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Summary record of the 2586th meeting

Topic:
Law and practice relating to reservations to treaties

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found in the Convention but which did not necessarily affect the question as to whether or not it was meaningful to speak of reservation in a bilateral context. There might be different rules as to what the consequences of the reservation were, but its character as a reservation was the same, whether in a plurilateral or a multilateral treaty. That was not true in the case of a bilateral treaty, and it therefore had to be said either that the term had been wrongly used by, for example, the United States and others, or more appropriately, that it was used differently from the way it was employed in the draft guideline 1.1.9 or in the Vienna Conventions. It was a simple approach to finding the right answer and was consistent with the position of Ago and Yasseen and with the previous activities of the Commission.

The meeting rose at 12.55 p.m.

2586th MEETING

Friday, 11 June 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, 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 (*concluded*)

GUIDELINE 1.1.9 (*concluded*)

1. Mr. PELLET (Special Rapporteur) said that, although he had read out only the first paragraph of draft guideline 1.1.9 ("Reservations" to bilateral treaties) at the preceding meeting, the Commission was being asked to consider both paragraphs of the provision.

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).

2. Mr. HAFNER said that he shared the Special Rapporteur's opinion on the two paragraphs of draft guideline 1.1.9. He did not, however, interpret Mr. Brownlie's observations (2585th meeting) in the same way as Mr. Rosenstock. In his view, what Mr. Brownlie had meant was that the problem lay not in "reservations" to bilateral treaties, but in the definition of a bilateral treaty. It could happen that certain multilateral treaties were in reality bilateral inasmuch as they established bilateral relations. Jurists had attempted to draw a distinction in legal literature by using the terms "bipartite" and "multipartite" instead of the terms "bilateral" and "multilateral" to reflect such distinctions.

3. For example, the peace treaties concluded at the end of the First World War (the treaties of Versailles, Trianon, Sèvres and Saint-Germain-en-Laye) were clearly multilateral treaties, but they established bilateral relations. He submitted that the idea of Germany being authorized to enter a reservation to the Treaty of Versailles or Austria to the Peace Treaty of Saint-Germain-en-Laye was inconceivable. It could, of course, be argued that such a step would be incompatible with the object and purpose of the treaty and that a reservation would be inadmissible on that ground, but the question was in fact whether the treaties in question were not, in reality, bilateral treaties, in which case reservations would be excluded. The same applied to the State Treaty for the Re-establishment of an Independent and Democratic Austria, which also established a certain category of bilateral relations. Another significant example was the bilateral treaty concluded between Austria and Germany on economic problems and transboundary water management. The European Economic Community had seen fit to associate itself with the treaty, at which point it had ceased to be bilateral and had become trilateral or multilateral.⁴ He wished to know whether a treaty of that kind, although it involved more than two parties, could still be viewed as multilateral for the purpose of reservations.

4. Mr. LUKASHUK said that he broadly endorsed draft guideline 1.1.9 and appreciated the Special Rapporteur's analysis of State practice in the area of reservations to bilateral treaties. He stressed the importance of the issue of "reservations" to bilateral treaties which had not been addressed either by the Commission or by the 1969 Vienna Convention. Strictly speaking, of course, there was no such thing as a "reservation" to a bilateral treaty, but such reservations nevertheless existed, a fact that had thus far been observed only in the writings of jurists. In practice, new situations might develop, particularly in the light of the growing trend towards parliamentary control over the foreign policy of Governments. The entering of reservations to treaties was an instrument of parliamentary control. He referred in that connection to the fact that the Russian Parliament had attempted to enter reservations to bilateral treaties. It had been necessary to explain to the deputies that reservations were inadmissible in such cases, but the Russian deputies had objected that the United States Senate had made reservations. It had then

⁴ Agreement between the Federal Republic of Germany and the European Economic Community, on the one hand, and the Republic of Austria, on the other, on cooperation on management of water resources in the Danube Basin (Regensburg, 1 December 1987), *Official Journal of the European Communities*, No. L 90, vol. 33 (5 April 1990), p. 20.

been necessary to point out that, although reservations to bilateral treaties were basically inadmissible, they had nonetheless been entered in some cases. Given that such reservations were not real reservations, a special regime was needed to deal with them and the Special Rapporteur's proposal in that regard was therefore fully justified. He nevertheless drew the Special Rapporteur's attention to the fact that reservations to bilateral treaties closely resembled conditional interpretative declarations. He did not entirely agree with the Special Rapporteur when he said in paragraph 473 of his third report (A/CN.4/491 and Add.1-6) that a "reservation" to a bilateral treaty was actually a request to renegotiate the treaty.

