

Document:-  
**A/CN.4/3022**

**Summary record of the 3022nd meeting**

Topic:  
**Reservations to treaties**

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could be “correct” or “incorrect” but not “valid” or “invalid”. Draft guideline 3.6 was based on that understanding. In her view, however, since interpretative declarations could be valid or invalid, reactions of approval or opposition could also be valid or invalid. She could not understand why the criteria of substantive validity that applied to the other unilateral acts should also not apply to reactions.

51. As for the validity of conditional interpretative declarations, she endorsed the view that the conditions for the validity of reservations applied (as expressed in draft guideline 3.5.2), as did the competence to assess such validity (draft guideline 3.5.3). However, if conditional interpretative declarations were substantially the same as reservations, the time of formulation might be an issue. Under the Vienna Conventions, the time element was part of the definition of a reservation, and reservations were subject to a number of formal requirements and the subsequent procedure of objections or acceptances. She wondered what the effect would be if a conditional interpretative declaration was made later than the time limit set for reservations and what regime of reactions would apply. Since articles 19 and 20 of the Vienna Conventions did not apply directly to conditional interpretative declarations, further elaboration might be required.

52. It was possible that the wealth of technical detail presented by the Special Rapporteur had caused her to misunderstand some points, and she would appreciate his clarification on the questions she had raised.

*The meeting rose at 11.25 a.m.*

### 3022nd MEETING

*Thursday, 16 July 2009, at 10.20 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

**Reservations to treaties (*continued*) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)**

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL  
RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2).

2. Mr. FOMBA said that he would begin by making some general comments before giving his opinion on the draft guidelines proposed by the Special Rapporteur.

3. The goal set by the Special Rapporteur in paragraph 80 of his fourteenth report was legitimate. The opinions expressed in paragraph 81 were justified and should be endorsed. The approach recommended in paragraph 82 was acceptable, as were the viewpoints set out in paragraphs 83 and 84. The recapitulation of the position with regard to the validity of reservations in paragraph 85 was extremely useful, as the topic was highly technical and had been under consideration for many years. What counted in the Commission was the intellectual process comprising the understanding, definition, logical grounding and nexus of issues covered in the first, second and third parts of the Guide to Practice, as well as the exposition of the role and function of the various draft guidelines.

4. In the section on the validity of reactions to reservations (paras. 94–127), the Special Rapporteur, having first drawn attention to the lacunae in the 1969 and 1986 Vienna Conventions, was then at pains to clarify the nature, role and function of reactions. That clarification was very important and useful. In paragraph 95 he said that, while it might be appropriate to refer to the substantive validity of an objection to, or acceptance of, a reservation, although the term had a slightly different connotation, the main issue was whether the objection or acceptance could produce its full effects. He was personally unsure whether he had fully understood that statement, especially as *prima facie* there was a tendency to mix up substantive validity and effects.

5. Turning to the validity of objections, he approved of the idea that the fate of draft guideline 2.6.3 and, more precisely, the question of whether objections were a “freedom” or a “genuine right”, should be settled by the Drafting Committee. Without prejudice to any consensus which might emerge, at first sight he agreed that a right did exist and that it was rooted primarily in State sovereignty. He supported the idea put forward in paragraph 98 that the compatibility of a reservation with the object and purpose of the treaty must furnish the criterion for the attitude of a State, as the ICJ had found in its 1951 advisory opinion on *Reservations to the Convention on Genocide*. In paragraph 100, he endorsed the Court’s unambiguous position that “in its trade relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto” [p. 21 of the opinion]. He also supported the way in which the Special Rapporteur had construed the Court’s position when he wrote in the same paragraph that “a State may make an objection to any reservation, whether valid or invalid”.

6. The Special Rapporteur correctly interpreted the purpose and possible effect of objections in paragraph 102. In paragraph 103, he put forward a number of interesting ideas, but it was not always clear what he meant and there appeared to be a certain amount of contradiction in his reasoning when he wrote, on the one hand, that the purpose or possible effect of any objection did not necessarily render the objection invalid and, on the other, that an objection could undermine the object and purpose of

the treaty, for example by excluding the application of an essential provision of the treaty.

