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Summary record of the 2582nd meeting

Topic:
Law and practice relating to reservations to treaties

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67. Mr. Pambou-Tchivounda had also raised the question of the legal effect sought by the unilateral declaration, and had been supported in his views by most other members of the Commission, who had emphasized the importance of the content of the declaration. He could not endorse that point of view. He accepted that the content of a provision was important and that it could throw light on a State's intention, but he could not accept that it should be incorporated in the actual definition itself, which was drawn from the 1969 Vienna Convention and was thus sacrosanct. The definition said that the declaration "purported" to produce certain effects. To reconsider the question of definitions would be tantamount to going back to square one. In his view, it was in the context of draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations), which the Commission had yet to consider, that the question of content became essential. That would be the appropriate place in which to incorporate the issue of content, and draft guideline 1.3.1 should perhaps be reviewed from that standpoint. There was thus a significant difference of opinion between some members of the Commission and himself on that issue. That being said, the matter need not be settled at the current meeting, and could be resolved subsequently, preferably in the Drafting Committee.

68. Mr. Economides had also commented on the use of the word "phrasing". True, the words "phrased" and "named" were not very clear. However, the Commission's hands were to some extent tied by the definition contained in the 1969 Vienna Convention. He was not hostile to Mr. Economides' comment that it was the content that produced the legal effect, but that question could, of course, be dealt with in draft guideline 1.3.1, as could Mr. Sreenivasa Rao's observations in that connection. Lastly, he was not fully convinced by Mr. Lukashuk's assertion that reservations turned hard law into soft law. With those remarks, he urged the Commission to refer draft guideline 1.2.2, on which there appeared to be broad consensus, to the Drafting Committee.

69. Mr. PAMBOU-TCHIVOUNDA said it was not clear from the Special Rapporteur's comments whether the 1969 Vienna Convention had defined an interpretative declaration. If that was not the case, it was all the more important that the Commission should highlight its special status as distinct from a reservation.

70. The CHAIRMAN noted that the French text of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention spoke of *une déclaration unilatérale*, whereas the English text referred to "a unilateral statement". The English text of draft guideline 1.2 should thus be amended to read "interpretative declaration" means a unilateral statement".

71. He said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.2 to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

2582nd MEETING

Friday, 4 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/491 and Add.1-6,² A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,³ A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR
(*continued*)

GUIDELINE 1.2.3

1. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited) was similar to draft guideline 1.2.2 (Phrasing and name), with the difference that draft guideline 1.2.3 dealt with the consequences of the fact that reservations were prohibited by the treaty itself in terms of the definition of unilateral declarations formulated in respect of the provisions of that treaty, whereas draft guideline 1.2.2 related to the phrasing chosen by the declaring State. The object of draft guideline 1.2.3 actually raised the question whether it might not be preferable for that provision to appear in section 1.3 (Distinction between reservations and interpretative declarations) of the Guide to Practice. Whatever the answer to the question of the placement of draft guideline 1.2.3 in the Guide to Practice as a whole—a question that was not of fundamental importance—the underlying idea was, basically, that States were not presumed to be acting in bad faith and that, in principle, if a treaty prohibited reservations, the States parties respected the prohibition and the unilateral declarations they formulated in respect of the treaty were not reservations, but interpretative declarations. That was an indication, and probably even a presumption which, short of contradicting the principle that it did not matter what title was chosen, was not irrebuttable. The second sentence therefore specified that, if a declaration sought to exclude or modify the legal effect of

¹ For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

² See *Yearbook ... 1998*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1999*, vol. II (Part One).

the treaty's provisions, it was not enough for the declaring State to call it "interpretative" in order to make it unassailable. That being said, there was a problem with the word "impermissible" at the end of the provision, since its inclusion meant going beyond the definition of interpretative declarations and reservations and entering by stealth into that of their permissibility. He had nevertheless considered that there could scarcely be any objection to using the word "impermissible", as it was so obvious that there could be no reservations to a treaty which expressly prohibited reservations. That was another case where the Commission might give the Drafting Committee instructions on the course it should follow.

2. Mr. KABATSI said that, where a treaty specifically prohibited reservations, the only choice open to States should be between accepting the treaty and refusing to be bound by it. A provision in the Guide to Practice ought not to be based on the idea of a possible third choice.

3. Mr. GOCO asked whether draft guideline 1.2.3, which began with the words "When a treaty", related only to bilateral or multilateral treaties or whether it also dealt with conventions. States unwilling to incur notoriety by failing to become parties to a certain convention, the convention banning anti-personnel mines, say, or the International Covenant on Civil and Political Rights, might want to interpret the instrument in question in their own way without going so far as to formulate a reservation and the interpretative declaration was a tool that enabled them to do so.

