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Summary record of the 2584th meeting

Topic:
Law and practice relating to reservations to treaties

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2584th MEETING

Wednesday, 9 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, 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. 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]

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

GUIDELINE 1.2.5 (*concluded*)

1. The CHAIRMAN said that, at its preceding meeting, the Commission had decided to refer draft guideline 1.2.5 (General declarations of policy) to the Drafting Committee. He would, however, give the floor to Mr. Hafner, who had been unable to take the floor on that occasion for lack of time.

2. Mr. HAFNER said that, in his opinion, neither the original text⁴ nor the new version of draft guideline 1.2.5⁵ was clear. He was not sure whether that provision referred only to certain declarations, for example those of a political nature, or whether it referred to all declarations that were neither reservations nor interpretative declarations. In the latter eventuality, the provision was tautological and had no *raison d'être*. If, however, it referred only to certain declarations, there was still a need to clarify the situation with regard to other declarations and the criteria to be used in distinguishing between the categories, bearing in mind that the political character of a declaration was a highly subjective matter. It would also be necessary to explain whether declarations not covered by the definition given in draft guideline 1.2.5 must therefore be considered as interpretative declarations or as reservations. In the absence of any explanations or clarifications, the draft guideline as submitted could only give rise to confusion.

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).

⁴ See 2583rd meeting, footnote 7.

⁵ *Ibid.*, footnote 8.

3. For example, a situation might arise in which a professor at a university, which could be regarded as a State organ, gave a class expounding the Peace of Westphalia (Treaty of Peace between Sweden and the Empire and Treaty of Peace between France and the Empire). Would his declarations come within the scope of draft guideline 1.2.5? In another context, the declarations that Austrian officials occasionally made concerning the State Treaty for the Re-establishment of an Independent and Democratic Austria were doubtless covered by draft guideline 1.2.5. But it was not clear whether the political nature of the declaration resulted from the nature or from the political function of the organ making it or from the actual content of the declaration. Consequently, draft guideline 1.2.5 would create more problems than it solved and had no place in the Guide to Practice.

4. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.5 referred, not to all declarations made concerning a treaty that were neither reservations nor interpretative declarations, but only to certain of those declarations which were frequent and reflected customary practice. The declarations in question were those made by a State regarding a treaty, taking the treaty as a pretext, but without interpreting it or entering a reservation thereto. It often happened that such declarations were made at the time of the signature of the treaty or of expression of consent to be bound by it. He conceded that the text of the guideline was perhaps badly drafted and also that there was probably a problem with regard to the relationship between the title and the content.

5. That being said, the draft guideline was intended to remind States that, in making general declarations of policy, they were not operating within the context of the law of treaties and that, in that connection, neither the law concerning reservations nor the law concerning interpretative declarations was applicable. The example of a university professor interpreting the Peace of Westphalia was not well chosen; one might conceivably admit that his declaration constituted an interpretative declaration and fell within the scope of draft guideline 1.2 (Definition of interpretative declarations), but, in any event, it would not fall within the scope of draft guideline 1.2.5. The problem raised by Mr. Hafner perhaps related to draft guideline 1.2.

6. There were other categories of unilateral declarations made concerning a treaty that were neither interpretative declarations nor reservations. The question was whether all types of declaration that were neither interpretative declarations nor reservations were covered by the Guide to Practice. An attempt should be made to find a serious example of a declaration that came under none of the rubrics provided. If no example was found, it would probably be sensible to point out in the commentary that other types of declaration perhaps existed and that the Guide to Practice did not claim to be exhaustive. On the other hand, if an example was found, the Commission might take up the proposal, made at the preceding meeting, to introduce a new provision indicating that the enumeration of the various forms of unilateral declaration made with regard to a treaty did not necessarily cover every possible contingency. He noted, however, that most members of the Commission had found draft guideline 1.2.5 useful and that it had been referred to the Drafting Committee.

GUIDELINE 1.2.6

7. Mr. PELLET (Special Rapporteur) said that he regarded draft guideline 1.2.6 (Informative declarations) as an excluding clause in the sense that, like draft guideline 1.2.5, it dealt with unilateral declarations that corresponded neither to the definition of reservations nor to that of interpretative declarations. Those declarations, however, were more closely linked with the treaty than general declarations of policy because they indicated the manner in which the State or international organization formulating them intended to discharge its obligations under the treaty.