7. In paragraph 104, although the idea that the objections of France and Italy to the “declaration” of the United States<sup>250</sup> regarding the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) were only unwarranted and regrettable would dispose of the argument that they were invalid and was correct from the point of view of a textually rigorous interpretation, it might nonetheless imply a possible link with the issue of invalidity, if viewed from standpoint of the reasons for and unwarranted nature of the objections. Moreover, the Special Rapporteur had placed the word “only” in inverted commas, which might reflect some hesitation or caution on his part. He personally endorsed the idea expressed in paragraph 105 that an objection that conflicted with a *jus cogens* norm would be unacceptable. Furthermore, the mini debate between Mr. Pellet and Mr. Nolte at the previous meeting had been most enlightening in that respect. The explanation of why such an eventuality was impossible was very interesting, but rather difficult to grasp. Perhaps that was on account of the Special Rapporteur’s tremendous analytical skills and keen intellect, which not everyone shared.

8. Moving on to paragraph 106 of the fourteenth report, he said that there were good reasons to doubt the consequences of objections with a “super-maximum” effect and hence their validity. The Special Rapporteur, who himself remained sceptical, put forward some good arguments, but the Commission had been right to include objections with a super-maximum effect in the definition of the term “objection” in order to adopt a neutral position with regard to the intention of the author of an objection.

9. The idea in paragraph 113 that it was difficult for States to anticipate all possible reservations and to evaluate their potential effects had merit. In paragraph 115, the conclusion that, although the Vienna Conventions did not expressly authorize objections with intermediate effect, they did not prohibit them, was correct and acceptable. In paragraph 116, the Special Rapporteur rightly denounced the risk of abuse inherent in that type of objection. The review of the origins of the practice of objections with an intermediate effect, which was to be found in paragraph 117, was very helpful. He fully agreed with the Special Rapporteur’s analysis in paragraphs 118 to 120.

10. As far as the validity of acceptances was concerned, the Special Rapporteur was right in paragraph 122 to distinguish between cases in which a reservation was valid and those in which it was not. Referring to the latter, he used the expression “at least on the face of it”, which suggested that he was not, perhaps, entirely convinced, at least at that stage. In paragraph 123, with regard to the question of whether acceptance could determine the validity of a reservation, he could accept the theoretical position defended by the Special Rapporteur, which was, in fact, a negative answer. He agreed with the analysis of the doctrinal position because it contained some ideas of

significance for the legal certainty of treaty relations. The notion that the acceptance of an invalid reservation was not *ipso facto* invalid and the supporting arguments were acceptable.

11. In the conclusions regarding reactions to reservations, the Special Rapporteur, after emphasizing the silence of the Vienna Conventions, wrote that it would be unwise to speak of the substantive validity of those reactions. That conclusion was apt and acceptable. It was indeed necessary to stress the principle of consensualism among the various arguments, even if it might appear to be self-evident. It was true that a specific draft guideline on the subject was not indispensable. The Special Rapporteur did, however, raise the question of whether the Commission might wish to decide differently. It had two options: to say nothing and maintain the silence of the Vienna regime, or to break the silence and to speak out clearly, even if that meant stating the obvious. The Special Rapporteur had been well-advised to choose the second option.

12. The reference to the fact that the Vienna Conventions did not contain any rules on the validity of interpretative declarations was very useful. He subscribed to the idea expressed in paragraph 128 that interpretative declarations could not simply be equated with reservations. The cautiously positive approach adopted in draft guideline 1.2 (Definition of interpretative declarations), as quoted in paragraph 129, had been wise and justified. The Commission should maintain its position that the term “permissibility” should be understood to mean “validity”. The distinction drawn in paragraph 130 between the question of validity and that of the classification of a unilateral declaration was crucial and the examples quoted in paragraph 131 were apposite. In paragraph 133, he could accept the conclusion that, with the exception of treaty-based prohibitions of unilateral interpretative declarations, it would seem impossible to identify any other criterion for the substantive validity of an interpretative declaration. The arguments set out in paragraphs 140 to 146 concerning the validity or otherwise of genuine interpretative declarations when the treaty contained no rules on the matter were sound, relevant and enlightening. In paragraph 149, the use of temporal limitations on the formulation of reservations and interpretative declarations as a distinguishing feature was also appropriate. The Special Rapporteur concluded that a guideline specifying the rules for determining the validity of interpretative declarations was unnecessary, since it was a less complex question than that of reservations and should not raise major assessment issues. In view of the very nature, role and function of interpretative declarations, he could, at first sight, endorse that position.