4. Mr. ECONOMIDES said that he wished to raise three points. First, why did a unilateral declaration in respect of a treaty prohibiting reservations—which could therefore not constitute a reservation—necessarily have to be an interpretative declaration and not a declaration of general policy or an informative declaration? Secondly, why should an interpretative declaration seeking to exclude or modify the legal effect of certain provisions of the treaty be considered impermissible only in the case of treaties which prohibited reservations and not in cases of reservations that were incompatible with the object and purpose of the treaty? The last case should also be covered. Thirdly, was the term "impermissible" appropriate in the light of the principle that it must be presumed that States were acting in good faith? According to the second sentence of draft guideline 1.2.3, it would be better to say that the declaration would be inoperative, inadmissible or void rather than "impermissible".

5. Mr. MELESCANU said he agreed with the Special Rapporteur that draft guideline 1.2.3 would be more appropriately placed in section 1.3. He also noted that the first sentence of the provision was based on a presumption of the good faith of States, whereas the second sentence spoke peremptorily of an "impermissible" reservation. The introduction of the new concept of impermissible reservations gave rise to many problems. Who was it that had to consider the declaration an impermissible reservation? And what would be the legal effect of such a conclusion? If the Commission decided to maintain the concept, it would have to provide a general definition of impermissible reservations covering all other cases of impermissible reservations. It might be preferable, as Mr. Economides had suggested, to speak of a declaration that was void.

6. Mr. ROSENSTOCK said he also thought that draft guideline 1.2.3 would raise fewer problems if it were placed in section 1.3. With regard to the first point raised by Mr. Economides, he noted that draft guideline 1.2.3 referred only to interpretative declarations because it was hard to imagine a situation where a distinction could not be drawn between a declaration of general policy or an informative declaration and a declaration by means of which a State might attempt to formulate a reservation. The provision had a common sense element which made it superfluous to say that it applied to all types of declarations. As to the use of the term "impermissible", the Drafting Committee might perhaps find another wording that would state, in substance, that the declarations referred to in the second sentence of draft guideline 1.2.3 constituted reservations of the kind that was prohibited. In any event, the two main points of the provision—the good faith of States and the rejection of what would constitute a reservation where reservations were prohibited—should be maintained.

7. Mr. LUKASHUK said that draft guideline 1.2.3 was useful and should be maintained. While it would indeed seem difficult to confuse interpretative declarations with declarations of general policy, he would nevertheless recommend an addition to the text to cover situations where the true purpose of the declaration could not be agreed upon.

8. Mr. HERDOCIA SACASA said that, although draft guideline 1.2.3 served a useful purpose in the Guide to Practice, the word "impermissible" should be replaced by the word "prohibited".

9. Mr. MELESCANU asked whether the English term "impermissible" fully corresponded to the French term *illicite*.

10. Mr. PELLET (Special Rapporteur) said that he had first used the word "validity", but, after a debate, the Commission had systematically employed the words "impermissible" in English and *illicite* in French.

11. Mr. CANDIOTI, noting that in the additional unnumbered guideline provisionally adopted by the Commission on first reading at the fiftieth session, the English word "permissibility" was rendered as *recevabilité* in French and as *permissividad* in Spanish, said that it might be possible to use the French word *irrecevable* for the English word "impermissible".

12. Mr. HERDOCIA SACASA, noting that the French text of the draft guidelines used the words *illicite*, *irrecevable* and *interdite*, requested the Special Rapporteur to clarify the situation so that the Commission could move ahead in its work.

13. The CHAIRMAN said that he thought the Special Rapporteur and the Drafting Committee would be able to solve the language problem and produce standard texts in all languages.

14. Mr. ADDO said that draft guideline 1.2.3 had a place in the future Guide to Practice. To his mind, the word "impermissible" (*illicite* in French) meant that the reservation was not authorized or was prohibited. The term was perfectly appropriate in the context, but, if it

created problems, the Commission might consider replacing it by the word “inadmissible” (*irrecevable* in French).

15. Mr. HE said that he saw draft guideline 1.2.3 as a key element of the future Guide to Practice, of which it formed a logical part. It dealt with situations where a State party to a treaty that prohibited reservations of any kind sought to formulate a reservation under the guise of an “interpretative declaration”. The word “impermissible” was entirely appropriate in the English text.

16. The draft guideline could be included provisionally in section 1.2 (Definition of interpretative declarations), but it could, of course, also appear in section 1.3.