5. With regard to the wording of draft guideline 1.1.9, the first paragraph stated that "a unilateral statement formulated by a State or an international organization ... does not constitute a reservation" but it failed to say what exactly it was. He suggested amalgamating the two paragraphs of the draft guideline, for example by starting the second paragraph with a phrase such as "If the reservation entered by one party requires the acceptance of the other party ...". He further noted that the words "the new text" in the second paragraph could be taken to mean that the reservation could be viewed as having been accepted only if the original text had been amended, but that eventuality was rarely encountered. The usual practice in such circumstances was to append an additional document. Lastly, he said that there were serious mistakes in the Russian version of the draft guideline which should be corrected when the final version of the draft guideline was translated.

6. Mr. ROSENSTOCK suggested that draft guideline 1.1.9 should be referred without further delay to the Drafting Committee.

7. Mr. PAMBOU-TCHIVOUNDA endorsed the Special Rapporteur's conclusion set forth in paragraph 481 of the third report. He began by suggesting that, for the sake of consistency, the word "formulated" in the first paragraph of the draft guideline should be replaced by the word "made". In line with the positive approach advocated by Mr. Economides in connection with another draft guideline and following on from Mr. Lukashuk's comment, he also proposed that a phrase should be inserted at the end of the first paragraph of the draft guideline stating what a unilateral statement concerning a bilateral treaty was, since it was not a reservation. It could perhaps be described as an offer of renegotiation, a term used by the Special Rapporteur in his presentation. With regard to the second paragraph, he proposed that the words "The express acceptance of the content of that statement" should be replaced by the words "The express acceptance of that statement" because the word "content" served no purpose and the text would benefit from being pruned down. Lastly, he would be inclined to include the draft guideline under the heading "Other statements", which had been proposed by Mr. Brownlie and would group together all statements that were neither reservations nor interpretative declarations, but he would defer to the Drafting Committee in that regard.

8. Mr. Sreenivasa RAO said that he shared Mr. Kateka's view and had no objection to the draft guideline being referred to the Drafting Committee. The problem under consideration would never arise in India because any prob-

lems relating to the text of an agreement were resolved before the signing and ratification stage was reached.

9. Mr. KUSUMA-ATMADJA said that he had found Mr. Brownlie's statement about plurilateral treaties interesting. After referring to a number of agreements that Indonesia had concluded with other countries, particularly in the context of WTO, he congratulated the Special Rapporteur on his analysis and said he agreed that draft guideline 1.1.9 should be referred to the Drafting Committee.

10. Mr. HE stressed the need to clarify the issue of reservations to bilateral treaties. He was pleased that the third report of the Special Rapporteur provided detailed information about State practice. The term "reservations" to bilateral treaties had been frequently used in practice, giving the impression that such reservations existed. The Special Rapporteur's conclusion in paragraph 481 of his third report was satisfactory. A question that had not yet been resolved was that of conditional interpretative declarations, which stood on the borderline between reservations and interpretative declarations and had occasionally been termed "para-reservations", "quasi-reservations" or "assimilating reservations". The question was to what extent a conditional interpretative declaration was subject to the legal regime applicable to reservations or interpretative declarations. Perhaps the Special Rapporteur could shed some light on the matter.