13. With regard to the validity of reactions to interpretative declarations, the method of first examining the validity of the declarations themselves was the most logical one. The Special Rapporteur wrote that the common basis for analysing both was the sovereign right of any State to interpret the treaties to which it was a party. There was no disputing that fact. The argument that, in principle, the exercise of the right to react to an interpretative declaration was not subject to an assessment of the validity of those reactions could also be supported.

<sup>250</sup> *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. XI.B.22.

14. As far as the validity of approvals was concerned, it was true that the author of the approval did the same thing as the author of the interpretative declaration. Furthermore, the cause and effect relationship justified symmetry in any conditions governing validity in both cases. In paragraphs 153 and 154, the review of the position under the Vienna Conventions was once again very useful. The analysis of cases in which an interpretative declaration would not be valid and the interpretation of the consequences thereof were acceptable. Paragraph 154 dealt with individual interpretations by States. He wished to know what would happen in the opposite case. He agreed with the opinion expressed in paragraph 155 that the question of the “right” interpretation could not be resolved until the effects of interpretative declarations had been considered.

15. He subscribed to the idea that it was unnecessary to predicate the validity of an opposition upon respect for any specific criteria. In the event of a conflict between two interpretations, the solution proposed in paragraph 157 seemed to be logical and acceptable. It was appropriate to distinguish between the validity of opposition and its possible effects, as had been done at the end of paragraph 158.

16. As for the validity of reclassifications, the idea expressed in paragraph 159 that it was the legal nature of the initial declaration and the regime applicable to it which were at stake was enlightening and had merit. A reminder of the way in which classification operated was very useful. At the end of paragraph 161, the Special Rapporteur was right to differentiate between the question of a justified or an unjustified opinion and that of the validity of reclassification. He went along with the position set out in paragraph 163 that, as a matter of principle, reclassifications, whether justified or unjustified, were not subject to criteria for substantive validity.

17. The conclusions regarding reactions to interpretative declarations which the Special Rapporteur drew in paragraphs 164 and 165 were perfectly defensible.

18. In the section on the validity of conditional interpretative declarations, the recapitulation in paragraph 166 of the definition of such declarations was very useful. In paragraph 167, the Special Rapporteur seemed, however, *a priori* to establish a parallel with “simple” interpretative declarations, which appeared logical given that the argument was actually drawn from the definition of conditional interpretative declarations. In paragraph 169, the conclusion that any conditional interpretative declaration potentially constituted a reservation was appropriate and the telling example quoted in support of that statement was interesting. There seemed to be a mistake in paragraph 168: “condition formulated by the author of the declaration” should read “condition formulated by the author of the conditional interpretative declaration”. In paragraph 172, the parallel established between the conditions for the substantive and formal validity of conditional interpretative declarations and reservations appeared logical and the analysis of the classification and consequences of the hypothetical cases presented in that paragraph had merit. In paragraph 177, the Special Rapporteur concluded that there was no reason to think that conditional interpretative declarations were subject to the same conditions for their validity as “simple” interpretative declarations and

that, instead, they were subject to the conditions for the validity of reservations. But that conclusion contradicted the position expressed in paragraph 167 and it would be helpful if the Special Rapporteur were to supply an explanation in that respect.

19. Turning to the draft guidelines proposed by the Special Rapporteur, Mr. Fomba said that even if draft guideline 3.4 (Substantive validity of acceptances and objections) was not really indispensable, it was worth retaining for practical reasons and in order to reflect the purpose of the Guide to Practice, which was to act as a useful tool.

20. Draft guideline 3.5 (Substantive validity of interpretative declarations) was fully justified by the arguments put forward in paragraphs 147 and 148 of the report. As for form, in order to avoid repetition, it might be possible to say “unless the latter is expressly or implicitly prohibited”.

21. Draft guideline 3.5.1 (Conditions of validity applicable to unilateral statements which constitute reservations) was concerned with a particularly important aspect of State practice and was therefore necessary and useful.

