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Summary record of the 2977th meeting

Topic:
Reservations to treaties

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2977th MEETING

Thursday, 10 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the thirteenth report on reservations to treaties.

2. Mr. YAMADA, congratulating the Special Rapporteur on his excellent report on interpretative declarations, said that the proposed draft guidelines contained carefully selected terminology that would prove to be very useful to practitioners. Generally speaking, he had no problems with any of the draft guidelines, but, before commenting on them, he would refer to the conceptual difficulties to which they gave rise. In 1999, the Commission had adopted draft guideline 1.2 (Definition of interpretative declarations)¹⁶⁸ and draft guideline 1.2.1 (Conditional interpretative declarations). The texts of these draft guidelines and the commentaries thereto made it abundantly clear that interpretative declarations were not reservations and that they purported to specify or clarify the meaning or scope attributed by the declarant to a treaty or certain of its provisions. With regard to conditional interpretative declarations, the Commission had considered that their legal regime was infinitely closer to that of reservations, but that they were also not reservations. In that connection, he drew attention to the following excerpts from paragraph (11) of the commentary to guideline 1.2.1:

...some members of the Commission wondered whether conditional interpretative declarations should not be treated purely and simply as reservations. Although there is support for this position in doctrine, the Commission does not believe that these two categories of unilateral statement are identical: even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try "to exclude or modify the legal effect of certain provisions of the treaty in their application".... Even if the distinction is not always obvious, there is an enormous difference between application and interpretation.¹⁶⁹

Unless the Commission decided to alter that position, the draft guidelines on reactions to interpretative declarations or any other related aspect must be based on it.

3. Referring to the different types of interpretative declarations dealt with in the report, he had no problem with draft guideline 2.9.1 (Approval of an interpretative declaration) and no particular problem with the wording of draft guideline 2.9.2 (Opposition to an interpretative declaration), although the meaning of the last phrase "with a view to excluding or limiting its effects" was not clear. It could be asked why and for what purpose the other parties would oppose something that was not a reservation unless they considered that the interpretative declaration in question altered the legal relationship between the parties and that it was a disguised form of reservation. In such a case, the other parties could invoke the next guideline, guideline 2.9.3 (Reclassification of an interpretative declaration), and regard the declaration as a reservation. Then guidelines 2.6 to 2.8 could be applied and guideline 2.9.2 would no longer be relevant. Perhaps guideline 2.9.2 applied in the case where the other parties considered that the interpretative declaration in question created additional obligations or broadened their scope and they could not so agree; opposition then became meaningful. He wondered whether that was the case to which guideline 2.9.2 applied.

4. He had no problem with draft guideline 2.9.3 (Reclassification of an interpretative declaration) or with draft guidelines 2.9.5 to 2.9.8. With regard to draft guideline 2.9.9 (Silence in response to an interpretative declaration), he did not agree with some members of the Commission that the first and second paragraphs were contradictory because either all parties remained silent and consent could not be inferred, or the overwhelming majority of the parties gave their express consent and one of them remained silent and acquiescence could be inferred. In conclusion, he supported the referral of the proposed draft guidelines to the Drafting Committee.

5. Mr. HASSOUNA thanked the Special Rapporteur on reservations to treaties for his elaborate and thoughtful thirteenth report. In his introduction, the Special Rapporteur had sounded almost apologetic for the slow progress of his work, but had justified it as being the result of a deliberate attempt at thorough and deep analysis of the issues involved. He assured the Special Rapporteur that he would have his full support as long as the product of his work was of practical value to Governments and practitioners, as was the case of the draft guidelines under consideration. In his introduction, the Special Rapporteur had also stressed the importance he attached to the Commission's views on some of the issues discussed in the report, recalling that he had often in the past argued that it was up to the Commission to take clear positions of principle on certain issues, even through the voting procedure, rather than having them debated in the Drafting Committee. While he agreed that the Commission could and sometimes must adopt such positions of principle, recent experience had shown that it was not always wise to follow that course and that, by referring a matter to the Drafting Committee, an acceptable compromise could be reached through informal discussions.

¹⁶⁸ Yearbook ... 1999, vol. II (Part Two), pp. 97–103.

¹⁶⁹ Ibid., p. 105.

6. With regard to the substantive issues referred to in the report, Mr. Hassouna said that he agreed with the Special Rapporteur's general approach that reactions to interpretative declarations and objections to and acceptance of reservations were separate issues. That difference of approach was justified in the light of the different legal characteristics of the two issues and the different legal effects they were meant to produce in relation to a treaty. The report analysed the different types of reactions by States or international organizations to which an interpretative declaration might give rise. In describing the types of reaction, the report occasionally misread their nature. For example, the text submitted by Israel to the Secretary-General of the United Nations in response to a declaration by Egypt concerning the United Nations Convention on the Law of the Sea (para. 8 [283] of the report), in which the Government of Israel gave its own interpretation of the declaration by Egypt, should, in his view, be considered as a conditional approval, not a total and absolute one. That example showed that it was difficult to interpret and categorize reactions to interpretative declarations.

