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Summary record of the 2937th meeting

Topic:
Reservations to treaties

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2937th MEETING

Tuesday, 17 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, 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, 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 (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the twelfth report of the Special Rapporteur on the topic of reservations to treaties (A/CN.4/584).

2. Ms. ESCARAMEIA, after commending the Special Rapporteur, whose powers of analysis and capacity to scrutinize all possible situations and problems never failed to amaze her, for his twelfth report on reservations to treaties, noted that paragraph 2 [182] of the report stated that acceptances of reservations were irreversible, the reasoning being that article 22 of the 1969 Vienna Convention referred only to the withdrawal of reservations and objections to reservations and not to acceptances. In her view, the absence of a reference to acceptances did not necessarily indicate that they were final. Rather, it seemed logical to apply the same regime to acceptances as to withdrawal of reservations or of objections to reservations. She would, however, return to the issue in connection with draft guideline 2.8.12. On the other hand, she agreed with the Special Rapporteur's view that there was no need to make a distinction, for the purposes of the draft guidelines, between tacit and implicit acceptances or to refer to so-called "early acceptances" in cases where reservations were expressly referred to in a treaty.

3. With regard to draft guideline 2.8 (Formulation of acceptances of reservations), she endorsed its content but drew attention to the need to bring the English text into line with the original French. In the phrase "the contracting State", the word "the" should thus be replaced by the word "a" or, for even greater clarity, the word "another". As for the words in square brackets in the second paragraph of the draft guideline, they should, in her view, be retained because, even if they were not strictly necessary, their inclusion would make for greater clarity both in the draft guideline and in the commentary.

4. With regard to draft guideline 2.8.1 (Tacit acceptance of reservations), she preferred, in principle, its simpler wording to that of draft guideline 2.8.1 *bis*, since, as the Special Rapporteur had pointed out, draft guideline 2.6.13 had already been referred to the Drafting Committee and there was no point in simply repeating it almost word for word. As for the phrase currently in square brackets ("Unless the treaty otherwise provides,"), she would favour its inclusion, since it also appeared in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. Its inclusion would cause no harm and it would serve the useful purpose of emphasizing the subsidiary nature of the provision.

5. Turning to treaties with limited participation, and to draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), she endorsed the position adopted by the Special Rapporteur, namely that newcomers to a treaty should not be permitted to object to reservations that had been unanimously accepted. She was, however, concerned that, as drafted, the phrase "all the States or international organizations that are entitled to become parties to the treaty" implied that such States or organizations could accept a reservation before becoming parties, which was surely not what was intended. Acceptance was limited to contracting parties and not open to potential parties, as could be inferred from article 20, paragraphs 2 and 5, of the Vienna Conventions and, indeed, as was stated in paragraph 59 [239] of the report. She was not sure how the existing draft should be amended in order to clarify the situation. Perhaps the best solution would be to draft a guideline 2.8.2 *bis*.

6. She endorsed the content of draft guideline 2.8.3 (Express acceptance of a reservation). However, she had serious doubts about the example, given in paragraph 49 [229], of a so-called "reservation" by France to the Convention providing a Uniform Law for Cheques, made 40 years after France's accession to that Convention. According to the definition contained in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, the French action was not a reservation, because one of the constituent elements of a reservation was the time at which it was made. She did not know how the depositary had reacted, but the German response to the "reservation" seemed to be more in the nature of a political understanding or a courtesy than an acceptance in the legal sense. She endorsed draft guidelines 2.8.4 (Written form of express acceptances), 2.8.5 (Procedure for formulating express acceptances) and 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation).

7. Turning to section 3, relating to treaties establishing international organizations, she endorsed draft guidelines 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) and 2.8.9 (Organ competent to accept a reservation to a constituent instrument). 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), however, should be amended along the lines already suggested

by the Special Rapporteur during his presentation; the word “concerned”, the meaning of which was potentially very broad, should be replaced by a phrase along the lines of “that have expressed their consent to be bound by the treaty”.

8. Draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument) was a useful provision, but she was uneasy about some of the terms used. First, the word “right”, which appeared both in the title and in the text, was too strong as a translation of the French word “*faculté*”, particularly as the position taken was one devoid of legal effects. She would prefer a word such as “possibility”, “faculty” or “capacity”. Secondly, the word “accept” in the title of the draft article was misleading, since members could also object to a reservation, as was made clear in the text of the draft guideline by the words “take a position on”. In the title, the word “accept” should therefore be replaced by the words “respond to” or “react to”.

9. With regard to the provision relating to the irreversibility of acceptances of reservations, she said it was her belief that, in draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations), the same regime should apply both to tacit acceptances (which were the most common) and to express acceptances (which were very rare); in other words, they should become final only once 12 months had passed. The 1969 and 1986 Vienna Conventions were silent on the issue, but the Special Rapporteur had argued that article 20, paragraph 5, pointed in the direction of the final and irreversible nature of acceptances, which would be operative after 12 months in the case of tacit acceptances but immediately in that of express acceptances. According to the Special Rapporteur, any other approach would undermine the principle of good faith and militate against the stability of treaty relations. That might be true if an acceptance came after several years had elapsed, but not if it came within a certain period. During the discussion on draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation), there had been a measure of consensus that the scope could be widened within a 12-month period; and that was borne out by the statement in paragraph 92 [272] of the report, discussing the acceptance of reservations, that “[a] comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation”. It stood to reason that, if an objection was not final until a 12-month period had elapsed, a State should also be able to change its mind over the same period about the acceptance of a reservation. She therefore proposed that draft guideline 2.8.12 should be amended to state that an acceptance was final and irreversible after a 12-month period had elapsed after notification of the reservation. Subject to that amendment, she was in favour of referring all the draft guidelines to the Drafting Committee.

10. Mr. McRAE said that he, too, was impressed by the content, detail and depth of the discussion in the twelfth report. He had no major objections to any of the draft guidelines, all of which should be referred to the Drafting Committee. He agreed, however, with most of the points raised by Ms. Escarameia. As she had indicated, for example, draft guideline 2.8.2 (Tacit acceptance of a

reservation requiring unanimous acceptance by the other States and international organizations) referred to the possibility of objections by States or international organizations that were entitled to become parties to the treaty. Such States or organizations were, however, irrelevant for purposes of determining whether acceptance had or had not been unanimous; if they were not yet parties to a treaty, they could not be considered as such.

11. With regard to draft guideline 2.8.12, his concern differed slightly from that of Ms. Escarameia and would not be met simply by the addition of a reference to a 12-month period. In his view, there could be circumstances in which a State might wish to revisit its acceptance of a reservation, either because it found that the reservation had far wider application than anticipated, as a result of a statement by the reserving State or, perhaps, owing to a judicial interpretation. If the content of the reservation turned out to be significantly different from what had been supposed, there was surely a case for entitling the accepting State to reconsider its position. He acknowledged that an amendment to that effect would have an impact on security in treaty relations, but it could be argued that the original acceptance really related to what was effectively a different reservation.

12. With regard to draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he wondered whether the issue had any place in the draft guidelines. The question of the organ competent to accept a reservation to a constituent instrument was a matter for the members of the organization concerned, or at least for the organization itself. At best, the draft guideline would serve as a fallback position, when the organization was unable to provide an answer.

13. With regard to draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he agreed with Ms. Escarameia that both the title and the text would benefit from further work. First, the title referred to the right to “accept” a reservation, whereas the text referred to the right to “take a position” on the validity or appropriateness of a reservation. Moreover, the second sentence of the text used the word “opinion” to denote what in the first sentence was described as a “position”. The Drafting Committee should review the text carefully. Lastly, he wondered whether there was any need to specify that in such cases the State’s opinion was devoid of legal effects. Given that knowledge of a State’s position might well encourage the reservations dialogue favoured by the Special Rapporteur, he wondered whether at least some of those positions were not more akin to interpretative declarations, and could usefully be characterized as such.

14. Mr. NOLTE said that the twelfth report on reservations to treaties was thorough, systematic and pragmatic. Nevertheless, he wished to make two points regarding the acceptance of reservations to the constituent instrument of an international organization.