22. He approved of draft guideline 3.5.2 (Conditions for the substantive validity of a conditional interpretative declaration), provided that he received an answer to the point he had raised in connection with paragraph 177.

23. Since the Commission had not reached a final decision on how to handle conditional interpretative declarations, the Special Rapporteur had been wise to propose that draft guideline 3.5.3 (Competence to assess the validity of conditional interpretative declarations) should be included on a provisional basis only.

24. The Special Rapporteur offered the Commission two options for draft guideline 3.6 (Substantive validity of an approval, opposition or reclassification): the first would be to make a detailed presentation of draft guideline 2.9.4 in the commentary—the solution which the Special Rapporteur appeared to prefer; the second would be to provide a specific guideline, the solution which Mr. Fomba personally preferred.

25. In conclusion, he was in favour of referring the draft guidelines proposed by the Special Rapporteur to the Drafting Committee.

26. Mr. HMOUD congratulated the Special Rapporteur on the part of his fourteenth report in which he thoroughly analysed questions connected with the validity of reservations, interpretative declarations and reactions to those reservations and declarations. In the light of the choices offered by the Special Rapporteur, the Commission must decide on the way forward with regard to those matters. Having debated the tenth report<sup>251</sup> and adopted draft guidelines on the validity of reservations<sup>252</sup> and some terminology, the Commission had decided to separate the issues of validity and legal effects. Consideration of the

<sup>251</sup> See footnote 134 above.

<sup>252</sup> *Yearbook ... 2006*, vol. II (Part Two), paras. 158–159.

latter should therefore be postponed until the Special Rapporteur presented his report on that subject at the following session.

27. The crucial question raised by the Special Rapporteur with regard to the validity of reactions to reservations was whether they themselves were subject to conditions governing their substantive validity. The Special Rapporteur had noted that the Vienna Conventions did not set forth any conditions for their substantive validity and that a reaction was a statement formulated by a State which would have refrained from doing so, if another State had not formulated a reservation before that. While reactions did not exist independently of reservations, the freedom to formulate them meant that they were not subject to any substantive validity conditions. That premise regarding the validity of reactions could be accepted, as long as it was understood that reactions might, or might not, have all or some of the legal effects intended by their author, even if they were not subject to substantive validity conditions.

28. The Special Rapporteur made an important point about objections in paragraph 103 of his report, namely that, even if an objection could have the effect of undermining the object and purpose of the treaty, the author had the right to exclude all treaty relations with the author of the reservation and that he who could do more could do less. While that made sense, it had to be borne in mind that the author of the reservation would, in that case, be forced to apply a treaty deprived of its object and purpose *vis-à-vis* the objecting entity—either a State or an international organization. The author of the reservation had little choice, especially if the period of time for making another reservation aimed at ruling out any treaty relationship with the objecting State had expired. In that case, the principle of consent would be greatly weakened as far as the author of the reservation was concerned. The Commission should therefore consider that matter when investigating the legal effects of objections.

29. The issue became more complex if the effect of the objection was to exclude a peremptory norm of international law from the application of the treaty relationship with the reserving entity. That matter had been debated at the previous meeting on the basis of the example quoted by Mr. Nolte. Nobody disputed the fact that *jus cogens* obligations and rules were binding regardless of treaty relations. But in the example in question, if State A (the reserving State) insisted that before surrendering a person to State B (the objecting State), the latter had to guarantee that it would not torture that person, could State A oblige State B to submit to that demand on the basis of the *jus cogens* rules existing separately in international law outside the treaty relationship? The answer was “no”. The *jus cogens* rules prohibited State B from committing acts of torture, but because State B had excluded the relevant article in the treaty from its relations with State A, the latter could not oblige State B to furnish such a guarantee. Such a situation was not inconceivable and if it was not dealt with in the section on validity, the Guide to Practice should make it clear that such an objection had no legal effect because it violated *jus cogens* rules of international law.