7. As to the reclassification of an interpretative declaration by States and international organizations, he pointed out that, although, in practice, States almost always combined a reclassification with an objection to a reservation and the reclassification in fact became a form of objection, such a reaction should be regarded as a separate category with its own rules of procedure. In draft guideline 2.9.3 (Reclassification of an interpretative declaration), he endorsed the first paragraph and was in favour of retaining the second, in which the square brackets should be removed in order to emphasize the distinction between reservations and interpretative declarations. Several parts of the report referred to the legal effects of interpretative declarations, emphasizing that they were different from the legal effects that reservations might produce, but, contrary to what the Special Rapporteur stated, the consideration of the legal effects of interpretative declarations should not be left pending. By way of clarification or illustration, it would be useful to have some explanation of those effects in the body of the draft article or in the commentary thereto.

8. Referring to the issue of conditional interpretative declarations, it was clear that such reactions could in many ways be regarded as reservations and, consequently, the legal regimes of the two categories contained many similarities. In addition, the procedure for reactions to conditional interpretative declarations would therefore closely follow the one applicable to acceptance of and objection to reservations. Although the report spelled out the content of those principles without ambiguity, draft guideline 2.9.10 (Reactions to conditional interpretative declarations) called for further clarification.

9. Some members of the Commission had proposed that draft guideline 2.9.9 (Silence in response to an interpretative declaration), which had given rise to a lengthy and interesting discussion, should be deleted on the grounds that it was redundant, while others had expressed the view that only the second paragraph was superfluous. His own preference was that the draft guideline should be retained as it stood because it shed light on the role of silence as a response to an interpretative declaration. He did acknowledge, however, that the words "[i]n certain specific

circumstances" in the second paragraph were too vague and thus required some legal clarification. In conclusion, he recommended that all the draft guidelines should be referred to the Drafting Committee.

10. Ms. JACOBSSON congratulated the Special Rapporteur on his excellent and very interesting report, which was particularly thorough and well researched. She also thanked Mr. Daniel Müller, whose major role in preparing the report had been acknowledged by the Special Rapporteur himself. In response to the Special Rapporteur's explicit request, she would focus on draft guideline 2.9.9 (Silence in response to an interpretative declaration), in connection with which she endorsed the Special Rapporteur's analysis that the concept of acquiescence was also relevant in treaty law, although "conduct" (art. 45 of the 1969 Vienna Convention and art. 45 of the 1986 Vienna Convention) was as impossible to define in that context as it was difficult to determine the circumstances when silence was tantamount to consent. That was why the Special Rapporteur concluded that the effect of acquiescence could be determined only on a case-by-case basis (para. 40 [315] of the report).

11. The crucial question was whether that conclusion was adequately reflected in draft guideline 2.9.9. The first paragraph did not give rise to any problems, but the second did. As Mr. Fomba had pointed out at an earlier meeting, since silence was simply a type of conduct, the distinction between "silence" and "conduct" in the second paragraph was rather unfortunate. Was that paragraph necessary? If it was, the "specific circumstances" being referred to should be specified. She was reluctant to have the Commission embark on an exercise focusing more on the law of acquiescence than on the formulation of a practical guideline. The question of acquiescence by a State was in itself worthy of a separate study that could be included in the Commission's long-term programme of work. Perhaps one way out would be to redraft the second paragraph as a without prejudice clause which might read: "This paragraph [i.e. the first paragraph] is without prejudice to a situation whereby silence on the part of a State or an international organization is one of the factors that may evidence acquiescence". In conclusion, she believed that some sort of reference to the possible consequences of silence as part of "acquiescence" would be better than a list of "specific circumstances" in the body of the draft guideline. She agreed that the draft guidelines should be referred to the Drafting Committee.

12. Mr. PETRIČ said that he fully supported the approach adopted by the Special Rapporteur in his thirteenth report and particularly appreciated the study of the legal effects of interpretative declarations. The rules governing interpretative declarations must therefore be more than a copy of the rules on reservations contained in the 1969 Vienna Convention and that was why the Special Rapporteur had rightly introduced different terminology. He also appreciated the Special Rapporteur's work on the issue of silence, the question of reclassification and the treatment of conditional interpretative declarations.

13. The draft guidelines proposed in the report were the result of all that work and they could, with the exception of draft guideline 2.9.9, be referred to the Drafting Committee.