8. The classic example of that type of declaration was the “Niagara reservation”⁶—which admittedly referred to a bilateral treaty—which was analysed in paragraphs 374 et seq. of the third report (A/CN.4/491 and Add.1-6). That declaration formulated by the United States of America had simply comprised an identification of what national authorities would be competent to implement the Treaty Relating to the Uses of the Waters of the Niagara River⁷ it had concluded with Canada. Following an internal dispute, the District of Columbia Court of Appeal had ruled that that “reservation” did not constitute a true reservation within the meaning of international law, not because it referred to a bilateral treaty, but for reasons relating to its actual content,⁸ nor could it be described as an “interpretative declaration” concerning the treaty, for its purpose had not been to clarify the meaning or scope of the treaty. Such declarations reflected considerations of domestic policy or national law, but did not purport to produce any effect at the international level, as States formulating them sometimes specified.

9. Of course, such declarations in no way modified the rights and obligations of the declarant vis-à-vis its partners. If a State wished to explain how it was going to discharge its obligations, it was free to do so, and its partners did not have to concern themselves with its declaration. On the other hand, they were entitled to require the declaring State to discharge its obligations towards them; unless the treaty expressly provided to the contrary, they were not entitled to require it to do so by implementing any given specific means.

10. Mr. BROWNLIE, referring to the structure of the Guide to Practice, said that he noted the Special Rapporteur had distinguished between two major rubrics: the definition of reservations (draft guideline 1.1) and the definition of interpretative declarations (draft guideline 1.2). He suggested that, in the interests of clarity, the Special Rapporteur should introduce a third rubric before draft guidelines 1.2.5 and 1.2.6, which might be entitled “Certain other types of declaration”.

11. He also noted that, according to the draft guidelines that preceded draft guideline 1.2.6, declarations, including general declarations of policy, were formulated as it

were simultaneously with reservations and interpretative declarations and in the specific context of expressing consent to be bound. That nexus was not spelled out in the case of informative declarations, where there was a looser connection between the juncture at which the declaration was made and that at which consent to be bound by the treaty was expressed. There was a narrow margin between informative declarations and what might simply be called conduct of States the consequence of which might be to modify the effect of the treaty. To illustrate the problem that might arise, he referred to the measures taken by certain States to extend the 12-mile limit of the contiguous zone while the Convention on the Territorial Sea and the Contiguous Zone had been in force. Those measures had been in some sense unilateral declarations indicating the manner in which States had intended to discharge their obligation at the internal level. Draft guideline 1.2.6 was acceptable, but perhaps some attention could be paid, in the commentary or possibly in the text itself, to the question of the relationship between the juncture at which the informative declaration was made and that at which consent to be bound by the treaty was expressed.

12. Mr. HAFNER said he thought that, like draft guideline 1.2.5, draft guideline 1.2.6 was a source of confusion and that it was very difficult to draw a distinction between the two provisions. The example given by the Special Rapporteur in paragraphs 370 and 371 of his third report was not convincing. In order for it to be so, it would have been necessary to quote the relevant provisions of the amendment procedure (art. XVIII) for the Statute of the International Atomic Energy Agency⁹ in order to see whether, in making that declaration, the United States had in fact intended to make a reservation. If the amendment procedure provided for majority decisions, the United States declaration certainly went far beyond a mere declaration of domestic policy. Another example of an informative declaration was the fairly frequent case in which a State informed the other parties to a treaty that the government services competent to implement the treaty had changed. It would also be interesting to consider the situation that arose in the case of a succession of States. When other national authorities were competent to implement the treaty, the new States often informed the other States parties to the treaty of the change. The type of declaration used in that context was neither provided for in the 1978 Vienna Convention nor in the Guide to Practice. Nevertheless and despite the relative frequency of such informative declarations, he maintained that draft guideline 1.2.6 was not necessary. It would be useful to conduct a specific study on the other types of declarations made in conjunction with treaties that were neither interpretative declarations nor reservations. He also suggested discussing those declarations, not in a negative manner, as was done in the draft Guide to Practice, but in a positive manner, taking account of the various categories of declarations enumerated in the study he proposed.