30. The example given was that of an objection with an intermediate effect. It could be assumed that that kind of

objection, like all the others, was not subject to validity conditions. It was, however, necessary to remember that it modified a treaty relationship with the reserving State in that it limited its consent—for the objecting State, that was a means of “putting a foot in the door”, because it knew that the objection could not be treated as a reservation and that, as stated in paragraph 114 of the report, the reserving State was not in a position to respond effectively to such objections. That might suggest that the Commission was concerned solely with the right of consent of the objecting State, but not of the reserving State. That imbalance should therefore be corrected either in the part on validity, or in the part on the legal effects of objections, but not just ignored on the grounds that the reserving State could always withdraw its reservation. The Special Rapporteur seemed inclined to deal with objections with intermediate effects in the part on legal effects. When it came to the acceptance of an invalid reservation, the distinction between the validity of the acceptance and its legal effects was more theoretical and involved no real practical issues. Whether it was invalid or devoid of legal effects amounted to the same thing in practice. Acceptance of invalid reservations could therefore be covered in the part on legal effects.

31. With regard to the validity of interpretative declarations, it could not be argued that treaty-based prohibitions of certain interpretative declarations were invalid. Indeed, the report provided some good examples of specific and general prohibitions on interpreting treaties. A guideline on the invalidity of declarations prohibited by a treaty was therefore warranted. The next question was whether an interpretative declaration not falling within the ambit of the treaty-based prohibition could be invalid. According to the Special Rapporteur, that was not the case, even when a tribunal or a judicial body issued the “right” interpretation of a treaty provision forming the subject of conflicting interpretations by States parties. The Special Rapporteur suggested that every State party had the right to interpret the treaty in a certain manner, provided that the interpretation was not prohibited by the treaty, even if it was the “wrong” interpretation. According to that line of reasoning, the interpretation in question could never be invalid because, unlike interpretations which were prohibited by the treaty, there was nothing in international law that prohibited a State party from interpreting a treaty in a certain manner. Paragraph 143 of the report described articles 31 to 33 of the Vienna Conventions as “guidelines as to the ways of finding the ‘right’ interpretation”. Although article 32 on supplementary means of interpretation was couched in non-binding terms, that was not true of articles 31 and 33, which laid down the methods of interpretation to be employed in the absence of any special agreed rules in the treaty. If a State interpreted a treaty in bad faith, that would therefore be incompatible with article 31, paragraph 1, and it could be held that its “interpretative declaration” violated international law. If the logic of the report were followed, that declaration should be invalid because it violated a State’s obligations under international law (namely those arising out of the provisions of common article 31 of the Vienna Conventions, provided that those provisions were binding on it).

32. Apart from any doctrinal considerations, what would be the consequences of a tribunal’s ruling that the

interpretative declaration of a State was incorrect? If it were accepted that such a declaration would be invalid by virtue of the tribunal's decision, it would be invalid from the moment it was formulated. But if the issue was not that of invalidity, but of the legal effects of the wrong interpretation by that State, it would be necessary to ascertain whether that interpretation had had any legal effect between the time it had been formulated and the time it had been declared wrong. That was a practical question, the answer to which would guide tribunals and judicial bodies on how to deal with the legal effects of an interpretative declaration deemed to be wrong, i.e. containing a valid but wrong interpretation.

33. The second issue in relation to interpretative declarations arose when a declaration made by a State specified the scope attributed by that State to a treaty. That kind of declaration had been extensively debated, especially in cases where the State making the declaration had intended to define the scope of a human rights or counter-terrorism instrument in a certain manner. States parties which disagreed with that interpretation had generally argued that the declaration was a reservation which was incompatible with the object of the treaty and therefore invalid. The problem was that, according to the definition in draft guideline 1.2, declarations specifying the scope of a treaty were interpretative and therefore valid under new draft guideline 3.5. But they could also be regarded as “disguised” reservations limiting the scope of the treaty and therefore invalid under new draft guideline 3.5.1. That inconsistency had to be resolved and that could be done by saying that, as a matter of principle, an interpretative declaration was invalid when it was incompatible with the object and purpose of the treaty.

34. As far as the validity of reactions to interpretative declarations was concerned, it was essential to examine two points in connection with opposition to an interpretative declaration. First, there was no reason to treat opposition containing an interpretation prohibited by a treaty any differently from interpretative declarations that were prohibited by a treaty. Hence, if a State opposed an interpretative declaration by giving a prohibited interpretation, that opposition should also be invalid and the new draft guideline 3.6 should say so. Secondly, he wondered whether oppositions containing an interpretation that were contrary to articles 31 and 33 of the Vienna Conventions should be deemed invalid. If their legal effects were the only aspect to be considered, would they produce effects between the time of their formulation and the time that an authorized body declared that they contained a wrong interpretation?

