the need for acceptance and derogated from the ordinary law of treaties, which was all that was of interest to the Commission. Similarly, he was not convinced by the distinction between tacit and implicit acceptances of reservations. According to some authors, the former resulted from a ratifying State having remained silent, even though the reservation had already been made, whereas implicit acceptances resulted from silence having been kept for 12 months following formulation of the reservation. Although that distinction was of interest at a doctrinal level, it served no practical purpose. In both cases, silence was tantamount to acceptance. Accordingly, the distinction should not be evoked in the Guide to Practice.

5. Questions relating to the time period, which concerned the right to formulate an objection to a reservation, had been the subject of draft guideline 2.6.13, which the Commission had sent to the Drafting Committee during the first part of the current session. For that reason, the second paragraph of preliminary draft guideline 2.8 merely referred to draft guideline 2.6.13. As a precaution, however, he had proposed in paragraph 25 [205] of the report a draft guideline 2.8.1 *bis* (Tacit acceptance of reservations), which reproduced the wording of draft guideline 2.6.13. Since the Commission had referred the latter draft guideline to the Drafting Committee, draft guideline 2.8.1 *bis* appeared to be superfluous.

6. As indicated in paragraph 27 [207] of the report, the advantage of draft guideline 2.8.1 was that it showed that acceptances of and objections to reservations were two sides of the same coin. It might be asked, however, whether the phrase "Unless the treaty otherwise provides" in square brackets should be retained. He had been reluctant to include it, but had eventually decided that it should be kept, first of all for a formal reason, since it was employed in article 20, paragraph 5, of the 1969 Vienna Convention, which should be followed as closely as possible, and secondly because it might prove useful in the current case because it expressly stipulated that the 12-month time period was not immutable and that the States which negotiated the treaty could change it. Paragraphs 33 [213] to 39 [219] of the report showed that the 12-month time period had become a customary rule which could be derogated from. He also stressed the fact that the time period could begin as from notification of the reservation, as from the date of ratification or, more broadly, as from the expression of consent to be bound, if the latter was given subsequently.

7. The system of tacit reservations was acceptable for general multilateral conventions; however, he wondered whether in the case of multilateral conventions with limited participation, referred to in article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions, the principle of tacit acceptance was needed. The question arose because if the requirement of unanimous acceptance was to be interpreted strictly, it would mean that any new contracting State could undermine the previous unanimity by opposing the reservation. However, two decisive factors would tend to prevent that from happening. First, article 20, paragraph 5, of the Vienna Conventions expressly referred to article 20, paragraph 2 (on limited treaties), which showed that the authors of the Conventions had sought, through the principle of tacit acceptance, to achieve clarity and stability in treaty relations, an objective which, secondly, would not be attained if each new accession to the treaty could call into question the participation of the author of the reservation to the treaty. That was illustrated by draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), which read: "A reservation requiring unanimous acceptance by the parties in order to produce its effects is considered to have been accepted by all the contracting States or international organizations or all the States or international organizations that are entitled to become parties to the treaty if they shall have raised no objection to the reservation by the end of a period of 12 months after they were notified of the reservation."

8. The principle of the tacit acceptance of reservations as posed in the 1969 and 1986 Vienna Conventions and specified in draft guidelines 2.8 to 2.8.2 was enormously useful. It had the essential function of preventing any uncertainty in the treaty relations between the reserving State and the other parties from lasting indefinitely. The principle of tacit acceptance thus made it possible to dispel all uncertainty at the end of a reasonable time period, i.e. 12 months.

9. Draft guidelines 2.8.3 to 2.8.6 clearly needed editorial improvements, but they should not give rise to any fundamental opposition. The four cases drew on the principles set out in the Vienna Conventions or the draft guidelines already adopted. Draft guideline 2.8.3 (Express acceptance of a reservation) provided that express acceptance could be formulated at any time before the abovementioned time period of 12 months but also thereafter. Nothing prevented a State from expressly accepting a reservation even if it had tacitly accepted it earlier.

10. Draft guideline 2.8.5 (Procedure for formulating express acceptances) referred to the relevant provisions that the Commission had adopted on the formulation of reservations themselves.

11. Draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation) reproduced, with minor adaptations, the provisions of article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions. He had refrained from providing a draft guideline on potential early acceptances, contrary to what he had done for pre-emptive objections. Article 20, paragraph 5, of the 1969 Vienna Convention virtually ruled out any such possibility. Another disadvantage was that it would encourage the formulation of reservations.