13. He would also be interested to know why, at any rate in its English version, the Guide to Practice sometimes referred to a “statement” and sometimes to a “declaration”. Moreover, he wondered why draft guideline 1.2.6 referred to the rights and obligations of the other contract-

⁶ See L. Henkin, “The treaty makers and the law makers: the Niagara reservation”, *Columbia Law Review* (New York), vol. LVI (1956), pp. 1151-1182, at p. 1156.

⁷ Signed at Washington on 27 February 1950 (United Nations, *Treaty Series*, vol. 132, No. 1762, p. 223).

⁸ See M. M. Whiteman, *Digest of International Law*, vol. 14, 1970, pp. 168-169.

⁹ Done at the Headquarters of the United Nations, on 26 October 1956 (United Nations, *Treaty Series*, vol. 276, No. 3988, p. 3).

ing parties. Did that mean that some unilateral declarations could have an effect on the rights and obligations of the other contracting parties? If the Commission wished to retain draft guideline 1.2.6, perhaps it would be better to state explicitly that informative unilateral declarations must not have an effect on the rights and obligations of the other contracting parties.

14. Mr. KATEKA said he feared that the categories of declarations which were being created were hybrids which might complicate matters instead of clarifying them. Like other members, he thought that it would perhaps be clearer if all declarations which were neither reservations nor interpretative declarations were bracketed together under the single heading of “Other declarations”. In any case, he failed to see what interest a unilateral declaration which had no effects at the international level could have for the international community. Draft guideline 1.2.6 should therefore be either deleted or incorporated in a broader category covering all other types of declaration.

15. Mr. KAMTO said that, like Mr. Brownlie, he was concerned by the absence of linkage between the time at which the informative declaration was made and the time when consent to be bound by the treaty was expressed. Even if a declaration had effects only at the internal level, it was desirable to indicate at what point in time it could be made; and the fact that a declaration was intended to have internal effects did not mean that it was of no interest to other subjects of international law and, in particular, the other parties to the treaty. Further, he would be in favour of combining all guidelines of the same type in the same rubric or, given the broad sense in which the word “policy” was being used, simply incorporating the draft guideline on informative declarations in the same provision as the guideline on general declarations of policy. Even the form in which the State proposed to apply the treaty at the internal level could be considered as belonging to general declarations of policy. In any case, there seemed to be no point in devoting a special provision to informative declarations.

16. Mr. ECONOMIDES said he thought that draft guideline 1.2.6 was very useful because it dealt with unilateral declarations, frequently met with in practice, which were neither reservations nor interpretative declarations. A complete guide to practice ought to cover all types of unilateral declarations. That being said, the text defined an informative declaration as a unilateral declaration by which a State or an international organization indicated the manner in which it intended to discharge its obligations at the internal level and said nothing about the rights that went with those obligations. By way of example, he noted that, when Greece had ratified the Convention on the Law of the Sea, it had attached to its instrument of ratification a declaration indicating the manner in which it intended to exercise a right conferred by the Convention.¹⁰ The text of the draft guideline should therefore either be expanded to include a reference to rights or redrafted to read: “... indicates the manner in which it intends to implement the provisions of the treaty ...”. Furthermore, the definition could be made more positive by adding the words “but an informative declara-

tion” after the words “neither a reservation nor an interpretative declaration”. Lastly, so far as the structure of the Guide to Practice was concerned, Mr. Brownlie’s proposal to establish three major categories of unilateral declarations—reservations, interpretative declarations and other declarations—was of interest and should be taken into account by the Drafting Committee.

17. Mr. DUGARD said that he was in favour of maintaining draft guideline 1.2.6 because the purpose of the Guide to Practice was to list all types of unilateral declarations, specifying those which were neither reservations nor interpretative declarations. He wondered, however, whether the point of the exercise was not to discourage States from formulating declarations of that third kind. If such was the case, combining all declarations which were neither declarations nor interpretative declarations in a single category could have the opposite effect and could thus add to the confusion attached to treaty making.