11. Mr. YAMADA said that he had no objection to the referral of draft guideline 1.1.9 to the Drafting Committee. He wished to present a clarification concerning the reference in paragraph 449 of the third report to the Treaty between Japan and the United States of America.⁵ That example had not been given by Japan in response to the Special Rapporteur's questionnaire, but had probably been taken from the *Digest of International Law*. In the aforementioned example, the United States Senate, in giving its consent to the Treaty, had entered a reservation to one of the articles. The reservation had been communicated to the Japanese Government, which had taken it as a proposal for the renegotiation of the article. Japan had accepted the amendment proposed by the United States Senate on the basis of reciprocity. The article in question had not been rewritten, but an exchange of notes between the Governments of the two countries⁶ had had the effect of amending it. The term "reservation" had been used in the exchange of notes out of respect for the United States Senate. In the view of the Japanese Government, however, it could not on any account be viewed as a reservation to the bilateral treaty. That was why the Japanese Government had not mentioned it as an example in reply to the Special Rapporteur's questionnaire.

12. Mr. ECONOMIDES said that he endorsed draft guideline 1.1.9, which was useful and suitable for solving a problem that had, in any event, arisen only in legal writings. It raised the technical question of how to determine which moment marked the end of negotiations and when a State could make a new proposal to modify a treaty that

⁵ Treaty of Friendship, Commerce and Navigation (with Protocol and exchange of notes) (Tokyo, 2 April 1953) (United Nations, *Treaty Series*, vol. 206, No. 2788, p. 143).

⁶ *Ibid.*, pp. 230 and 235.

had already been concluded. In principle, it was the moment when the “authentic and definitive” version was adopted, to use the terminology of the Vienna Conventions, in other words, most often, the moment of signature, or sometimes that of provisional agreement by initialling the text. Reference to the latter moment, which marked the end of negotiations, should be made in the draft guideline, to which a positive element could also be added specifying not only what a unilateral statement was not, but also what it was, i.e. a new proposal for the modification of the provisions of the treaty which could be either accepted or rejected. The Drafting Committee could likewise include a reference to the case where the new proposal was refused, as well as that where it was accepted.

13. Mr. GOCO pointed out that, after a treaty had been drafted, as described by Mr. Economides, a body such as the Senate of the United States or of the Philippines might have something to say about it and wish to add something that had not been thought of by the negotiators. If that addition was not accepted by the other party, then there was, strictly speaking, no longer a treaty. It might also happen that, after the signature of the treaty, an event took place which caused one of the States to formulate a reservation. Must it necessarily be assumed that a new treaty was involved?

14. Mr. PELLET (Special Rapporteur), summing up the discussion on draft guideline 1.1.9, said that the members of the Commission all agreed not only on the inclusion of the provision in the Guide to Practice, but also on its content, in general terms. “Reservations” to bilateral treaties were not necessarily a reflection of bad faith on the part of States. When a State was structured along presidential or parliamentary lines, that type of unilateral statement sometimes constituted a practical solution. The fact that the United States frequently resorted to the practice did not necessarily reveal greater maturity on its part, however. Other equally “mature” States refrained from making such statements, which nonetheless created problems for the partner State. It had also been asked whether such “reservations” were not conditional interpretative declarations. They were, because they placed conditions on the ratification of the treaty, and they were not, because they aimed to modify, and not to interpret, the treaty’s provisions. Many members of the Commission had suggested that a positive descriptive phrase should be added, such as “a proposal to renegotiate”. That addition would be acceptable, as long as it was not interpreted to mean that “reservations” to bilateral treaties formed part of the topic other than at the stage of definitions. There was no question of dealing with their legal regime. Other specific drafting proposals had been made and the Drafting Committee would surely take them into account. A major problem was still what was meant by “bilateral treaty”. It had been pointed out that the problem arose primarily for bilateral treaties that were actually plurilateral treaties. If plurilateral treaties were understood to mean treaties with a limited number of parties, then there was no doubt that reservations to such treaties were possible, subject to the usual conditions and restrictions of the law of treaties. If plurilateral treaties were understood to mean bilateral treaties with many parties, then the problem did indeed arise. The Treaty of Versailles and the Peace Treaty of Saint-Germain-en-Laye, for example, as well as the Agreement between NATO and the Federal

Republic of Yugoslavia,⁷ brought together a single party and a plural party. It would be difficult to allow reservations by the single party, but the same was not necessarily true for the plural party. Nevertheless, it was a problem that should be covered in the commentary. The same was true of bilateral treaties whose nature changed, although it was not necessary to explain everything in the part of the draft dealing with definitions.

15. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.1.9 to the Drafting Committee.

It was so agreed.