12. The aim of draft guideline 2.8.12, which appeared at the end of the twelfth report, was to establish the definitive and irreversible nature of acceptances of reservations. The 1969 and 1986 Vienna Conventions were silent on

[270] The numbers in brackets refer to the original numbering by the Special Rapporteur.

the matter, unlike in the case of objections, but it would be contrary to the object and purpose of article 20, paragraph 5, of the Conventions to permit the accepting State or international organization to go back on its acceptance once it had been established. Two cases could arise. In one, supposing that the reservation had been accepted in writing before the end of the 12-month time period set in article 20, paragraph 5, there was no question that this unilateral act of the State or international organization—express acceptance—had given rise not only to expectations but also to rights for the reserving State, this State could become a party, and its reservation could produce effects. To go back on those rights might constitute an *estoppel*; in any event, it would be contrary to the general principle of good faith. In the other possible case, if the reservation had been the subject of a tacit acceptance by a State or international organization which had kept silent for more than 12 months, the problem would be similar, since, in remaining silent, the State or international organization in question would have created expectations on the part of the reserving State at the very least. In any case, such a withdrawal would be null and void, because an objection did not produce effects once the 12-month time period had ended, as the vast majority of Commission members had argued during the discussion on draft guideline 2.6.14. Thus, whether express or tacit, acceptances of reservations were irreversible.

13. Draft guidelines 2.8.7 to 2.8.11 sought to resolve the particular problems relating to the acceptance of reservations to the constituent instrument of an international organization. Even though the question was a rather marginal one, it must be said that such problems were numerous and not always very simple. For that reason, they were the subject of detailed commentaries in paragraphs 60 [240] to 90 [270] of the twelfth report. The authors of the 1969 Vienna Convention, although reluctant to make distinctions between various types of treaties, had been aware of the specific problems posed by the constituent instruments of international organizations, including with regard to reservations, as article 20, paragraph 3, of the 1969 Convention showed: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." It would in fact be odd to subject reservations to constituent instruments to the entire Vienna regime. The formulation of reservations to constituent instruments clearly posed very serious problems, at least if the reservation related to the composition or functioning of the organization. For example, it would be strange, to say the least, for a State to become a Member of the United Nations, ratify the Charter of the United Nations and make a reservation to Article 23, on the composition of the Security Council, or to Article 17, on the approval of the budget, without the express acceptance—in the latter case, in any event—of the Organization. It was those considerations that had led the International Law Commission to conclude in 1962, during the elaboration of the draft articles on the law of treaties,[271] which had been at the origin of the 1969 Vienna Convention, and more specifically in its commentary to article 20, paragraph 4, adopted on first reading, that "in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and … it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable".[272] That was the prevailing practice, as indicated in paragraph 67 [247] of the report. Accordingly, he saw no reason why the entire text of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions should not be reproduced in the Guide to Practice.

14. As he had explained in paragraph 69 [249], however, that principle was far from solving all the problems that could and did arise. First of all, article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions did not say what was meant by "constituent instrument of an international organization". It was clear that a constituent instrument was the treaty by which the organization was created, its structure defined, its organs established and the modalities of their functioning determined. However, "pure" constituent instruments according to that definition were rather rare, because most of the time the instrument mixed substantive provisions with provisions of an organic or organizational nature. That was the case, for example, with the Charter of the United Nations, Articles 1 and 2 of which in particular contained substantive provisions unrelated to the functioning of the Organization. An even more striking case was that of the 1982 United Nations Convention on the Law of the Sea, which was the constituent instrument of the International Seabed Authority but which chiefly contained substantive provisions governing the law of the sea. One might be tempted to draw a distinction between rules applicable to reservations to genuinely constituent—i.e. institutional—provisions and rules applicable to reservations to substantive provisions of the same treaty. He was opposed to doing so, more for reasons of convenience than of principle, although it could also be argued that such a distinction should not be made because article 20, paragraph 3, of the Vienna Conventions did not do so. It was, in fact, no easy matter to distinguish between the two types of provisions, which sometimes coexisted in the same article. Thus, he did not propose adopting a draft guideline on that point; it would be sufficient to include a reference to it in the commentary based on the material contained in paragraphs 73 [253] to 77 [257] of the twelfth report.

15. On the other hand, he did not intend to remain silent on another question which the 1969 and 1986 Vienna Conventions had left unanswered: whether the acceptance required by the competent organ of the organization must be express or could be tacit. It might be argued that it would be legitimate to apply the ordinary law of reservations there in the absence of exceptions made in the Vienna Conventions for constituent instruments and simply to say that tacit acceptance was sufficient, so as not to paralyse the exercise of the broad right to formulate reservations, which was what the authors of the Vienna Conventions had wanted. That, however, would be entirely unacceptable for the reason he had just indicated, which had to do with the particular nature of constituent instruments, namely that it would greatly facilitate the formulation of reservations, which was to

[271] *Yearbook … 1962*, vol. II, document A/5209, p. 161.