17. Mr. PAMBOU-TCHIVOUNDA said that he agreed with the substance of draft guideline 1.2.3, which was one of the key provisions of the future Guide to Practice. In an effort to establish a basis for treaty relations, it set out to frustrate any attempt by States or international organizations, where a treaty prohibited reservations, to make use of the possibility of formulating a declaration in order to promote their own interpretation of a particular provision and, in that way, to convey a different message. The problem was a political one and called for a solution. In that spirit, he thought that the last phrase of the draft guideline, which read “the declaration must be considered an impermissible reservation”, was too weak because it did not say enough. Was the impermissibility relative or absolute?

18. It was also necessary to determine what punishment should be imposed in the event of a false interpretative declaration, i.e. a reservation in disguise. Noting that the term “impermissibility” was to international law what the term “unlawfulness” was to internal law and that, in French law at least, unlawfulness was punishable by the heaviest penalty of all in the sense that an illegal or unlawful act was considered to be non-existent, he suggested that the Drafting Committee might consider specifying that the declaration in question was considered not to exist, to be null and void or have no validity.

19. The CHAIRMAN, speaking as a member of the Commission, said that, as far as substance and purpose were concerned, he endorsed the inclusion of such a guideline in the future Guide to Practice. However, he was somewhat hesitant about the way in which the first sentence was phrased: it presumed that any unilateral declaration made in cases in which a treaty prohibited reservations should automatically be treated as an interpretative declaration. He wondered whether that was what the Commission really wanted to say, since it could also be a general declaration of policy (draft guideline 1.2.5), as pointed out by Mr. Economides, or an informative declaration (draft guideline 1.2.6). It would be useful if the Special Rapporteur could enlighten the Commission so that it could proceed with full knowledge of the facts.

20. Mr. PELLET (Special Rapporteur), replying to the questions asked, said that the last problem referred to was real and was the most difficult of all. Logically, of course, a State could not make a reservation if a treaty prohibited all or some reservations, but it could make an interpretative declaration, a general declaration of policy or an informative declaration. The problem was rather theoretical because the declaration which would be made

would no doubt automatically come within one of those three categories, but the problem existed nevertheless. Admittedly, there was a presumption, which was negative: it was not a reservation, in principle, because reservations were prohibited. But was it really an interpretative declaration? Nothing, in terms of the prohibition of reservations, made it possible to state that.

21. Logically arguing that, if a reservation was prohibited, States could not formulate any, Mr. Kabatsi had reasoned as a legal expert. It had to be said, however, that States formulated reservations regardless, even if they were prohibited. Hence the need to know what those reservations were. He proposed a simple and obvious reply: they were impermissible reservations, their impermissibility being the consequence of the fact that they were prohibited. In that connection, he did not share Mr. Economides’ view that the word “impermissible” presupposed bad faith on the part of States. Impermissibility was objective: it was something that was contrary to the rule of law.

22. Actually, he was uncomfortable with the use of the word “impermissible” in the draft guideline under consideration because it was premature, since the impermissibility of reservations was the subject of a later chapter and there might be other categories of impermissible reservations. He admitted to introducing the notion of “impermissible” reservation for want of a better term and because he had been hoping to receive proposals. However, it was not enough simply to say that the declaration in question “is a reservation” or “must be considered a reservation”. That would suggest that the reservation might be permissible, and that was obviously not the case.

23. As to the proposal that the reservation should be characterized as “inadmissible”, he thought that that term referred to the procedure, which was restrictive. If a reservation was prohibited, it was impermissible. Inadmissibility was only one element of impermissibility. Introducing that concept at the current stage was somewhat risky. Given the consequences of prohibiting a reservation, the word “impermissible” was more neutral. Referring in that context to the use of the word *recevabilité* in the French text of the unnumbered guideline provisionally adopted by the Commission on first reading at its fiftieth session, he said that that was a mistranslation of the English word “permissibility” which he had inadvertently allowed to slip through.⁴ He intended to go back to that translation when the Commission considered the desirability of extending the draft guideline to include interpretative declarations.

24. Mr. Herdocia Sacasa’s proposal that the word “impermissible” should be replaced by the word “prohibited” would simplify matters, but it would result in a tautology. It would therefore be better to keep the idea that, if making a reservation to a treaty was prohibited, an interpretative declaration aimed at excluding or modifying the legal effect of certain provisions of a treaty was an impermissible reservation because it was prohibited by the treaty.

⁴ See 2581st meeting, footnote 5.