18. Mr. ELARABY said that he was in favour of draft guideline 1.2.6, but agreed with Mr. Hafner that it differed from the other guidelines by its reference to effects on the rights and obligations of other parties, an aspect which called for further clarification. He also wondered whether the provision was not an example of overclassification and would not be of relatively little use in practice, especially since, as earlier speakers had pointed out, draft guidelines 1.2.5 and 1.2.6 could be combined in a single category of unilateral declarations which were neither reservations nor interpretative declarations. Lastly, the title of the provision was perhaps not the best possible, since all declarations were, in a sense, informative. All those points would have to be looked at by the Drafting Committee.

19. Mr. GOCO said that draft guideline 1.2.6 was useful because, even if no one could prevent a State from making a declaration when it acceded to a treaty, that State should know by what yardstick its declaration would be measured. The title of the provision did, however, raise a problem in that there could be informative declarations that did not correspond to the definition given in the text under consideration.

20. Mr. LUKASHUK said that the Commission was simply repeating the debate which had taken place in connection with draft guideline 1.2.5. Draft guideline 1.2.6 was a necessary addition to the general classification of unilateral declarations. It should be referred as quickly as possible to the Drafting Committee, which should take special note of the point raised by Mr. Economides concerning the need to include a reference to the rights which went with the obligations mentioned in the text.

21. Mr. PAMBOU-TCHIVOUNDA said he thought that draft guideline 1.2.6 was important and should appear in the Guide to Practice because, as draft guideline 1.2.5 did in respect of general policy declarations, it set out to define informative declarations in negative terms. There were, however, some difficulties. Thus, the Special Rapporteur had chosen not to settle the question of the moment when the informative declaration had to be made, a position that was understandable. In the first place, the law, procedures and organs of the State involved at the internal level were of no concern to the other parties;

¹⁰ See *Multilateral Treaties ...* (2583rd meeting, footnote 6), p. 767.

secondly, they were subject to changes that could have effects in terms of the implementation of the treaty at the internal level. For that reason, the informative declaration could be made after the expression of consent to be bound by the treaty. Another reason why the draft guideline was important was that it illustrated the extent to which all aspects of the Commission's work were interlinked. It was not a matter of indifference that "the manner in which it intends to discharge its obligations..." could be understood as an obligation of conduct within the meaning of that concept adopted in connection with the topic of State responsibility. Summing up his remarks, he said that he considered it necessary to spell out the status of declarations that indicated the manner in which a State intended to discharge its obligations at the internal level, but which did not affect the rights and obligations of other contracting parties.

22. Mr. ROSENSTOCK said that it was perfectly possible to codify the subject of reservations to treaties without going into the question of interpretative declarations and without acknowledging the existence of unilateral declarations that were not interpretative declarations. He could understand the reasons for the classification in three categories proposed by Mr. Brownlie, namely, reservations, interpretative declarations and other declarations, but going into the details of the third category seemed to be devoid of interest other than of a doctrinal or philological nature and he failed to see how it could influence the conduct of decision makers in any of the world's capitals.

23. Mr. TOMKA said that draft guideline 1.2.6 was useful because it dealt with a phenomenon not unknown in State practice. The Drafting Committee could solve the problems that had been mentioned, taking into account in particular the classification proposed by Mr. Brownlie and the proposal by Mr. Economides that the words "intends to discharge its obligations" should be replaced by the words "intends to implement the treaty".

24. Mr. MELESCANU said that, while the study and clarification of State practice in the field of reservations and declarations as a whole were undoubtedly of theoretical interest, they also had practical value. Since the Commission was merely repeating the discussion that had already taken place in connection with draft guideline 1.2.5, it should refer draft guideline 1.2.6 to the Drafting Committee instructing it to incorporate all proposals made by members, including in particular the proposal for a better title.

25. Mr. KABATSI said that he wondered whether it was a good idea to discourage States from making declarations that were neither reservations nor interpretative declarations and were therefore outside the scope of the law of treaties. Such declarations could be useful, especially if made prior to the final commitment to be bound by the treaty in question, in that they helped the parties fully to understand each other's intentions. When used as a disguised means of making a reservation, such declarations offered the other parties an opportunity to react. Hence the third category of declarations was of interest in the sense that it obliged States to indicate clearly what they were doing.