15. His first point concerned draft guideline 2.8.7. Paragraph 77 [257] of the report suggested that it was debatable whether a distinction should be made between the strictly constitutional provisions of constituent instruments and

their material or substantive provisions. In the Special Rapporteur's view, there was no value in introducing a guideline that attempted to define the concept of "constituent instrument" and it would make more sense to set out the difficulties of defining the concept in the commentary. While he agreed with the Special Rapporteur that it would be difficult to provide an exact definition of the concept of a "constituent treaty" or to delimit "strictly constitutional" and "substantive" provisions, he thought it would be possible and advisable to address the problem in draft guideline 2.8.7, rather than in the commentary, by simply replacing the first word "when" with the phrase "as far as". The draft guideline would then read: "As far as 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." That formulation would alert the reader to the existence of an important distinction without attempting to delineate the boundary between strictly constitutional and substantive provisions, whereas a reference to that distinction in the commentary could easily be overlooked.

16. His second point concerned draft guideline 2.8.10. He was somewhat uncomfortable with the Special Rapporteur's suggestion that a reservation formulated before the entry into force of a constituent instrument of an international organization "requires the acceptance of all the States and international organizations concerned" only, and not that of the organs of the international organization concerned. As he understood it, that provision would mean that a State which acceded to a treaty at a very early stage might have its reservation accepted much more easily than if it were to accede later. In that case, States that acceded at a later stage and the organs of the international organization might be faced with a precedent which they would not have accepted if the reserving State had formulated its reservation at a later date. He wondered whether the interests of early legal security should really prevail in such circumstances. After all, the treaty had not yet entered into force and, once it had done so, the organs of the newly established international organization might immediately take a decision on whether to accept reservations. If the Commission were to take the view that the interests of early legal security should indeed prevail, consideration could perhaps be given to requiring all signatories to the treaty to accept the reservation concerned.

17. Having listened to the points made by Ms. Escarameia and Mr. McRae regarding the final and irreversible nature of acceptances of reservations, he tended to concur with the Special Rapporteur. He could imagine circumstances in which the full implications of a reservation might become clear only some time after it had been accepted; however, if such a case were to arise, it would be more appropriate for the accepting State to react by explaining and interpreting its acceptance.

18. In conclusion, he was in favour of referring all the draft guidelines contained in the twelfth report to the Drafting Committee.

19. Mr. MELESCANU said he had initially supposed that the subject of reservations to treaties was a straightforward topic which the Commission could quickly

dispatch. Over the years, however, he had come to realize that it was in fact extremely complex. The Special Rapporteur's very thorough Guide to Practice would therefore be of great practical value to all those who, in their professional capacity, were concerned with such matters.

20. He, too, was in favour of referring the draft guidelines contained in the twelfth report to the Drafting Committee.

21. Draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations) was absolutely necessary in order to secure the stability of a treaty establishing an international organization. Furthermore, the provision was also needed to make it clear that only contracting parties and those States or international organizations entitled to become parties to the treaty were required to accept such reservations.

22. Notwithstanding the excellent arguments put forward by Ms. Escarameia and Mr. McRae regarding draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations), he agreed with Mr. Nolte that it was difficult to contend that the draft guideline should be redrafted in order to cover the eventuality that the full extent of the effects of a reservation might not have been realized when it was accepted, or that it might subsequently be interpreted in a broader sense by the courts.

23. On the other hand, the language of draft guideline 2.8.12 needed to be less categorical, in order to cover situations in which a State which was a member of an international organization ceased to exist and its successor State or States became members of that organization. In such circumstances, the successor State might have a position on a reservation very different from that held by its predecessor. Given that State practice allowed successor States some latitude during the process of assuming the obligations of the predecessor State, it would be wise to find more flexible wording for the draft guideline in question.

24. Mr. PELLET (Special Rapporteur), replying to the comments of Ms. Escarameia, Mr. McRae and Mr. Melescanu on draft guideline 2.8.12, reminded Mr. Melescanu that the effects of the succession of States on reservations to treaties would be covered by a set of draft guidelines in the fifth part of the Guide to Practice. The Secretariat had already provided him with a very full study on the matter, to which he wished to give further thought before making it public.