25. He endorsed Mr. Pambou-Tchivounda's comments on the relationship between the words "impermissible" and "unlawful", but thought that considering the interpretative declaration to be non-existent would be going too far. As to the unjust criticism that he had been too lenient, he pointed out that the words *est réputée* presupposed a simple presumption, whereas the words *doit être considérée* were more affirmative and stronger.

26. The best solution, although he was sure that it would not satisfy the Commission, would be to say that such a declaration was a reservation, even if it meant qualifying the reservation at a later time, once the criteria for the impermissibility of reservations had been defined. For that reason and in view of the Commission's usual cautiousness, he had proposed the wording "it [the declaration] must be considered an impermissible reservation". Actually, he would prefer to speak of reservations which were not valid: that was the appropriate legal expression, at any rate in French.

27. Replying to Mr. Economides, he acknowledged that the unilateral declaration in question might be something other than an interpretative declaration. It was up to the Drafting Committee to find a solution to that problem, which was a real one. The suggestion that there should be a general provision taking account of all cases in which a reservation was impermissible was premature at the current stage. Obviously, the question of when a reservation was permissible and when it was impermissible would have to be settled: it was impermissible because it was contrary to the object and purpose of the treaty or because it was prohibited by the treaty. It might also be possible to define an impermissible reservation, but what would be the point? If it were to do so, the Commission would get itself involved in something from which it would have difficulty extricating itself. Cases in which a reservation was prohibited should be enumerated, but that exercise could not be undertaken at the present stage, which was that of definitions.

28. Replying to a comment by Mr. Goco, he said that he had relied on the definition of the word "treaty" in article 2, paragraph 1 (a), of the 1969 Vienna Convention, namely, "an international agreement concluded between States in written form ... whatever its particular designation". There was no reason to draw a distinction between convention and treaty and he was not even sure whether criteria existed for doing so. Hence, the reservations under consideration were reservations to all treaties, regardless of whether they were covenants, conventions, charters, protocols or annexes. Replying to Mr. Melescanu, who considered that the second sentence of the draft guideline was peremptory, he said that it was based on the definition of the term "reservation" in the 1969 Vienna Convention.

29. As to who would be empowered to find that a statement was impermissible, he thought that it should be a matter for States to decide, each State being the judge of international impermissibility. That question would be settled in the context of the implementation of the Guide to Practice.

30. The Commission might take a decision on Mr. He's question about the place of the draft guideline in the

Guide to Practice once it had adopted all the guidelines. That was a problem of the relationship between reservations and interpretative declarations, but it did not prevent the Drafting Committee from doing its work.

31. He had the impression that the members of the Commission endorsed the two main ideas underlying the draft guideline, which would certainly keep the Drafting Committee very busy.

32. Mr. GOCO, referring specifically to the International Covenant on Civil and Political Rights, asked what exactly the words "When a treaty prohibits reservations" covered. The word "reservation" did not appear in any provision of the Covenant, thus suggesting that reservations were not allowed; yet in cases of exceptional national emergencies and until they ended, a State which ratified the Covenant could derogate from some of the obligations for which it provided. For example, when the Philippine Government had ratified that instrument, it had made a statement asserting the right of derogation because, at the time, martial law had been in force in the Philippines.

33. He therefore asked whether the case of the International Covenant on Civil and Political Rights came under the wording "When a treaty prohibits reservations" and, if so, whether a State was allowed to make an interpretative declaration.

34. Mr. Sreenivasa RAO proposed that, in order to deal with the terminological problem of the word "impermissible", the Special Rapporteur and the Drafting Committee might consider merging the two sentences of the draft guideline, which would then read: "When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization may be considered to constitute an interpretative declaration, provided that the declaration does not seek to exclude or modify the legal effect of certain provisions of the treaty".

35. Mr. PAMBOU-TCHIVOUNDA said that the proposal to shorten the wording and thereby circumvent the difficulty associated with the words "impermissible reservation" was very useful. Another way of avoiding the difficulty might be to introduce the idea of "relevance", a relatively neutral term in international law which would cover admissibility, validity and permissibility. He suggested the following possible wording: "it shall be deemed irrelevant".

36. Mr. HE suggested that the Special Rapporteur and the Drafting Committee should try to find more concise wording for the first sentence which would link it more closely to the second sentence and cover States which attempted to make a reservation by calling it an interpretative declaration.

37. The CHAIRMAN suggested that, in view of the various drafting suggestions made, the Commission should refer draft guideline 1.2.3 to the Drafting Committee.

It was so agreed.