26. Mr. HE said he shared the view that combining "other" declarations within a single category would improve the structure of the Guide to Practice as a whole. The Drafting Committee and the Special Rapporteur should consider that possibility. With reference to draft guideline 1.2.6 itself, he noted that it raised the problem of the difficulty of distinguishing, in certain cases, between an informative declaration and an interpretative declaration, as shown by the example of the declaration which Sweden had attached to its instrument of ratification of the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, referred to by the Special Rapporteur in paragraph 372 of his third report, even though such a distinction could often be drawn without any difficulty.

27. Mr. ECONOMIDES said that he wished to add some further comments to his earlier statement on the words "but which does not affect the rights and obligations of the other contracting parties". First, the word "contracting" was superfluous and, secondly, even an informative declaration could affect the rights and obligations of the other parties, since the effect probably and often certainly derived not from the declaration itself, but from the treaty to which the declaration related. It would therefore be wiser to use wording such as that of draft guideline 1.2.5 and to say "but which does not modify the legal effect of the treaty".

28. Mr. BROWNLIE said that Mr. Economides' concern could be met by adding the words "as such" before the words "affect the rights and obligations". As some speakers had pointed out, what was involved was the conduct of a State party and, if that conduct was acquiesced in by the other contracting parties, an informative declaration, even an unofficial one, could potentially have important legal effects.

29. The CHAIRMAN noted that the Commission considered draft guideline 1.2.6 to be useful, but thought that the Special Rapporteur's exercise of classifying "declarations" was incomplete. He himself shared that view. Perhaps a third or even a fourth category of declarations should be added to "general policy declarations" and "informative declarations".

30. Mr. PELLET (Special Rapporteur), summing up the discussion, noted that, except perhaps for Mr. He, the members of the Commission had the same position on draft guideline 1.2.6 as on draft guideline 1.2.5, at least as far as its usefulness or lack of usefulness was concerned. He would not repeat the reasons which had led him to defend the need for draft guideline 1.2.6 and endorsed the arguments along those lines put forward by the members of the Commission.

31. In reply to Mr. Dugard, who had asked whether the exercise would not deter States from making a declaration, he said that what was involved was more an exercise in rationalization: the idea was to have States face up to their responsibilities by clearly specifying that declarations of that kind were neither reservations nor interpretative declarations and to make them aware of the consequences.

32. Turning to the main problems raised, he said that he appreciated the comments made on the title of the draft

guideline and admitted that, in one sense, any declaration other than a reservation was an informative declaration and that his proposed title should perhaps be changed. He counted on the Drafting Committee's assistance to find more precise wording.

33. As to Mr. Brownlie's suggestion for the inclusion of a third heading, which some of the members of the Commission had endorsed, he had no objection, provided it was specified that, in addition to reservations and interpretative declarations, which were subject to the law of treaties, there were other unilateral declarations, including general declarations of policy and informative declarations, and that the subject matter was carefully delimited. It would be virtually impossible to list all the types of declarations. However, he was willing to attempt to group declarations which were neither reservations nor interpretative declarations, such as reservations of non-recognition, under an additional heading.

34. He had listened with interest to Mr. Brownlie's proposal, which had been picked up by other members of the Commission and which was that draft guideline 1.2.6 should include the temporal factor that he had deleted in his revised text of draft guideline 1.2.5. Interpretative declarations could be made at any time. However, the reintroduction of the temporal factor might be justified because, after all, the risk of confusion between reservations and interpretative declarations was greater when a unilateral declaration was made at the same time as consent to be bound was given. If it was made later, it was clear that it was neither a reservation nor a conditional interpretative declaration. It was not apparent, however, that it was not an interpretative declaration, in the definition of which (sect. 1.2) the temporal factor did not come into play. He was not prepared a priori to reintroduce the temporal factor but the Drafting Committee might consider the question while bearing in mind the problems of principle to which it gave rise.

35. Replying to a comment by Mr. Hafner on the use in the English version of draft guideline 1.2.5 of the words "statement" and "declaration" to refer to one and the same thing, he pointed out that, in the French version, which was the original version, only one term was used: *déclaration*. As to the question whether a unilateral declaration could have an impact on the rights and obligations of other States parties, he said that it could, and in that case, it was a reservation.

