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Summary record of the 2551st meeting

Topic:
Law and practice relating to reservations to treaties

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2551st MEETING

Wednesday, 29 July 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,¹ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)

GUIDE TO PRACTICE (*continued*)

DRAFT GUIDELINE 1.1.7 (*concluded*)

1. Mr. ROSENSTOCK said that the type of statements covered in draft guideline 1.1.7 could be made at any time, even after a State had expressed its consent to be bound by the treaty concerned. That should be spelled out, because otherwise such statements would not be deemed to be reservations, in view of the rule according to which a reservation must be formulated at the moment of consent. Draft guideline 1.1.7 could accordingly be amended to read: “A reservation by a State which purports to exclude the application of a treaty between itself and one or more other States which it does not recognize may be made at any time.”

2. Mr. ILLUECA said that the Commission had questioned (2550th meeting) whether it was really necessary to retain draft guideline 1.1.7. Non-recognition was an essentially political problem that was certainly of special importance in Latin America and the Caribbean as well as in the Middle East, but one was justified in asking whether it had its place in the Guide to Practice.

3. Mr. LUKASHUK indicated that the problem was an extremely serious one that absolutely had to be resolved. Having listened to all the previous speakers, he wished to propose a compromise solution. Some had asserted that the statements referred to in draft guideline 1.1.7 did not

constitute reservations. That was true, but they were nevertheless a particular type of statement that had a significant legal effect, since they could exclude all contractual relations between parties to a treaty. Unlike interpretative declarations, they had an impact on the legal effect of the treaty concerned. A distinction could be drawn between statements relating to recognition and statements relating to non-recognition. The fact that a State could indicate that joint participation did not signify recognition but that non-recognition posed no impediment to the application of the treaty between itself and another State could not be passed over in silence. Such situations arose all too frequently for the Commission to abstain from commenting on them.

4. Mr. MIKULKA recalled that draft guideline 1.1.7 concerned only one type of statement relating to non-recognition, namely those that purported to exclude the application of a treaty between their author and the non-recognized State, and that the problem was to determine whether such statements constituted reservations. As he had said (*ibid.*), he did not think they did. As to the amendment proposed by Mr. Rosenstock, it was generally acceptable, but he wondered if Mr. Rosenstock was truly convinced that the type of statement involved constituted a reservation. Perhaps the word “reservation” could be replaced by “unilateral declaration”; otherwise serious problems might be encountered, particularly if other States formulated objections.

5. Mr. PELLET (Special Rapporteur), summing up the discussion on draft guideline 1.1.7, said that many speakers had asked whether a political problem or a legal problem was involved. Unlike Mr. Illueca, he did not believe that because something was a political problem it should not be mentioned. Quite the contrary: it was precisely because a political problem was involved that excesses had to be averted. That being said, the Commission must not launch into a theoretical analysis of recognition and non-recognition: it must not rewrite international law. On the other hand, it was essential to determine whether the unilateral declarations concerned could have an effect on the application of a treaty. If so, did that permit them to be categorized as reservations? He fully agreed with Mr. Simma and Mr. Yamada who held that the problem should not be approached from the standpoint of non-recognition, but he disagreed with members like Mr. Crawford and Mr. Brownlie who felt that it was outside the scope of the topic of reservations. The Commission must decide whether the unilateral statements mentioned in draft guideline 1.1.7 corresponded to the definition of reservations given in the Vienna Conventions. Many speakers had emphasized the differences, which they deemed fundamental, between such statements and reservations. Some had laid stress on the phrase “certain provisions of the treaty”. He hoped to have shown, however, during the consideration of draft guideline 1.1.4 (Object of reservations), that most reservations were not aimed at “certain provisions”, a phrase that should not be taken too literally lest transverse reservations be excluded, something that would be unacceptable. On the other hand, a distinction should be drawn between “certain provisions” and the exclusion of a treaty in its entirety. Unlike most members of the Commission, he believed that a reservation did not have to have only an object *ratione materiae* and that it

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

could additionally have an object *ratione personae*. He would not press his point, however. Nobody doubted that, within the legal regime of reservations, a reservation could exclude the application of a treaty in its entirety. If an objection could do so, as Mr. Yamada had shown, it was hard to see how a reservation could not.