GUIDELINE 1.2.4

38. Mr. PELLET (Special Rapporteur) said that, with draft guideline 1.2.4 (Conditional interpretative declarations), the Commission was entering an area that was both extremely important and comparatively difficult because of the need to draw a distinction, within the general category of interpretative declarations, between two subcategories: declarations that were simply “proposed interpretations” by the declaring State to which it did not subordinate its consent to be bound, and “conditional interpretative declarations”, which, as their name indicated, constituted a condition for acceptance of the treaty by the State or international organization that made the declaration. That distinction, attested by the State practice of which he had provided examples in paragraphs 309 et seq. of his third report (A/CN.4/491 and Add.1-6), had been discussed in a particularly clear and generally convincing way by McRae in a ground-breaking article in which the author referred to “qualified interpretative declarations” (corresponding to *déclarations interprétatives conditionnelles* in French),⁵ i.e. those which, unlike “simple” interpretative declarations, purported to bind the other contracting States. In such cases, the declaring State—or possibly the international organization—affirmed its willingness, as it were, to commit itself and be bound by the treaty on condition that it was interpreted (or that some of its provisions were interpreted) in the way it stated.

39. The situation thus created was unquestionably closer to that ensuing from reservations than to that resulting from simple interpretative declarations. The State not only intended to be bound itself by the proposed interpretation, but was trying to bind the other States, or the other contracting parties, by the interpretation, barring which the legal effects of the declaration—which the Commission would have to study carefully at a later stage—would probably be identical or similar to those of a reservation. That raised the question whether conditional interpretative declarations should not simply be placed in the same category as reservations. That seemed, broadly speaking, to be McRae’s argument, but it was not one to which he himself subscribed, for reasons that he had developed at length in his third report. Conditional interpretative declarations looked and behaved like reservations in many respects, but they were not reservations for the simple reason that, unlike reservations, they did not purport “to exclude or to modify the legal effect of certain provisions of the treaty in their application to” their author, which was the criterion applicable to reservations according to the definitions in the 1969, 1978 and 1986 Vienna Conventions reproduced in draft guideline 1.1 (Definition of reservations). Such declarations merely purported “to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions” and thus fully corresponded to the definition of interpretative declarations proposed by draft guideline 1.2 (Definition of interpretative declarations). They were, however, a special kind of interpretative declaration inasmuch as the State not only proposed an interpretation, but sought to impose

it on its partners; that raised very difficult legal issues, although they concerned the legal scope of such declarations rather than their definition. The question thus arose: as the “conditionality” that the declaring State or international organization sought to produce by means of the declaration unquestionably had consequences for the legal regime pertaining to interpretative declarations, should draft guideline 1.2.4 reflect that fact or would it be enough to spell out the differences in legal regime between a simple and a conditional interpretative declaration when the Commission considered the question of the impact of reservations and interpretative declarations? He had no strong opinion on the matter and had therefore left the last phrase—“which has legal consequences distinct from those deriving from simple interpretative declarations”—in square brackets. He saw it as a doctrinally important point, but one that was not necessarily indispensable in normative or quasi-normative terms. It was not really “definitional”, but it could nevertheless be useful to state the point at the outset in order to cover all the differences between simple and conditional interpretative declarations.

40. One of those differences related to the temporal element embodied in the definition of reservations, since, according to the wording of article 2 of the 1969, 1978 and 1986 Vienna Conventions reproduced in draft guideline 1.1, “‘Reservation’ means a unilateral statement ... made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty ...”. For reasons that he had set forth in considerable detail at the Commission’s preceding session and that had been accepted by the majority of its members, he was not in favour of transplanting the temporal limitation applicable to reservations to the definition of interpretative declarations in general. The main reason for that position was that reservations pertained to the conclusion of the treaty, as borne out by their inclusion in Part II of the 1969, 1978 and 1986 Vienna Conventions, whereas interpretations—and hence interpretative declarations—related to the application of the treaty, as borne out by the inclusion of rules of interpretation in Part III of the 1969, 1978 and 1986 Vienna Conventions on application. On that point, he was in complete agreement with Sir Humphrey Waldock, who had written, in his fourth report on the law of treaties, that an interpretative declaration could be made at any time, “during the negotiations, or at the time of signature, ratification, etc., or later, in the course of the ‘subsequent practice’”.⁶ State practice followed that pattern, although it was still relatively limited, and it was precisely in order to evade the rigours of the regime governing reservations *ratione temporis* that a State might decide to call something which had all the appearances of a reservation an “interpretative declaration”. Some examples of such efforts were given in paragraph 333 of the third report.

41. That attitude attested to States’ conviction that interpretative declarations were possible at times when reservations were not, a fact which, if they were real interpretative declarations and not reservations in disguise, carried no great risk for the stability of treaty-based

⁵ D.M. McRae, “The legal effect of interpretative declarations”, *The British Year Book of International Law*, 1978, vol. 49, pp. 155-173, at p. 161.