GUIDELINES 1.2.7 AND 1.2.8

16. Mr. PELLET (Special Rapporteur) said that interpretative declarations gave rise to fewer problems than reservations in respect of bilateral treaties, even though the Vienna Conventions were silent on the matter, as they were on interpretative declarations in general. The practice was nevertheless of very long standing, and not only in the United States, but, most importantly, neither States in their responses to questionnaires nor the literature disputed the principle. Accordingly, it was “a general practice accepted as law”, but to say that it was a well-established practice did not necessarily mean that there were no problems involved. First, it might be difficult to distinguish such interpretative declarations from the “reservations” that were the subject of draft guideline 1.1.9, namely, proposals that were actually aimed at amending a treaty. Therein lay the problem of “disguised reservations” or “false interpretative declarations” that had already been encountered in respect of multilateral treaties. Secondly, all unilateral declarations made in respect of bilateral treaties were not interpretative declarations. Many such declarations—for example, the “Niagara” reservation⁸—fell into the category of what could be called, for the time being, “informative” declarations and were covered in draft guideline 1.2.6 (Informative declarations), which the Commission had already considered. Thirdly, it might be asked whether the indisputable distinction between simple interpretative declarations and conditional interpretative declarations could be applied in the present context. As a general rule, in respect of bilateral treaties, the latter were more common and he had found virtually no examples in practice of simple interpretative declarations. There was, however, nothing to prevent a State from making such a declaration when ratifying a treaty, and without seeking to oblige the other party to do the same. In such a situation, the treaty could enter into force and, if the other contracting State did not agree with the proposed interpretation and a problem arose, the two States would settle the dispute by peaceful means in conformity with the general rules of international law. If, on the other hand, the other State accepted the proposed interpretation, it would then become the authentic interpretation of the treaty and be binding on both parties, whose agreement on the matter would con-

⁷ Kosovo Verification Mission Agreement between the North Atlantic Treaty Organization and the Federal Republic of Yugoslavia (Belgrade, 15 October 1998) (S/1998/991, annex).

⁸ See 2584th meeting, para. 8.

stitute an additional agreement within the meaning of article 31, paragraphs 2 (a) and 3 (a), of the 1969 and 1986 Vienna Conventions.

17. It would therefore seem, on the one hand, that there was no problem in acknowledging that a bilateral treaty could be the subject of an interpretative declaration and that such a declaration was covered by the definition given in draft guideline 1.2 (Definition of interpretative declarations), without requiring the formulation of a separate draft guideline, and, on the other hand, that since the overall problem was the same, the “application” guidelines were equally relevant in the case of interpretative declarations made in respect of bilateral treaties, with two exceptions. First, draft guideline 1.2.1 (Joint formulation of interpretative declarations) was irrelevant in the context of bilateral treaties, where joint interpretation was, ipso facto, an additional agreement. Secondly, draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited) was not applicable. Since bilateral treaties could not be the subject of reservations, the problem did not have to be considered. In addition to draft guideline 1.2, that left only draft guidelines 1.2.2 (Phrasing and name), 1.2.4 (Conditional interpretative declarations), 1.2.5 (General declarations of policy) and 1.2.6, it being understood that the place ultimately found for those provisions in the draft as a whole was not being prejudged. That was what was stated in draft guideline 1.2.7 (Interpretative declarations in respect of bilateral treaties), which should nevertheless be supplemented by draft guideline 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) indicating that the interpretation resulting from an interpretative declaration by a State and accepted by the other party constituted the authentic interpretation of that treaty. It would seem difficult to dispute those two provisions, but that relatively neutral wording had to be retained and no position, at the present stage in any event, should be taken on whether and in what circumstances an interpretative declaration made in respect of a bilateral treaty had to be accepted by the other party. That went back to the overall problem of the conditional interpretative declarations which were the subject of draft guideline 1.2.4 and on which the Commission had agreed to draw conclusions in another part of the Guide to Practice. If he had spent a bit too much time on the subject, which did not seem to give rise to insurmountable difficulties, it was because it was quite fascinating and was badly served by disputable terminology.