6. He was more worried by the comments that had essentially related not to whether a statement conformed to the Vienna definition, but to the problems that could arise from the inclusion of unilateral statements relating to non-recognition in the category of reservations. Mr. Mikulka had gone especially far in saying that such statements went against the very philosophy of reservations. He did not agree, but admitted that problems could indeed arise, if only because the system of acceptance and objection would not be able to function. He therefore acknowledged that it might be dangerous to say purely and simply that such statements were reservations. He agreed with Mr. Mikulka's reaction to the proposal made by Mr. Rosenstock: true, draft guideline 1.1.7 could be amended to place emphasis on the time when the unilateral statement could be made, but that did not resolve the fundamental problem, which was whether such statements constituted reservations. He would in any case prefer to use the option he had mentioned when introducing the draft guideline, namely to specify that a reservation could be made at the moment when the State committed itself, but also at the moment when the non-recognized entity did so. Deleting the final phrase would not solve the problem: to improve the text, the moment had to be specified.

7. Some speakers had wondered what the object of non-recognition was. It could certainly be made clear that it was not necessarily a State, but that was not the problem: the important element was the desire of the reserving State to exclude all contractual relations with another entity. As for the question raised by Mr. Yamada, namely whether it was possible to refuse to have contractual relations with a recognized State, he admitted that he had not thought about it.

8. For all those reasons, he acknowledged that it might be preferable not to classify statements relating to non-recognition as reservations. It remained to be seen what they were.

9. Members of the Commission had proposed two explanations. To some, they were *sui generis* statements, a phrase that was to some extent the jurist's admission of defeat and that elucidated nothing. To others they were interpretative declarations, a more interesting thesis whose proponents included Mr. Bennouna. The question should be given further consideration, and that was why he was not asking the Commission to send draft guideline 1.1.7 to the Drafting Committee. It would be better to revisit it during the consideration of the draft guidelines relating to interpretative declarations and general declarations of policy. But under no circumstances could the problem be passed over in silence.

10. Mr. ECONOMIDES stated that the crucial issue was whether a unilateral statement relating to non-recognition was a true reservation in the meaning of the law of treaties. At the previous meeting, a majority of members had said that it was not. Nor was it, in his opinion, a *sui*

generis statement or an interpretative declaration; rather, it was a statement by which a State did not recognize that an entity had the capacity to have international, including contractual, relations. Such statements fell under the rules of the law of treaties relating to non-recognition, but the Commission had to discuss the matter, and he wondered if, with the necessary explanations in the commentary, it might not use the same approach as with draft guideline 1.1.5 by indicating that a unilateral statement relating to non-recognition "does not constitute a reservation".

11. Mr. GOCO said he was worried on a number of counts. First, the basic hypothesis was that a multilateral treaty was negotiated by a number of States and that some treaties required the consent of all the parties. What, then, was the impact on the application of a treaty of a reservation relating to non-recognition? For the declarant State, the meaning of such a reservation appeared to be that it did not wish to be bound by a treaty because it did not recognize other States that were party to the treaty. In that connection, he recalled the advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.² A prior counter-proposal had concerned the need for the consent of the other State party to be bound by the treaty. The question also arose as to whether the draft guideline would apply in all cases and to all international treaties.

12. Mr. HAFNER said that the problem should not be viewed from the standpoint of non-recognition. As the Special Rapporteur had emphasized in his third report on reservations to treaties (A/CN.4/491 and Add.1-6), a distinction must be made between reservations that indicated simply that the reserving State did not recognize a State party to a treaty and those that indicated that the reserving State did not recognize a State party to a treaty and that the treaty would not apply between itself and that State. The real question was whether it was possible to formulate a reservation that excluded the application of a multilateral treaty to another State party thereto, and whether that was a matter of non-recognition. Another question was whether there were cases when States rejected the application of a treaty to certain States parties in the absence of any statement relating to non-recognition.

13. He did not agree with the Special Rapporteur that the object of non-recognition was of little importance. One might expect that a State would have the right to exclude the application of a treaty between itself and another State if that State underwent a change of government which the first State did not recognize.

14. Finally, pointing out that the regime of reservations was very similar to that of agreements *inter se*, he proposed that the Commission consider whether the definition of agreements *inter se* might be applicable to such statements.

15. Mr. BROWNLIE said that the view expressed the day before to the effect that the question under consideration fell not within the law of treaties but within the law of recognition was not without merit. He agreed with the Special Rapporteur, however, that the matter was

² See 2536th meeting, footnote 13.

indeed covered by the law of treaties but was governed by those provisions of the 1969 Vienna Convention that related to the capacity to conclude treaties and to the expression of consent, not by those relating to reservations. The problem was thus one of classification and could be resolved by a saving clause such as “without prejudice to”.