36. With regard to the comment by Mr. Kateka, who was concerned about the creation of categories of hybrid declarations, he said that he had attempted to define categories that were as "pure" as possible. The fact of the matter was that there were all sorts of declarations which depended on positions taken by States.

37. In reply to Mr. Kamto, he said that the term *déclaration de politique générale* (general declaration of policy) in the French version was exactly what he had in mind. He was not certain that the use in the English translation of the word "policy" was appropriate.

38. He was fully convinced by the proposal by Mr. Economides that the words "the manner in which it intends to discharge its obligations" should be replaced by

the words "the manner in which it intends to implement the provisions of the treaty". He was not hostile to the inclusion of the words "informative declaration" at the end of the draft guideline and the Drafting Committee should proceed as it had for draft guideline 1.2.5.

39. Referring to Mr. Pambou-Tchivounda's comment on the words "which does not affect the rights and obligations of the other contracting parties", he thought that they should be seen in relation to the point he had made on obligations of conduct: if a declaration which was informative in its content and by means of which a State indicated the manner in which it intended to discharge a particular obligation related to a provision of the treaty imposing an obligation of conduct on States, it was no longer an informative declaration; it was a reservation if it aimed to modify the obligation of conduct or an interpretative declaration if it aimed to clarify how the State intended to discharge a treaty obligation. However, declarations falling under the heading of draft guideline 1.2.6 were precisely those which did not have that kind of impact, and they were rather frequent. In that connection, Mr. Brownlie's proposal that the words "as such" should be included could probably be adopted.

40. He pointed out that the purpose of the exercise the Commission had undertaken was to catalogue State practice. It was thus clear that, regardless of the care which the Commission took in putting the finishing touches on the definitions, titles and texts, problems would arise in certain cases. No codification text had ever made it possible to do away with problems: it could only simplify their solution. However, it was useful to try to clarify situations.

41. In closing, he proposed that the Commission should refer draft guideline 1.2.6 to the Drafting Committee.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

43. Mr. PELLET (Special Rapporteur) said that he would introduce draft guidelines 1.2.7 (Interpretative declarations in respect of bilateral treaties) and 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) together with chapter II of his third report. He reminded members that draft guideline 1.1.9 ("Reservations" to bilateral treaties) had been put aside for the time being.

44. The CHAIRMAN invited the Special Rapporteur to introduce section 1.3 (Distinction between reservations and interpretative declarations), grouping together, if possible, the guidelines of which it was composed.

45. Mr. PELLET (Special Rapporteur) said that he would introduce draft guidelines 1.3.0 (Criterion of reservations), 1.3.0 bis (Criterion of interpretative declarations) and 1.3.0 ter (Criterion of conditional interpretative declarations) together; draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations) must be introduced separately because its subject matter was different. The title of section 1.3 was

provisional. As he had indicated in paragraph 391 of his third report, he had not been convinced at the outset of the need for the guidelines which made up that section—or, in any case, the first three—and that was why he had given them that strange numbering, which would need to be deleted if they were retained. The discussion which had taken place in the Commission had nevertheless dispelled any doubts he might have had on the subject: the Commission was duty-bound to draft provisions on ways of proceeding with the distinctions established in the two sections devoted, respectively, to defining reservations and to defining interpretative declarations. The point was not to determine what reservations and interpretative declarations were, but how, in practice, to distinguish between reservations and interpretative declarations and between interpretative declarations which were conditional and those which were not. Actually, the Commission had already referred two draft guidelines to the Drafting Committee which met that concern: draft guidelines 1.2.2 (Phrasing and name) and 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited), which he had initially included in section 1.2 on the definition of interpretative declarations. He pointed out once again that he did not consider that to be a good idea: the two draft guidelines in question did not relate specifically to reservations or interpretative declarations, but to how to tell them apart. Logically, they belonged in section 1.3. He did not wish to reopen the discussion on that point and counted on the Drafting Committee to make proposals on where to include those draft guidelines.