18. Mr. ECONOMIDES pointed out that, among the guidelines to which draft guideline 1.2.7 referred, guidelines 1.2, 1.2.2 and 1.2.4 apparently applied to unilateral declarations formulated in respect of treaties in general, in other words, to both multilateral and bilateral treaties. Draft guideline 1.2.7 could be deleted and it could be indicated that section 1.1 (Definition of reservations) applied to multilateral treaties, while section 1.2 (Definition of interpretative declarations) applied to bilateral treaties, or that the guidelines in the future Guide to Practice applied to the two categories of treaties, since reservations, by definition, could be made only in respect of multilateral treaties.

19. If draft guideline 1.2.7 was retained, he wondered whether it was appropriate for it to refer to certain guidelines only, to the exclusion of others that clearly did not apply. He would prefer more flexible wording indicating that all the guidelines could also apply to bilateral treaties where that was truly feasible.

20. Draft guideline 1.2.8 was self-evident and useful. He agreed with the Special Rapporteur that it did not require more detailed consideration.

21. Mr. PELLET (Special Rapporteur) said that he, too, wondered whether the fact that the guidelines to which draft guideline 1.2.7 referred did not refer expressly to multilateral treaties constituted a problem. He invited the Drafting Committee to consider that point. Nevertheless, he believed that it could be helpful to States to list the applicable guidelines. Again, the Drafting Committee would be called upon to decide the matter.

22. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 1.2.7 and 1.2.8 to the Drafting Committee.

It was so agreed.

GUIDELINE 1.3.1

23. Mr. PELLET (Special Rapporteur) said that he was particularly attached to draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations), which, unlike 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), added an important element to the definitions contained in sections 1.1 and 1.2 of the draft. Definitions alone were not enough; it was essential to know how to proceed in order to determine the legal nature of a specific unilateral declaration. That was the purpose of draft guideline 1.3.1. He emphasized that the method was also applicable to drawing a distinction made in draft guideline 1.2.4 between a simple interpretative declaration and a conditional interpretative declaration. There was only one method of doing so, just as article 31 of the 1969 Vienna Convention provided only one method of interpretation of treaties.

24. On the surface, draft guideline 1.3.1 was also a statement of the obvious. Authors and practitioners were unanimous in recognizing that the general rule of interpretation of treaties embodied in article 31 of the 1969 Vienna Convention and reproduced in the 1986 Vienna Convention was a success and the harmonious balance achieved between that general rule and the supplementary means of interpretation covered by article 32 was welcomed with satisfaction. The fact remained that those rules applied only to treaties and that reservations did not form an integral part of the treaty to which they related; they constituted unilateral legal instruments separate from the treaty. That distinction was quite fundamental. Furthermore, the aim in the case in point was not, properly speaking, to interpret the unilateral declaration as such, but to determine whether or not it constituted a reservation, a simple interpretative declaration or a conditional interpretative declaration.

25. He would leave it to the Special Rapporteur on unilateral acts of States to say whether the general rule of interpretation of treaties was generally transposable to unilateral acts. He personally had no doubt that it was; and unilateral declarations formulated in respect of treaties, whether they were reservations, interpretative declarations or other types of declaration, were transposable. Only a limited effort was required for the transposition; the treaty irradiated the declarations made in respect of it and to neglect the rules of interpretation of treaties when dealing with the interpretation of such declarations would be a little odd. That had been the natural reflex of the Inter-American Court of Human Rights in its famous advisory opinion on *Restrictions to the Death Penalty*, which was referred to in paragraph 399 of the third report; in substance, the Court had said that a reservation must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it had been formulated within the general context of the treaty.

26. The problem, for the time being, was not how to interpret reservations, but to determine what method to use to define a unilateral declaration as a reservation, an interpretative declaration or otherwise. In his view, the same approach should be followed; after all, a definition was also an interpretation, as many members of the Commission had pointed out in connection with other draft guidelines. What mattered in determining the nature of a unilateral declaration made in respect of a treaty was the content of the declaration.