16. Mr. PELLET (Special Rapporteur) said he had been struck by the good sense of the comments made by Mr. Economides and was prepared to revise the wording of draft guideline 1.1.7 along the lines he had proposed, namely to indicate that a unilateral statement by which a State purported to exclude the application of a treaty between itself and one or more States which it did not recognize did not constitute a reservation. The draft guideline should be accompanied by a fairly substantial commentary in which the comments of Mr. Brownlie, among others, could be included; that would enable the Commission to settle the problem of such statements once and for all.

17. Mr. HE said that for him, draft guideline 1.1.7 raised two fundamental issues: a State’s decision whether or not to recognize an entity, and the determination of whether the entity concerned had the capacity to be party to a treaty. A decision relating to non-recognition was a very important political statement and could not be construed as a reservation. He endorsed the proposal by Mr. Economides and thought that the Commission should very clearly indicate that the statements concerned were not reservations. The Commission would be making a contribution to international law by clarifying that matter.

18. Mr. BENNOUNA said that the method used by the Commission was unsatisfactory from the legal point of view. The debate under way was an admission of impotence, because it referred to something without classifying it. He was surprised that the Special Rapporteur had drastically changed his mind in the space of a few hours, and he hoped he would give the matter further consideration. Discussion of the question should be postponed until the next meeting.

19. Mr. MIKULKA said he thought the Special Rapporteur had changed his mind after having drawn the right conclusions from a discussion that had lasted for over a day. The intention had never been to pass over the problem in silence. On the contrary, members had recognized its existence, its importance and the need to deal with it, but not as a reservation. He therefore endorsed the proposal made by the Special Rapporteur and suggested further that the other aspect of the matter, namely the moment when a statement could be made, should be referred to the Drafting Committee. The discussion seemed to show that such a statement could be made at the moment when the declarant State expressed its consent to be bound by the treaty or at the moment when the entity whose status was disputed expressed such consent. The Drafting Committee could stipulate that it was not prejudging the position the guideline would occupy in the Guide to Practice.

20. Mr. SIMMA said that since the Special Rapporteur’s initial point of view, which was likewise his own, had proved to be in the minority, there was no reason not

to suggest that the problem be referred to the Drafting Committee, together with the explanations given by Mr. Mikulka. Once the problem of interpretative declarations had been considered, it would be up to the Drafting Committee to elaborate the relevant guidelines for inclusion in the final part of the Guide to Practice.

21. Mr. PELLET (Special Rapporteur) explained that the problem of non-recognition fell within the topic with which he had been entrusted only insofar as statements relating to non-recognition had an effect in the law of treaties and in that such statements were frequently confused with reservations. It might turn out that such statements could not even be categorized as interpretative declarations and would have to be relegated to a special category, like general declarations of policy and informative declarations. Draft guideline 1.1.7 should be referred to the Drafting Committee, with a request that it make proposals while keeping two things in mind: that a clear majority of members of the Commission thought that statements relating to non-recognition were not reservations; and that the link, if there was one, between such statements and interpretative declarations had to be identified.

22. Mr. BROWNLIE and Mr. ILLUECA endorsed that proposal.

23. Mr. HERDOCIA SACASA said that in addition, it was very important for the Drafting Committee not to lose sight of the close ties between draft guideline 1.1.7 and draft guidelines 1.1.9, 1.2 and 1.2.5.

24. Mr. GALICKI pointed out that while in general the draft Guide to Practice operated in a positive mode by indicating, for example, what constituted a reservation, it also contained draft guidelines (such as 1.1.9) that indicated that a given type of statement was not a reservation. The problem of statements relating to non-recognition existed and should be dealt with in the final part of the Guide.

25. Mr. ROSENSTOCK said he was not sure it would be prudent to decide that statements relating to non-recognition were not reservations before having looked at all the other possible categories in which they could be placed, including the possibility of addressing them in the commentary. It was necessary to be equally prudent before classifying them as interpretative declarations. Unless the Commission considered that the declaration made by Saudi Arabia at the signing of the constituent instrument of IFAD mentioned in the third report of the Special Rapporteur³ had no legal effect on the capacity of the State cited therein to use dispute settlement machinery enabling it to bring Saudi Arabia before ICJ, it might well be according such statements a legal effect of which they were deemed to be devoid in other quarters if it was to classify them as interpretative declarations.