35. Lastly, with regard to conditional interpretative declarations, the fact that their author's consent to be bound by a treaty was subject to some interpretation made it more akin to a reservation. Did that mean, however, that it should be treated as a reservation for the purpose of determining whether it was invalid? If the other parties or an authorized body accepted the author's interpretation, it should be treated in the same manner as any other interpretative declaration. But if that declaration was opposed by one or more parties, or by an authorized body, it was legitimate to treat it as a reservation for the purpose of determining whether it was invalid. That was why he

wondered whether it would be sufficient to apply draft guideline 3.5.1 to a conditional interpretative declaration without determining that such a declaration always had to be regarded as a reservation for the purpose of determining its validity. Thus, if the validity of a conditional interpretative declaration which was actually a reservation was opposed by one or more States parties, or declared wrong by an authorized body, it would be assessed as if the declaration were a reservation in accordance with draft guidelines 3.1 and 3.1.1 to 3.1.15. Otherwise, that declaration should be treated like any other interpretative declaration.

36. In conclusion, Mr. Hmoud recommended that the draft guidelines should be referred to the Drafting Committee once the Special Rapporteur had provided further explanations on the points he had raised in his statement.

37. Mr. PELLET (Special Rapporteur) said that he was still unconvinced by the example given by Mr. Nolte and did not see what was to be done about the *jus cogens* issue. The only thing worth saying was that the *jus cogens* obligation still existed. In other words, if the objection might entail conduct contrary to a peremptory norm of general international law, it would not have any effect, but he failed to see what that had to do with validity. If an objection might entail the violation of a *jus cogens* obligation, it could not be accepted, but in his opinion the problem did not arise in the context of validity.

38. Mr. MELESCANU said that the most important issue was that of the legal effects of reservations and declarations, but first it was absolutely vital to consider the question of validity. The Special Rapporteur had proceeded methodically and his logical arguments rested on State practice in the matter. He had first examined the conditions for the validity of reservations and declarations and then he had looked at the validity of objections to reservations and declarations, which was wise, because the conditions for the validity of reservations and objections should to some extent mirror the conditions for the validity of declarations and objections to declarations.

39. The situation was fairly plain in respect of draft guideline 3.4 (Substantive validity of acceptances and objections). The Special Rapporteur referred to the Vienna Conventions, which did not determine the conditions for the substantive validity of acceptances, and he thought that it would be unwise to speak of the substantive validity of reactions to reservations. He personally shared that point of view and proposed that the draft guideline should be referred to the Drafting Committee.

40. He broadly endorsed the comments made by Mr. Fomba and Mr. Hmoud with regard to interpretative declarations. He recommended referral of draft guideline 3.5 (Substantive validity of interpretative declarations) to the Drafting Committee, but with one reservation in respect of the phrase “unless the interpretative declaration is expressly or implicitly prohibited by the treaty”. The question of a treaty-based prohibition on a conditional interpretative declaration did not, in fact, seem to have been settled. Although the Commission was supposed to be drawing up a guide, in other words, guidelines based on State practice, the report provided only two examples of State practice in the matter, one concerning a bilateral treaty between

Canada and Costa Rica, and the other a multilateral treaty which was still no more than a draft. There was therefore not enough practice to posit the existence of legal instruments expressly or implicitly prohibiting the formulation of a declaration. From a practical viewpoint, all the members agreed that declarations were more appealing than reservations because they were not subject to time restrictions and because they could be made even when a treaty prohibited the formulation of reservations. For that reason, if the issue were dealt with in a very rigid manner, as it was in draft guideline 3.5, the Commission was likely not only to give States ideas, something which would limit the importance and practical utility of declarations, but also to kill the goose that laid the golden eggs, for if interpretative declarations, even conditional ones, were subject to the same legal regime as reservations, States might as well opt for the latter, as the Government of the Netherlands had pointed out (see the 3021st meeting above, paragraph 11).<sup>253</sup> That question should therefore be handled in the section on legal effects, as Mr. Fomba and Mr. Hmoud had recommended. The draft guidelines should not contain inflexible provisions which might prejudice the Commission's decision when it considered legal effects, or, above all, the reservations dialogue.