⁶ *Yearbook ... 1965*, vol. II, p. 49, document A/CN.4/177 and Add.1 and 2.

legal relations because, unlike reservations, simple interpretative declarations did not modify the legal effects of the treaty or some of its provisions for the declaring State nor did they affect the entry into force of the treaty for the declaring State or the relations of the declaring State with other contracting parties; the only effect of simple interpretative declarations was to put forward an interpretation that was binding only on the declarant itself, unless an estoppel was raised. Draft guideline 1.2 thus omitted the temporal element in the case of simple interpretative declarations.

42. Conditional interpretative declarations were a different matter. Their definition should incorporate the temporal element as a matter of course because the author of the declaration, by virtue of the fact that it was making its interpretation the condition of its consent to be bound, could only make its declaration before or at the time of giving its consent, for the same eminently practical and pragmatic reasons that had led to the inclusion of a temporal element in the definition of reservations: the other contracting States must be in a position to react and, where appropriate, to prevent the proposed interpretation from prevailing, and that would be conceivable only if the declaring State formulated its interpretation no later than when expressing its final consent to be bound.

43. Mr. YAMADA said that he found the Special Rapporteur's analysis of the distinction between a simple interpretative declaration and a conditional interpretative declaration very interesting and very useful for government practice in terms of the different legal effects ensuing from the two categories. In Japan, the Government's general policy was to avoid entering reservations if possible and also to avoid making interpretative declarations that produced virtually no legal effect. As a result, most of its interpretative declarations could be characterized as conditional interpretative declarations in the light of the distinction made by the Special Rapporteur. For example, when Japan had ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the Government had deposited with the Secretary-General a declaration consisting of three reservations and one interpretative declaration.⁷ Referring in that connection to Mr. Goco's comment, he pointed out that the Covenants contained no provision prohibiting reservations and that the other contracting parties had not objected to the three reservations entered by the Japanese Government. The interpretative declaration applied, inter alia, to article 8 of the International Covenant on Economic, Social and Cultural Rights. Paragraph 1 of that article guaranteed three basic labour rights, namely, the right to form trade unions, the right to engage in collective bargaining and the right to strike, while paragraph 2 permitted the imposition of lawful restrictions on the exercise of those rights by members of the armed forces or of the police or of the administration of the State. In Japan, members of the armed forces were prohibited from exercising any of the three basic rights, the members of the police could exercise the right to form trade unions, but not the other two rights, while civil servants enjoyed the right to form trade unions and

the right to engage in collective bargaining, but not the right to strike.

44. The fire brigade, which had previously formed part of the police force, had become an independent agency, but continued to have the same status as the police in respect of labour rights, i.e. its members had the right to form trade unions, but not to engage in collective bargaining or to strike. On ratifying the International Covenant on Economic, Social and Cultural Rights, Japan had declared that members of the police, within the meaning of article 8, paragraph 2, of the Covenant, were to be understood as including the members of the fire brigade. The Japanese Government meant by the declaration that, in its interpretation, the fire brigade was covered by article 8, paragraph 2, of the Covenant, but also that it was requesting the other States parties to the Covenant and the body responsible for monitoring the implementation of the instrument, the Committee on Economic, Social and Cultural Rights, to accept its interpretation of the scope of article 8, paragraph 2. He therefore felt uneasy about the statement by the Special Rapporteur in paragraph 326 of the third report that it seemed fairly obvious that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations.

45. He also found it difficult to accept the introduction of the temporal element into draft guideline 1.2.4. It implied that conditional interpretative declarations could be made only when a State expressed its consent to be bound and no later. But given the recent tendency to entrust certain tasks traditionally performed by the civil service to independent agencies or even private entities, a Government might wish—and should be able—to make a conditional interpretative declaration, concerning article 8, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights in the case in point, even after ratification. Such a declaration did not purport to modify or exclude the legal effect of the provision concerned and there was therefore no reason to make it subject to a time limit.