GUIDELINES 1.3.0, 1.3.0 BIS AND 1.3.0 TER

46. Concerning draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, he said that the Commission must above all decide whether it wanted to retain them and, if so, should perhaps give the Drafting Committee instructions on the changes it wanted made. Actually, all three draft guidelines were obvious and did not appear to require lengthy comments. The three texts, which were placed in square brackets and introduced a much more important guideline, namely, draft guideline 1.3.1, were confined to explaining what seemed to flow clearly from the definitions contained in draft guidelines 1.1 (Definition of reservations), 1.2 and 1.2.4 (Conditional interpretative declarations).

47. Draft guideline 1.3.0¹¹ was another way of saying that a reservation was a unilateral statement by which a State aimed to exclude or modify the legal effect of the provisions of a treaty in their application to that State or, with regard to “across-the-board” reservations, all the provisions of a treaty from a particular point of view. It did not say anything other than had draft guidelines 1.1 and 1.1.1 (Object of reservations), which had already been adopted on first reading by the Commission at the fiftieth session, subject to possible changes by the Drafting Committee of draft guideline 1.1.1 in the light of the

¹¹ The draft guideline read:

“[1.3.0 *Criterion of reservations*

“The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.]”

definition of interpretative declarations, apart from specifying that there was only one criterion for reservations: the objective of the State or international organization making the declaration. As he had noted in paragraph 390 of his third report, if the declarant intended, by means of that declaration, to modify the legal effect of certain provisions of the treaty, then the problem did not arise: it was a reservation which then was subject to the legal regime of reservations. If that was not the declarant’s intention and if, after applying the criterion, it was established that it was not a reservation, then the unilateral declaration in question might be, but did not necessarily have to be, an interpretative declaration. It was at that point that draft guideline 1.3.0 bis¹² came into play, a provision which was conceived in the same way and in the same spirit as draft guideline 1.3.0.

48. Just as draft guideline 1.3.0 had stemmed from draft guideline 1.1, which defined reservations, draft guideline 1.3.0 bis was merely the logical extension of draft guideline 1.2, which defined interpretative declarations. Unlike a general declaration of policy or an informative declaration, the one and only purpose of an interpretative declaration was “to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions”. If the said declaration determined the consent of the declarant to be bound by the treaty, it was a special case, that of a “conditional interpretative declaration”, which was the subject of draft guideline 1.3.0 ter.¹³

49. As, in the final analysis, draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter merely aimed to pinpoint a number of criteria on the basis of the general definition of reservations and interpretative declarations which the Commission had already discussed, they might perhaps seem superfluous to some. However, if it was decided to refer them to the Drafting Committee, it would of course be necessary to bring the wording into line with that of draft guidelines 1.1, 1.2 and 1.2.4 because they stemmed directly from the definitions in question.

50. Mr. BROWNIE said that he really failed to see what purpose was served by those provisions, which, in his view, duplicated the definitions provided in draft guidelines 1.1, 1.2 and 1.2.4.

51. Mr. HAFNER, referring to the criteria used to differentiate between reservations and simple or conditional interpretative declarations, as analysed by the Special Rapporteur in paragraphs 378 to 391 of his third report, said that, in the Special Rapporteur’s view, if the practical result of a declaration was to exclude or modify the legal effect of the provisions of a treaty (objective criterion), it really constituted a reservation. Otherwise, it was an interpretative declaration. Where the latter merely pur-

¹² The draft guideline read:

“[1.3.0 bis *Criterion of interpretative declarations*

“The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.]”

¹³ The draft guideline read:

“[1.3.0 ter *Criterion of conditional interpretative declarations*

“The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.]”

ported to clarify the meaning or scope of the treaty, it was a simple interpretative declaration. Where it constituted a condition for the declarant's participation in the treaty (subjective criterion), it was a conditional interpretative declaration. However, according to the Special Rapporteur's reasoning, the subjective criterion, i.e. the purpose of the declaring State, was left until the second stage. That did not seem to be entirely consistent with the spirit of the 1986 Vienna Convention, which, in the provisions on the definition of reservations, gave considerable prominence to the intention of the parties. He wondered whether the objective and subjective aspects should not be considered jointly from the outset in the interests of consistency with the Convention.