27. That was confirmed by international jurisprudence, which was invariable and examples of which were given in paragraph 400 of the third report. So far as he was aware, international judges and arbitrators had, in all cases, sought to establish whether they were dealing with a reservation or with an interpretative declaration by proceeding on the basis, first of all and as a matter of priority, of the actual text or content of the unilateral declaration, in accordance with the method recommended in article 31, paragraph 1, of the 1969 Vienna Convention. It could be asked whether matters should not be left there and whether it was necessary to have recourse to the "supplementary means" provided for in article 32 of the Convention. The question arose especially because, in the case of unilateral declarations in respect of treaties, the preparatory work (*travaux préparatoires*), which was the main supplementary means, was often difficult to obtain or did not exist. On balance, he took the view that article 32 should be mentioned, first, because precedents were to be found in the jurisprudence, at any rate that of the European Court of Human Rights (para. 403 of the third report), and, secondly, because articles 31 and 32 of the Convention made a well-balanced pair. The dominant element was the text, the content, the ordinary meaning of the terms; as clearly indicated in article 32, recourse could be had to supplementary means of interpretation and, in particular, to the *travaux préparatoires* only when the interpretation according to article 31 left the meaning ambiguous or obscure or led to a result which was manifestly absurd or unreasonable.

28. The rule contained in draft guideline 1.3.1 was generally accepted as an indisputable rule of law. He there-

fore proposed that the draft guideline should be referred to the Drafting Committee.

29. Mr. GAJA noted that, according to the definitions contained in the draft guidelines proposed by the Special Rapporteur, "reservations" and "interpretative declarations" were unilateral acts. As such, they were not governed by the law of treaties. Both reservations and interpretative declarations could, of course, produce certain effects from the viewpoint of the law of treaties. He therefore agreed that it was possible to draw on the provisions of the 1969 Vienna Convention in order to settle, by analogy, problems connected with the validity and the interpretation of those unilateral acts. That was also true where the issue to be determined was whether the declaring State had intended to make a reservation or an interpretative declaration. In the latter case, however, it was not possible to proceed by analogy only, as the Special Rapporteur was suggesting in draft guideline 1.3.1. In its judgment in the *Fisheries Jurisdiction* case, ICJ, which had been requested to interpret a reservation formulated by the Canadian Government to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause, had said that it

will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served [paragraph 49 of the judgment].

It had also referred to

the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation [paragraph 54 of the judgment].

30. While he realized that those criteria were not readily applicable, especially where the *travaux préparatoires* were not easily accessible, he nevertheless recommended that draft guideline 1.3.1 should be reviewed in the light of the position adopted by the Court.

31. Mr. HAFNER said that the thorny problems raised by draft guideline 1.3.1 were made still more complicated by the different rulings adopted by different courts.

32. It was difficult, in practice, to distinguish a reservation from an interpretative declaration, those two unilateral acts being interchangeable. In that connection, he noted that, at the time of ratifying the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), the Austrian Government had submitted some interpretative declarations and some reservations to that instrument to Parliament for its approval. The Austrian Parliament had changed the reservations into interpretative declarations and vice versa⁹ and thereupon the Protocol was ratified.

⁹ See United Nations, *Treaty Series*, vol. 1289, No. 17512, pp. 303-304.

33. The interpretation which had to be carried out in order to make the distinction was twofold: the first step was to determine whether the unilateral declaration was a reservation or an interpretative declaration, and the second step was to interpret its content. In view of the definitions given of reservations and interpretative declarations, respectively, a subjective test had to be applied to the first of those operations by determining the intention of the declaring party. In that connection, he thanked Mr. Gaja for his reference to the judgment of ICJ in the *Fisheries Jurisdiction* case. The European Court of Human Rights, too, tried in the first instance to establish the intention of the parties rather than the meaning of the text itself.

34. In determining the intention, it was possible to have recourse to the designation given by the declaring party or to other means without reference to materials other than the text of the declaration and the *travaux préparatoires*, although access to the latter might be difficult to obtain. In that case, recourse could be had to methods similar to those envisaged by articles 31 and 32 of the 1969 Vienna Convention, on the understanding that the text would be used only to identify the intention of the declaring party. The application of article 31 was justified insofar as the declaration had to be interpreted in accordance with the ordinary meaning and, to use the terms of the judgment of ICJ (see paragraph 29 above), the interpretation should be reasonable and should be made in good faith and in the light of the object and purpose of the treaty. In order to guarantee fairness, it would be necessary to specify whether the object and purpose were those of the treaty or of the declaration. The criterion of object and purpose could lead to a restrictive interpretation of the declarer's intention in that it might operate in favour of defining the declaration as an interpretative declaration rather than as a reservation.