46. Mr. GAJA said that he supported the distinction drawn by the Special Rapporteur between simple and conditional interpretative declarations, but was unsure as to the nature of the latter category. Should one consider a conditional interpretative declaration to be neither an interpretative declaration in the strict sense nor a reservation, but as something in between, or should one see it as falling within the scope of the definition of a reservation in the sense that the State or international organization formulating it intended to modify to some extent application of the treaty to itself, as all other possible interpretations have been set aside? The authorities referred to by the Special Rapporteur either considered conditional interpretative declarations to be reservations or treated them in the same way as reservations. Thus, an interpretative declaration probably had been totally identified with a reservation in the decision by the arbitration tribunal in the *English Channel* case. There was similar treatment in the report of the European Commission of Human Rights in the *Temeltasch* case, confirmed thereafter by the Committee of Ministers of the Council of Europe. Also, in the judgement of the European Court of Human Rights in the *Belilos* case, interpretative declarations had been treated in the same way as reservations. He would like the Commission to state in positive terms that a conditional

⁷ See United Nations, *Treaty Series*, vol. 1138, No. 14531, pp. 452 and 456.

interpretative declaration, insofar as the State or international organization formulating it intended to impinge on the legal effect of a treaty provision in respect of itself, was a reservation or should be treated as such.

47. He conceded that a State or international organization could not only limit its own obligations under the treaty, but might also try to voice an interpretation and to impose it on all other States parties to the treaty. It could thus be seen as a true interpretative declaration, and some language should be found which preserved that possibility, while making it clear that, if a State or international organization could only accept one of the possible interpretations, the declaration should also be treated as a reservation.

48. Mr. BROWNLIE, after welcoming the scholarship and creativity of the third report of the Special Rapporteur, said that, at any rate in the English version, draft guideline 1.2.4 suggested that a conditional interpretative declaration was *sui generis*. He wondered whether it was truly a reservation of any sort because the provision stated that, by that declaration, "the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof" and that the situation was thus one in which a State set up a particular proposition as a threshold statement of conditionality. Typical reservations, whether pure reservations or one of the relatives of reservations, usually related to the treaty having, so to speak, come into force. Reservations operated in the umbrella of treaty obligations, although they might try to dilute, vary or even increase them. He thus thought that the conditional interpretative declarations provided for in draft guideline 1.2.4 did not seem to be part of the tribe of reservations, even if defined in a broad sense.

49. Mr. ROSENSTOCK asked Mr. Yamada what the situation would be if, after a treaty had been in force for some time, Japan made a conditional interpretative declaration that the majority of other States parties to the treaty found unacceptable. His own view was that Japan's obligation vis-à-vis those States would be the same as that which had existed before the making of the conditional interpretative declaration, given that that declaration could not have any legal effect on States that rejected it. In that sense, the Special Rapporteur's analysis of the temporal element might be pertinent.

50. Mr. YAMADA said that the fact that a State rejected such a declaration would mean that it amounted to a reservation in the sense that it intended to exclude or modify the legal effect of the treaty and it was clear that Japan could not make such a reservation, but, as long as that declaration was within the scope of the original treaty, it remained an interpretative declaration. The other States parties should not object to it unless they had a valid reason for saying that it was a reservation.

51. Mr. ROSENSTOCK said he thought that that approach obliterated the distinction between simple and conditional interpretative declarations, in that it made conditionality disappear. It was only when dealing with conditionality that the time at which the declaration was made was significant.

52. Mr. LUKASHUK said he thought that draft guideline 1.2.4 reflected States' practice and was therefore justified. It referred only to declarations that did not modify

the legal effect of the provisions of a treaty. In making a conditional interpretative declaration, the State made an interpretation which seemed to it the only possible one with respect to itself. It should perhaps be explicitly stated that a conditional interpretative declaration must not exclude or modify the legal effect of a treaty. However, difficulties would arise when the Commission came to examine the phrase within square brackets at the end of the text of the draft guideline, at which point various problems would have to be resolved. For example, would a State that had recognized a conditional interpretative declaration subsequently be able to denounce it or would it be of permanent application? Would the declaring State be able to reject or denounce the treaty if another State did not accept that declaration? Those questions should be left pending until such time as the Special Rapporteur had defined the legal consequences of the conditional interpretative declaration.

53. Mr. ECONOMIDES said that the nature of conditional interpretative declarations was an extremely thorny question. It was clear that a declaration of that sort was not an ordinary declaration, for two reasons. First, the State making the declaration placed a condition on its consent to be bound by a treaty; secondly, if it made the declaration, that was because it did not follow the accepted interpretation of the treaty; otherwise, it would not be necessary for it to make a supported declaration. It was thus a declaration that deviated from the line of the treaty, but not to such an extent as to become a reservation. It did not exclude or modify the provisions of the treaty and its legal effects. It thus constituted some intermediate category; hence the difficulties raised by that provision. It was difficult to grasp the precise nature of a conditional interpretative declaration, which could also be described as one making a derogation. It should be noted that, if a conditional interpretative declaration was made, but not accepted by the other States, it had no validity. In other words, in order for such a declaration to produce effects, it must be accepted. The concept of acceptance should therefore be included in the wording of the guideline. That addition would also provide some security because it would make it clear that a State could not make a conditional interpretative declaration unilaterally and then claim that that declaration produced legal effects. The element of acceptance had been present in the example given by Mr. Yamada: Japan had sought the acceptance of the other States, but also that of the body responsible for monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights, concerning the scope of a provision of the Covenant. Specifically, he asked the Special Rapporteur whether he considered it desirable to introduce the concept of acceptance into the wording of the guideline.