52. Mr. Sreenivasa RAO said that he also had doubts about the value of the three draft guidelines under consideration. They covered problems of definition that the Commission had already discussed and referred to the Drafting Committee. He found the wording of draft guideline 1.3.0 ter, in particular, somewhat questionable. In English at least, the phrase "subordinate its consent" was fraught with consequences: where a State intended to "subordinate its consent" to be bound by the provisions of a treaty to the application of certain modalities and its legal obligations were modified as a result, as was conceivable, its declaration was a reservation and not a conditional interpretative declaration. In that connection, he drew the attention of the members of the Commission to the example given by the Special Rapporteur in paragraphs 372 and 373 of his third report. It remained to be seen, of course, what position was taken by the other parties involved. The key issue of the legal effects produced had not really been resolved, so that the draft guideline was of little value. It would be preferable for the Commission to refrain from commenting.

53. Mr. LUKASHUK said he also thought that the draft guidelines under consideration were superfluous and encumbered the text unnecessarily.

54. Mr. GAJA said that he shared that view; the draft guidelines under consideration added nothing to the new text of draft guideline 1.2.2 approved by the Drafting Committee, which read: "The [legal] character of a unilateral statement [as a reservation or an interpretative declaration] is determined by the legal effect it purports to produce." He would revert to the essential question of the criteria to be used for the purpose of interpretation when draft guideline 1.3.1 was discussed.

55. With regard to the definition of a conditional interpretative declaration, he said that the Special Rapporteur's argument in paragraphs 380 and 381 of his third report showed how difficult it was to find a sound criterion that could be used to differentiate between a reservation and a conditional interpretative declaration. Indeed, the declaration made by the Swedish Government concerning the European Outline Convention on Trans-frontier Cooperation between Territorial Communities or Authorities, mentioned in the third report as probably being a reservation, was analogous to the declaration made by the Government of Japan that was considered an example of a conditional interpretative declaration.¹⁴

56. Mr. ECONOMIDES said he thought that the three provisions under consideration added nothing to what had been said in the definitions. They were at best clarifications that could be included in the commentary.

57. Mr. ELARABY said that, while he shared the opinion of the previous speakers, as a rule, he found that clarifications served a useful purpose: it should be remembered that it was basically the need to establish a clear-cut distinction between reservations and interpretative declarations that had given rise to the draft guidelines under consideration. But the closer one looked at draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, the more one was struck by the repetitive elements and the lack of anything new. Their sole value was as a means of shedding light on the definitions set out earlier in the text. He therefore agreed with Mr. Economides that their proper place was in the commentary.

58. Mr. PELLET (Special Rapporteur) said he was pleased that Mr. Elaraby had drawn attention to the importance of the distinction between reservations and interpretative declarations; that point should certainly be emphasized in a commentary, perhaps the commentary to draft guideline 1.3.1. Furthermore, he wished to make it clear that conditional interpretative declarations were only a subdivision of interpretative declarations—which could assume a great variety of forms—and did not constitute a distinct third category, a "separate species", of declarations, as Mr. Gaja seemed to think. He drew attention to the definition in draft guideline 1.2.4, which had been referred to the Drafting Committee.

59. With regard to Mr. Hafner's observation about the place to be accorded to the double test—the "objective criterion" and the "subjective criterion"—constituted by the purpose of the declaring State, he said that article 31 of the 1969 Vienna Convention concerning the general rule of interpretation of treaties made no mention of "interpretative declarations" and should therefore not serve as a frame of reference for the Commission. While the intention of the parties (subjective criterion) featured prominently in the section of the Convention dealing with reservations, it was still necessary for the declaration to be formulated in such a way as to ensure that the intention was materialized for a reservation to exist. Nevertheless, if Mr. Hafner was willing to work with him on a specific proposal, he was prepared to place more emphasis on the dual objective and subjective criterion in the Guide to Practice.

60. The question of the distinction between reservations and interpretative declarations could be further explored during the discussion of draft guideline 1.3.1.

61. The CHAIRMAN said that, in the light of the discussion, he took it that the Commission agreed not to refer draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter to the Drafting Committee, on the understanding, however, that their content would be reflected in the commentary.

It was so agreed.

The meeting rose at 1 p.m.

¹⁴ See 2582nd meeting, footnote 7.