35. For similar reasons, he did not think that the decision of the Inter-American Court of Human Rights (see paragraph 25 above) could be used in support of the Special Rapporteur's proposal, since it seemed to deal not with the intention of the declaring party, but with the interpretation of the content of the unilateral declaration, which was undoubtedly subject to the Vienna regime.

36. For those reasons, he took the view that draft guideline 1.3.1 should be modified to make it clear, first, that what was being identified was the intention of the declaring party and, secondly, that that intention derived first of all from the text of the unilateral declaration as interpreted in accordance with article 31 of the 1969 Vienna Convention; if that method of interpretation did not yield the desired result, only then should reference be made to the *travaux préparatoires*.

37. Mr. GOCO said that draft guideline 1.3.1 was useful and certainly had its place in the future Guide to Practice, but he was not clear about the title: the method in question was not for distinguishing between reservations and interpretative declarations, but for determining whether a unilateral declaration was a reservation or an interpretative declaration.

38. Mr. LUKASHUK said that he had two points to raise about draft guideline 1.3.1. The first had to do with its title, which was not entirely in keeping with the text

itself, and he suggested changing it along the following lines: "Method of determining the legal nature of a unilateral declaration". The second point had to do with the purpose of interpretation: that could not be the treaty itself, which was subject to the Vienna regime, but it could not be unilateral declarations either because that regime did not apply to all cases. Hence the need to give further consideration to the draft guideline, which should perhaps be deleted.

39. Mr. ECONOMIDES said that draft guideline 1.3.1 gave rise to a real conceptual problem. Article 31 of the 1969 Vienna Convention, to which it referred, had to do with the interpretation of treaties, i.e. all provisions agreed between two or more contracting parties. Yet by their very nature, reservations and interpretative declarations were unilateral and rules of interpretation applicable to bilateral or multilateral instruments could not be transposed to them. At most, articles 31 and 32 of the Convention might provide several basic elements which might serve as a starting-point for drawing up new rules.

40. Moreover, the title of the draft guideline was not consistent with its content because it spoke of interpretative declarations, whereas, in the body of the text, the words "unilateral declaration" were used, and they could designate very different kinds of declarations, and not only interpretative declarations. The criterion which was ideal for determining that a unilateral declaration was an interpretative declaration was the intention expressed by the declaring State. It was worth noting, however, that such a declaration could have been made at an earlier period in circumstances which had since changed. Hence the presence of a very specific problem which obviously also needed to be solved.

41. Mr. BROWNIE said he also thought that the title of draft guideline 1.3.1 was poorly chosen, because it gave the impression of providing a method for distinguishing between reservations and interpretative declarations; in reality, that distinction was made throughout all the guidelines and the guideline under consideration only proposed an additional element of assessment. That did not detract in any way from the value of draft guideline 1.3.1, however, and, in order to dispel the concerns of members who were disturbed by references to articles 31 and 32 of the 1969 Vienna Convention which were too direct, perhaps they could be preceded by the words *mutatis mutandis*.

42. Mr. MELESCANU said the argument that article 31 of the 1969 Vienna Convention on the rule of interpretation of treaties was applicable only to provisions agreed at the bilateral or multilateral levels was only partly valid. Once a reservation had been accepted by the other parties concerned, it became part and parcel of the bilateral or multilateral agreement which it sought to modify and therefore concerned all contracting parties and lost its unilateral nature.

43. The reference to articles 31 and 32 of the 1969 Vienna Convention had the advantage of providing a simple solution to the problem raised, whereas the drawing up of specific and entirely new rules might well be much more difficult and complex. However, he admitted that matters would be clearer if draft guideline 1.3.1 again

mentioned the respective characteristics of reservations and interpretative declarations already defined in other parts of the Guide to Practice or referred to the relevant guidelines. The inclusion of the words *mutatis mutandis* proposed by Mr. Brownlie seemed to be a good idea.