54. Mr. Sreenivasa RAO raised the question of the nature of the declarations made concerning freedom of navigation in the context of the Geneva Conventions on the Law of the Sea. The interpretation regarding the passage of warships varied from State to State: some considered that it must be subject to consent, others that it should be subject to notification, while others again considered that it should be subject only to the right of innocent passage. Could those declarations be regarded as conditional interpretative declarations? Noting that it was very difficult to define conditional interpretative declarations with

any precision, he wondered whether it was justified to make them a separate category. Some declarations clearly affected other States; that had been the case when some States had considered that they could extend the limit of their territorial sea to 200 miles. In other cases, such as the human rights conventions, it appeared that interpretative declarations by States affected only their own citizens, although some maintained that human rights were not simply a domestic matter to be left to individual States. Furthermore, conditional interpretative declarations could not be linked to the 1969 Vienna Convention, as, under the terms of that Convention, the treaty must be interpreted in context and in the light of its object and purpose. The idea of conditional interpretative declarations, as conceived by the Special Rapporteur, was thus very interesting, but care must be taken to ensure that it did not cause more difficulties than it solved.

55. Mr. HE suggested that the temporal element could be introduced into draft guideline 1.2.4 by using the same expression as in draft guideline 1.1.2 (Moment when a reservation is formulated), as proposed by the Special Rapporteur in his third report, namely, "... when that State or that organization expresses its consent to be bound ...".

The meeting rose at 1 p.m.

2583rd MEETING

Tuesday, 8 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/491 and Add.1-6,² A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,³ A/CN.4/L.575)

[Agenda item 5]

¹ For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

² See *Yearbook ... 1998*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1999*, vol. II (Part One).

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDELINE 1.2.4 (*concluded*)

1. Mr. RODRÍGUEZ CEDEÑO said that the Special Rapporteur was right to draw a distinction between a simple and a conditional interpretative declaration in draft guideline 1.2.4 (Conditional interpretative declarations). The former referred exclusively to the interpretation that a State might make a priori, without seeking to exclude or modify the legal effects of the provision or provisions of a treaty. It was intended to clarify the meaning or scope of one or more of its provisions, whereas a conditional declaration was linked to the expression of consent or a further refinement of the expression of consent. Those were two quite distinct cases, and it was worth drawing attention to that distinction in the draft guidelines.

2. The two cases had something in common. Like reservations, from the formal standpoint they constituted a unilateral declaration of the State, although it was hard to consider them outside the context of the treaty because, ultimately, the obligations that States could acquire by formulating such a declaration were linked to an existing text. In his view, the declaration might be regarded as purely unilateral when the State acquired obligations that went beyond those assumed under the treaty. Such obligations might be autonomous unilateral obligations not linked to the treaty, so that the rules applicable would differ from those applicable to treaty norms.

3. On the other hand, a unilateral declaration could not constitute a reservation, still less an interpretative declaration, if it was intended to diminish the obligations assumed, since, by reducing its obligations, the State would also, *a contrario*, be reducing the rights of another State or States, something which would be tantamount to imposing obligations upon that State or States.

4. While it was useful to draw a distinction between simple and conditional interpretative declarations, it was nevertheless difficult to decide in which category a given declaration belonged, and, in particular, what the legal effects of conditional interpretative declarations were. Simple interpretative declarations did not presuppose a reaction by States. A State formulating such a declaration simply tried to establish the meaning or scope it attributed to a provision of the treaty. However, in the case of a conditional interpretative declaration, a State interpreted a provision, but that interpretation entailed acceptance by the other parties in order for it to produce the effect sought, namely, a refinement of the expression of consent.

5. The timing of the formulation was critical to the definition of conditional declarations. In his view, such declarations could be formulated only when a treaty was signed, ratified, confirmed, accepted or acceded to. A State could not formulate such declarations subsequently, in other words, once it had consented to be bound by the treaty. In that respect, conditional interpretative declarations resembled reservations, in that they could have a legal effect on the treaty, as consent could be further refined only if the other States accepted the conditions imposed by the declarant State by means of that declaration. It was not seeking to produce a legal effect on a