[272] *Ibid.*, p. 181 (para. (25) of the commentary).

be avoided, especially in the case of institutional provisions. Moreover, and that in itself seemed to be reason enough, an *a contrario* interpretation of article 20, paragraph 5, would appear to exclude the transposition of the principle of tacit acceptance when the acceptance of reservations to constituent instruments was concerned. That provision referred expressly to article 20, paragraph 2, on limited treaties, and to paragraph 4, i.e. to general cases, but it deliberately refrained from citing article 20, paragraph 3, on constituent instruments. One could thus conclude, as draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) stipulated, that the acceptance of the reservation by the competent organ of the organization must not be presumed and that draft guideline 2.8.1 on the tacit acceptance of reservations was therefore not applicable to acceptance by the competent organ of reservations to a constituent instrument.

16. Another lacuna in the 1969 and 1986 Vienna Conventions related to the very definition of the "organ competent" to accept the reservation, a term which article 20, paragraph 3, of the Conventions used but did not define. He had been somewhat hesitant to propose a definition because the competent organ might vary considerably from one organization to another; nonetheless, he thought that draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument) might provide useful guidance. It read: "The organ competent to accept a reservation to a constituent instrument of an international organization is the one that is competent to decide whether the author of the reservation should be admitted to the organization, or failing that, to interpret the constituent instrument."

17. That provision, which systematized a rare practice, was of course far from resolving all the problems that might arise in that regard. A reservation to a constituent instrument was usually formulated at the time of the instrument's ratification, which very often was before the instrument came into force and thus before an organ competent to assess the admissibility of the reservation existed. As could be seen in the examples given in paragraph 81 [261] of the report, that was not a textbook case: the question had in fact arisen, in cases of reservations formulated prior to the entry into force of the constituent instrument, as to who could accept those reservations. As indicated in paragraphs 82 [262] and 83 [263], two solutions were contemplated to respond to that situation. The first was unanimous acceptance by all States that had already expressed their consent to be bound. The second was to do nothing and consider that the reservation would not be established until, the constituent instrument having entered into force, the competent organ as defined in draft guideline 2.8.9 had accepted the reservation. The disadvantage of the second solution was that it allowed a nagging uncertainty to persist as to the status of the reserving State or international organization, the very situation which article 20, paragraph 5, of the 1969 Vienna Convention sought to avoid. Accordingly, he suggested retaining the first solution in draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), which provided that if it was formulated before the entry into force of the constituent instrument, "a reservation requires the acceptance of all the States and international organizations concerned". In that connection, he did not think that the draft guideline should speak of "all the States" or of the States and international organizations "concerned"; there was no reason why it should not read "all the contracting States or international organizations". He left that question for the Drafting Committee to consider.

18. Paragraphs 86 [266] to 90 [270] of the report addressed a final problem that had not been settled by the 1969 and 1986 Vienna Conventions: whether the requirement of an express acceptance of reservations to the constituent instrument of an international organization excluded the possibility of States taking an individual position on the reservation. Arguments to the contrary could be cited: one might ask what purpose such a possibility served, since the States in question would probably be called upon to give their view within the competent organ of the organization, which was usually a plenary body, and since, regardless of whether they objected or accepted individually, their position would not have any real immediate effect for those States that reacted to a reservation in any case. Indeed, either they would be bound by the reservation because the competent organ had accepted it, or the reservation would not produce effects, because the competent organ had rejected it. It might be asked whether the States could still take a formal position *vis-à-vis* the reservation. Even if it might seem odd to encourage them to do something which served no legal purpose, he was in favour of allowing for such a possibility, because it was always useful to know the views of contracting States and international organizations. Such knowledge could help the competent organ to arrive at its own position and above all could offer an opportunity for a fruitful reservations dialogue. He therefore proposed that the Guide to Practice should include draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), which read: "Guideline 2.8.7 does not preclude the right of States or international organizations that are members of an international organization to take a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects."

19. That concluded his introduction of draft guidelines 2.8 to 2.8.12, which he hoped the Commission would refer to the Drafting Committee. Recalling that document A/CN.4/584, artificially referred to as his twelfth report, was actually the continuation of the eleventh, he said that it was not the end. He had just completed a section on the procedure relating to interpretative declarations, thereby concluding his work on the procedure for the formulation of reservations and interpretative declarations, which constituted the second part of the draft Guide to Practice. In 2008, the Commission would thus be able to continue with and, it was to be hoped, conclude the third part of the Guide, on the validity of reservations, and then begin the adoption of the fourth part, on the effect of reservations.

The meeting rose at 11.10 a.m.