14. Draft guideline 2.9.9 and its second paragraph, in particular, did not have much of a basis in the practice of States, and that was a weakness in itself. The Special Rapporteur's intention was understandable because, in certain specific circumstances, a State or an international organization might be considered as having acquiesced to an interpretative declaration via silence or conduct, but sound reasons were usually necessary. Moreover, as silence in response to interpretative declarations was common and explicit reactions were rare, care must be taken, all the more so because the effect of acquiescence was largely similar to that of approval, which must, in accordance with draft guideline 2.9.5, be formulated in writing.

15. With regard to conditional interpretative declarations, he pointed out that the legal effect of an act, not its name, determined its classification. He was not sure whether conditional interpretative declarations were not, by their effects, reservations and whether they should not be treated as such. As the Special Rapporteur stated in paragraph 50 [325] of his report, their main feature brought "conditional interpretative declarations infinitely closer to reservations than 'simple' interpretative declarations". He therefore fully agreed with the Special Rapporteur's conclusion in paragraph 55 [330] of his report that it was best to leave the terminology issue in abeyance until the Commission had taken a final decision on the effects of conditional interpretative declarations.

16. Mr. HMOUD said that the regime of interpretative declarations was a field of treaty law which required clarification and in which guidance must be given to States and practitioners in view of the lack of relevant provisions in the 1969 and 1986 Vienna Conventions. As treaties were more and more reflective of diplomatic compromises and thus contained ambiguous language, resort to interpretative declarations was becoming increasingly popular. In addition, some categories of treaties, primarily those relating to human rights, were closing the door to reservations and States were finding interpretative declarations to be a means of adopting a particular legal position in relation to a treaty and its provisions. That issue thus had to be dealt with in the draft guidelines.

17. He generally agreed with the Special Rapporteur that, as interpretative declarations differed from reservations in content, the legal regime applicable to reactions should not be the same as the one applicable to objections. That went beyond terminology and more towards a separate set of rules or guidelines. For practical purposes, the issue of reclassification and opposition to reclassification should be clearly explained in the guidelines so that practitioners and depositaries would know how to treat "disguised reservations", especially in the case of time periods for reacting to a declaration and even the legal effects of a reaction to a disguised reservation. Although a reservation was always a reservation no matter how its author named it, the practitioner or depositary still needed guidance on how to react and how to treat such reservations. The report gave examples of reactions to declarations that had been treated by the depositary as objections.

18. Although conditional interpretative declarations were a special case and were obviously distinct from simple declarations, it was not wise to make the legal regime applicable

to them closer to that of reservations or to draw an analogy between reactions to such declarations and objections. The author of a reservation purported to modify the legal effects of a treaty, whereas the author of a conditional interpretative declaration subjected its consent to be bound by the treaty to acceptance of its interpretation. That was a matter, on the one hand, of the modification of legal effects and, on the other, of conditional ratification/accession/acceptance of the legal instrument in question.

19. With regard to categories of reactions, he agreed that reclassification was separate. Although in practice it was associated with a negative reaction, it was possible that the author of the reaction might reclassify the declaration as a reservation without opposing it; that was true in the case of treaties that allowed reservations. As to guideline 2.9.3 on reclassification, it was important to make it clear that the State that reacted treated the declaration as a reservation, since the practitioner needed to know that, if it decided to reclassify, it had to assume the legal responsibilities related to such reclassification. He thus did not see the need to include the second paragraph of draft guideline 2.9.3 in order to reiterate the process of distinction and its consequence, as provided for in draft guidelines 1.3 to 1.3.3.

20. On negative reactions, States sometimes tended to limit the scope of a treaty by means of an interpretative declaration when the treaty did not allow reservations. It should be made clear that such declarations were not "interpretative", but reservations, and should not be included in the category of interpretative declarations. The reaction to them should be an objection to a reservation, not opposition. They should be excluded from the scope of draft guideline 2.9.2.

21. Silence was a very pertinent issue in relation to interpretative declarations and there should be guidance on how it should be interpreted so that States would be able to deal with the legal effects of interpretative declarations and reactions thereto. In practice, silence had been viewed as conduct or part of conduct, depending on the circumstances. He agreed with that approach: jurists treated those two categories—conduct and silence—interchangeably, and there was no harm in mentioning both silence and conduct as leading to acquiescence. He could therefore support draft guideline 2.9.9 as reflective of practice in relation to acquiescence, but he did not see draft guideline 2.9.8 as needed or as actually adding anything to the provisions of draft guideline 2.9.9. In any event, there should be provisions on silence and how to deal with it, including whether there should be a time period after which silence would be regarded as approval. That was very important, especially in view of the problem of interpretative declarations that were in fact reservations.

22. He supported draft guidelines 2.9.5 to 2.9.7 on form, statement of reasons and communication of approval, opposition or reclassification, but he hesitated to support the inclusion of draft guideline 2.9.10, pending a decision by the Commission on the legal effects of such conditional interpretative declarations.

The meeting rose at 10.55 a.m.