44. Mr. ROSENSTOCK said that the introduction of the words *mutatis mutandis* in the text might seem attractive because it had the advantage of simplicity. However, if that proposal was retained, it would be necessary to make it clear in the commentary that there was an important nuance or difference of approach between article 31 of the 1969 Vienna Convention and draft guideline 1.3.1. In article 31, the question asked was what the contracting parties understood, whereas, in the draft guideline, it was what the declaring State had meant, and that made the latter's intention more important. However, it was not always so simple because, once a reservation had been formulated without the other parties concerned objecting to it, it could be considered that, in a sense, they had "understood" or "meant" the same thing as the declaring State. Consequently, the insertion of the words *mutatis mutandis* did not offer an acceptable solution unless an effort was made to explain those nuances.

45. Mr. Sreenivasa RAO said that, in his view, Mr. Rosenstock had stated the problem perfectly. His statement had reminded him of a very lively debate which had taken place between two members of the American Society of International Law on the relative values of text and context as elements of interpretation. In the draft guideline under consideration, it was clearly the context which must be given greater importance.

46. Mr. GOCO noted that the problem raised by Mr. Rosenstock was often a source of misunderstanding between States parties. When one State party made a unilateral declaration, it might very well have wanted to formulate a reservation, i.e. avoid the effects of a particular provision, without provoking a reaction on the part of the other States parties, which thought that a simple interpretative declaration was involved. It was only in the case of a later dispute that they became aware of the misunderstanding; hence the need to remove the ambiguity.

47. Mr. PELLET (Special Rapporteur) said that the members of the Commission seemed to agree that draft guideline 1.3.1 should emphasize the intention of the declaring State. That might be done by replacing, in the first line, the words "the legal nature" by the word "intention". As underscored by Mr. Goco, it was important to help States determine whether a unilateral declaration was an interpretative declaration or a reservation so that they knew exactly what they were dealing with and what rules were applicable. Practice showed that the issue was somewhat blurred, for reasons which might be purely diplomatic. After all, it was simplest to refer to article 31 of the 1969 Vienna Convention. He thanked Mr. Gaja for citing the ICJ interpretation of the Canadian reservation in its judgment in the *Fisheries Jurisdiction* case, the relevant paragraphs of which [49-54] had simply been transposed from the provisions of article 31 of the Convention, or more exactly of article 31, paragraph 1. The intention of the contracting parties was present just below the surface in article 31, which spoke of the treaty's "object" and "purpose", i.e. what the contracting parties had wanted to do.

48. Mr. Lukashuk's criticism of the title did not seem founded because the text began with the words "To determine", which clearly showed that it had to do with a method.

49. Mr. Brownlie's proposal for the addition of the words *mutatis mutandis* would in fact be a possible solution, but he would prefer it if the Drafting Committee considered new wording based on Mr. Rosenstock's suggestion.

50. Mr. ECONOMIDES said that, if the text emphasized the difference between a declaration and the terms of a treaty as a way of determining the underlying intention of the declaring State, the reference to articles 31 and 32 of the 1969 Vienna Convention on the interpretation of treaties would become perfectly natural.

51. The CHAIRMAN noted that the discussion had not revealed any fundamental opposition to draft guideline 1.3.1 and he therefore said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.3.1 to the Drafting Committee.

It was so agreed.

GUIDELINE 1.1.7

52. Mr. PELLET (Special Rapporteur) said that, for the sake of honesty, he felt compelled to point out to the members of the Commission that he had changed the text of draft guideline 1.1.7 (Reservations relating to non-recognition) as a result of the criticism the members had expressed during the consideration of the text at the fiftieth session. In paragraphs 44 to 54 of his fourth report (A/CN.4/499 and A/CN.4/478/Rev.1), he explained the reasons and in particular the practical arguments which had led him to make those changes.

53. The new text of draft guideline 1.1.7 read:

"Statements of non-recognition

"A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize as a State does not constitute either a reservation or an interpretative declaration, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity."

54. Although the text was new, it could be considered that it had already been referred to the Drafting Committee because the discussion had already taken place and the changes had been made in keeping with the opinion of most of the members of the Commission.

The meeting rose at 1.05 p.m.