25. While he was prepared to accept some of the suggestions made by Ms. Escarameia and Mr. McRae, that was not true of their observations in connection with draft guideline 2.8.12, since it was necessary to bear in mind the differing effects of objections, and reservations and of acceptances. An acceptance had far-reaching effects in that it resulted in the treaty entering into force for the State making the reservation. To withdraw an acceptance once the treaty had entered into force would be contrary to the principle of good faith, and would also have very serious effects. That was why it was impossible to align the wording of the draft guidelines on acceptances with those on objections.

26. Mr. Nolte had been right to counter Mr. McRae's argument that, many years after a reservation had been made, it might be interpreted in an unforeseen manner, by pointing out that, in that case, the accepting State would not be bound by that interpretation, in accordance with the principle of relative *res judicata*. Mr. McRae had given the impression that a decision of an international court was of universal application, whereas in fact it was binding only on the parties to the dispute and in respect of that particular case. He was therefore most uncomfortable with the idea that acceptance might be revoked on the strength of a court's interpretation of a reservation. It would be more logical for the State in question to formally declare that it had accepted a reservation on the understanding that it was to be interpreted in a particular manner.

27. In other respects he was inclined to agree with the criticisms of his wording of the draft guidelines in his twelfth report.

28. Ms. ESCARAMEIA, responding to Mr. Pellet's comment concerning draft guideline 2.8.12, that the result of the suggestion she and Mr. McRae had made would be that a treaty which had already entered into force would cease to operate between the two States in question, said that almost no instances of that happening had ever been recorded. In 99.9 per cent of cases, the treaty would remain in force if an acceptance was withdrawn, because even in the event of an objection being made to a reservation, the treaty normally entered into force as between the reserving and the objecting State.

29. Mr. PELLET (Special Rapporteur) said that if his answer was a poor argument, so was the "quantitative" objection to it.

The meeting rose at 10.55 a.m.

2938th MEETING

Wednesday, 18 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNIE

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. Nolte, 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 (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the twelfth report of the Special Rapporteur (A/CN.4/584), which contained draft guidelines 2.8 to 2.8.12.

2. Ms. XUE, said that the wording of draft guideline 2.8 (Formulation of acceptances of reservations) was precise and logical, but was perhaps somewhat too abstract for the practitioner and ought to be simplified.

3. Noting that in paragraph 17 [197] of the report the Special Rapporteur stated that "[i]t arises from both the text of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires* and the practice that tacit acceptance is the rule and express acceptance the exception", she pointed out that tacit acceptance was more a common practice than a rule, not so much because it was the *opinio juris* of States, but for reasons of procedural convenience.

4. With regard to draft guidelines 2.8.1 and 2.8.1 *bis* (Tacit acceptance of reservations), she said that she much preferred the latter because although the content of the two was identical, the wording of draft guideline 2.8.1 *bis* was clearer than that of 2.8.1, which contained an impractical cross-reference.

5. She endorsed the content of draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), but upon reflection it seemed to her that it might pose a number of practical problems. For example, when a treaty establishing an international organization was concluded, it was possible that all the contracting States might sign the final act, but that some might not ratify it in due time. Under the terms of the 1969 and 1986 Vienna Conventions, however, the latter States were also entitled to be notified of all legal acts on the part of the other contracting States. If they formulated an objection to a reservation made by a signatory State, the reserving State might contest their status.

6. Draft guideline 2.8.4 (Written form of express acceptances) was well founded from a theoretical point of view but might pose practical problems, which she would discuss when she addressed draft guideline 2.8.8.

7. As to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), the Special Rapporteur had raised very pertinent questions in paragraph 69 [249] and had dealt with them in a sensible manner.

8. With regard to draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument), she said that at first sight it had seemed very clear, but after having listened to the questions raised by a number of members she had had second thoughts. She now wondered how the draft guideline could be applied in practice and what was meant by the phrase "shall not be presumed". If it meant that acceptance should be express, and express only, it would be preferable to say so. Or, bearing in mind draft guideline 2.8.4, did it mean that the international organization must always express its acceptance in writing? It was common knowledge that organizations did not always do so in practice. The words "shall not be presumed" might