41. As far as the validity of interpretative declarations was concerned, he thought that it would be harmful to rigidly align draft guidelines 3.5.2 and 3.5.3 on the reservations regime, even if draft directive 3.5.3 might seem to have some justification. If the phrase "unless the interpretative declaration is expressly or implicitly prohibited by the treaty" was retained in draft guideline 3.5, it should also be added to the provision concerning objections to interpretative declarations, although that might be taking matters too far, since there was no convincing practice in that respect.

42. Mr. NOLTE, replying to the Special Rapporteur's comments, said that an objection creating a treaty-based obligation that would violate *jus cogens* could already be deemed to violate the latter and would therefore be invalid. It was a matter of choice and consistency; if a reservation which created a treaty-based obligation that would violate *jus cogens* had to be deemed invalid, the same must be true of an objection having the same effect. He preferred that solution and thought that the Guide to Practice should stipulate that objections or other unilateral declarations which would create a treaty-based obligation contrary to *jus cogens* were themselves deemed invalid and did not produce any effect.

43. Mr. PELLET (Special Rapporteur) said that he would reply to Mr. Nolte's comments after he had given the matter some thought. Mr. Melescanu's statement called for two immediate remarks.

44. First, there seemed to be some misunderstanding, the Guide to Practice was not supposed to reflect existing practice but to guide future practice; in fact it was a guide "for" practice. It was not therefore crucial to find specific examples of a given point and he had used bilateral treaties, or treaties which had not yet been adopted, as

examples simply in order to show that the issue in question could arise and should therefore be dealt with in the Guide.

45. Secondly, he could not but be worried by the comments made by Mr. Hmoud and Mr. Melescanu about conditional interpretative declarations. If those declarations really formed a separate category, if only when it came to evaluating validity—and Mr. Hmoud and Mr. Melescanu had put forward some disturbing arguments in that connection—they could not be merely treated like reservations. In point of fact, that was very important for the Guide to Practice, because the Commission would have to retain all the provisions on conditional interpretative declarations that were currently in square brackets. He would therefore be grateful if the members of the Commission were to give their opinion on that issue.

46. Mr. DUGARD welcomed the draft guidelines contained in the Special Rapporteur's fourteenth report and, unlike some members, did not think that they were of little practical effect and therefore useless. The debate on reservations and interpretative declarations had turned on admissibility, validity and effects, and draft guidelines on those subjects were particularly welcome.

47. The section of the report under consideration, which was concerned with interpretative declarations, raised some interesting legal questions. The Special Rapporteur examined the rules relating to interpretation and rightly commented that there was rarely a "correct" interpretation of treaties. In national legal systems, it was up to the courts to interpret laws and it was inconceivable that the parties to a contract, or individuals affected by a law, would have the right to interpret them. The complexity of international law in that respect was due to the fact that it allowed each State, in the exercise of its sovereignty, to put forward one interpretation or another. But that did not mean that the Commission must refrain from any attempt to restrict the exercise of that power of interpretation. The Special Rapporteur said that when a treaty established a restriction with regard to a particular interpretation, its provisions must prevail; he then referred to the provisions of the 1969 Vienna Convention regarding interpretation, but in his own opinion, those rules were so flexible that they were not really much help in finding the right solution.

48. The Special Rapporteur then said that an interpretative declaration which was incompatible with the object and purpose of a treaty was in fact a reservation and could not be valid as an interpretative declaration. In that connection, he referred to the objections of Spain to the declaration of Pakistan<sup>254</sup> regarding the International Covenant on Economic, Social and Cultural Rights. He endorsed the Special Rapporteur's conclusions on that point and approved of draft guideline 3.5.1.

49. Lastly, in respect of *jus cogens*, it was clear that an interpretative declaration might violate a peremptory norm of international law. Mr. Nolte had given one example, and another might be that of a declaration in which a State accepted the provisions of the Convention

<sup>253</sup> *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. IV.4.

