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### RESERVATIONS TO TREATIES

#### **Note by the Special Rapporteur on the first paragraph of draft guideline 2.1.7 adopted by the Drafting Committee**

1. Under draft guideline 2.1.7 on the “Functions of depositaries” adopted by the Drafting Committee at the first part of the session:

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

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

- (a) *The signatory States and organizations and the contracting States and contracting organizations; or*
- (b) *Where appropriate, the competent organ of the international organization concerned.*

2. This drafting is identical to that which I proposed in my sixth report.<sup>1</sup> In support, I had pointed out that:

“The first paragraph of this draft reproduces the text of the first phrase of article 78, paragraph 1 (d), [of the Vienna Convention of 1986] referring expressly and exclusively to the attitude to be adopted by the depositary with regard to reservations. In contrast, it did not seem useful to transpose the second phrase of this provision since article 78, paragraph 2, which is reproduced word for word in the second paragraph of draft guideline 2.1.7, contains the same rule in greater detail.”<sup>2</sup>

3. In drafting a preliminary draft commentary on this provision I note that, unfortunately I have made an error of logic: contrary to my comment in my report last year, article 78, paragraph 2, of the Vienna Convention of 1986 does not in any way reproduce the second phrase of paragraph 1.

4. The relevant provisions are drafted as follows:

*Article 78*

*Functions of depositaries*

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

...

(d) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

...

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

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

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<sup>1</sup> A/CN.4/518/Add.2, para. 169.

<sup>2</sup> Ibid., para. 170.

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

5. Whereas paragraph (1) (d) of article 78 makes it the duty of the depositary to bring the matter to the attention of the author of the reservation, paragraph 2 imposes a similar duty but with regard to the *other* States or international organizations concerned.

6. In the circumstances the drafting of the first paragraph of draft guideline 2.1.7 should be amended as follows:

*The depositary shall examination whether a reservation to a treaty formulated by a State or an international organization is in due and proper form* **and, where appropriate, bring the matter to the attention of the State or international organization concerned.**

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