<sup>254</sup> *Ibid.*, chap. IV.3.

against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, but pronounced that it did not consider certain, very harsh interrogation techniques in an isolation cell to be torture. It might be said that such a declaration conflicted with a *jus cogens* norm. He therefore thought that the Special Rapporteur should seriously consider mentioning *jus cogens* in draft guideline 3.5, for example by adding the words “or is incompatible with a peremptory norm of international law”. The draft guidelines contained in the report under consideration should be sent to the Drafting Committee.

50. Mr. McRAE said that when the Special Rapporteur had introduced the report under consideration, he had clearly laid out the parameters of the debate; no attempt should be made to go back on draft guidelines that had already been sent to the Drafting Committee, even if they were quoted in the report, and the Commission should not ask whether it could deal with validity before knowing what the Special Rapporteur was going to say about effects, although he had stated that responses to reservations raised issues relating to effects, but not to validity. At an earlier meeting, Mr. Gaja, supported by Mr. Nolte and Ms. Escarameia (3021st meeting, paras. 25 and 44–46, respectively), had, however, contended that issues of validity did arise, at least in respect of objections to reservations with an intermediate effect (3020th meeting, para. 25). At least in the abstract they seemed to be right; if an objection to a reservation with an intermediate effect had an impact on the treaty relationship between the reserving and the objecting parties, it could, at least in principle, be characterized as a valid or invalid objection.

51. He wondered, however, if there was any substance to that debate. If the Special Rapporteur said that there was no point in characterizing the objection as valid or invalid and that the real issue was that of the effect of the objection, then what Mr. Gaja, Mr. Nolte and Ms. Escarameia called “invalidity” might in practice be no different from what the Special Rapporteur meant by “effects”. But of course it was impossible to know that for certain, because the Special Rapporteur had not yet spelled out those effects. The debate had therefore taken on a somewhat surreal quality. Hence, he was inclined to agree with Ms. Escarameia that the Commission should not be talking about validity at all, but just about effects. Mr. Hmoud had made some pertinent comments in that respect. Perhaps it was necessary to wait until the following year and to hear what the Special Rapporteur had to say about effects, before reaching a decision.

52. Even though reactions to reservations and interpretative declarations supposedly involved no validity issues, the Special Rapporteur asked whether there should be a draft guideline on the matter. There were already a large number of draft guidelines, but if the Special Rapporteur had needed several pages of closely reasoned argument to convince the Commission that there was no issue of validity, perhaps the readers of the Guide to Practice might need some guidance in order to reach the same conclusion. A draft guideline on the subject, accompanied by a commentary, therefore seemed necessary, assuming that the Commission did not decide, after the debate on effects the following year, to abandon any reference to validity. Those comments obviously applied to draft guideline 3.4

on the substantive validity of acceptances and objections, but they were equally applicable to draft guideline 3.6 on the substantive validity of an approval, opposition or reclassification, except for the points made by Mr. Gaja the previous day and Mr. Hmoud at the current meeting. If the validity of an interpretative declaration depended on the terms of a treaty, that must also be true of the validity of any approval of an interpretative declaration. That meant that the phrase “subject to the terms of the treaty”, or words to that effect, should be added at the end of draft guideline 3.6.

53. Lastly, the Special Rapporteur requested the opinion of the Commission members with regard to conditional interpretative declarations and noted in paragraph 167 of his fourteenth report that “[i]t is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner”. With all due respect to the Special Rapporteur, that was a distinction without a difference. If a State made its acceptance of a treaty conditional on a particular interpretation of it, it was seeking to modify what would be its meaning if the interpretation were not adopted, and that was a reservation. Of course, if the interpretation proved to be correct, there was no problem; the situation was comparable to that of a reservation accepted by all the other parties to a treaty. Perhaps there was a difference in the way a conditional interpretative declaration and a reservation were formulated, but in substance there was no distinction between them. For that reason, the content of draft guideline 3.5.2 was already encompassed in draft guideline 3.5.1. He therefore urged the Special Rapporteur to do as he had suggested and to explain at the following session that the effects of conditional interpretative declarations were the same as those of reservations, so that conditional interpretative declarations no longer led a twilight existence between simple interpretative declarations and reservations.

54. He was in favour of sending the draft guidelines contained in the Special Rapporteur’s fourteenth report to the Drafting Committee.

*The meeting rose at 12.25 p.m.*

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### 3023rd MEETING

*Friday, 17 July 2009, at 10.05 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

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