26. Mr. ELARABY said that the final goal of the operation was to ensure the greatest possible universality in accession to treaties. Political problems among States were a reality, and statements relating to non-recognition were a solution that enabled States to reconcile that reality

³ See 2550th meeting, para. 25 and footnote 3.

with accession to treaties. To add to that solution the risk of being brought before ICJ would run counter to the objective of universality and would complicate inter-State practice in comparison with the way it currently worked.

27. Mr. GOCO pointed out that the job of the Drafting Committee was to revise or supplement the wording of the provision in the light of the Commission's discussion on the problem of statements relating to non-recognition, but the fundamental issues of whether such statements came under the topic of reservations and whether they should be included in the Guide to Practice had not yet been resolved. Would the Drafting Committee have to decide those matters as well?

28. Mr. LUKASHUK said he was confident of the Drafting Committee's ability to elaborate a compromise text expressing the differing but not necessarily conflicting viewpoints of all members of the Commission.

29. The CHAIRMAN suggested that draft guideline 1.1.7 be transmitted to the Drafting Committee, on the understanding that it would take into account all the important remarks made during the discussion.

It was so agreed.

30. Mr. PELLET (Special Rapporteur), introducing chapter I, section C, of his third report devoted to the distinction between reservations and interpretative declarations), said he wished first to make three general comments. The first was that while the three Vienna Conventions of 1969, 1978 and 1986 formed a solid basis for considering the definition of reservations, the same was not true for interpretative declarations. In elaborating its draft articles on the law of treaties, the Commission had considered the definition of such declarations first at its eighth session, in 1956⁴ and again at its fourteenth session, in 1962,⁵ but its thinking did not show through in the draft,⁶ something that some States, including Japan,⁷ had found regrettable. The 1969 Vienna Convention and, a fortiori, those of 1978 and 1986 had done nothing but adapt the rules for reservations to their own subjects and remained silent on the matter. There were both advantages and disadvantages in that silence. The first disadvantage was that the Vienna Conventions provided neither guidance nor indications regarding the definition of interpretative declarations. But that disadvantage was also in some ways an advantage, since there was no orthodoxy on the subject as there was for reservations. The Commission was not shackled by a text adopted nearly 30 years ago, and it could innovate in accordance with the convictions of its members and the needs of contemporary international society.

31. The second general consideration related to the relevant practice. Paragraphs 231 to 234 of the third report showed that it was plentiful indeed and that States frequently made statements in relation to a treaty to which

they were becoming a party that were specifically formulated in such a way as not to be reservations. The history of interpretative declarations went back as far as did that of reservations, both dating from the Final Act of the Congress at Vienna of 1815.⁸ The two had also been in attendance at the first use of the multilateral convention and had grown up along with that technique. In numerical terms, States undoubtedly made interpretative declarations a bit less frequently than reservations, but as the table in paragraph 234 of the report showed, the figures were basically comparable.

32. Thirdly, two factors made it more difficult to define interpretative declarations and to determine what distinguished them from reservations. The first factor of complexity was that of terminological uncertainties. The question was whether the binary division, into "reservations" and "interpretative declarations" of unilateral declarations that had an impact on the treaty concerning which they were made, entailed an excessively Cartesian rationalism. While the binary approach was used in several languages, others had a more nuanced approach, employing more varied terminology. In the end he had resolved to stick to the distinction between reservations and interpretative declarations. English speakers used the terms "statement", "understanding", "proviso", "declaration", "interpretation" and "explanation", but they did not all define those terms in the same way, and they often admitted that any distinctions in the use of the terms at the domestic level did not spill over into international law. Of the 32 States and 18 international organizations that had replied to his questionnaire on the topic,⁹ none had objected to the division of unilateral declarations concerning treaties into two categories only. Nevertheless, some doubts remained about terminology. States had been known not to give any name at all to their declarations or else to use a range of tortuous and ambiguous circumlocutions of which he gave several examples in paragraphs 255 to 259 of his third report.

33. The second major factor of complexity in distinguishing between reservations and interpretative declarations derived from what could be called the "foreign policy" or legal strategy of States. Vague or ambiguous expressions were sometimes used inadvertently, of course, but sometimes they were used deliberately. As Denmark had pointed out in its response to the questionnaire, States sometimes baptized reservations "interpretative declarations" either to sidestep a prohibition against formulating reservations or to avoid the bad press that reserving States received in certain quarters. Such "adroitness" was, of course, rightly condemned, since a reservation remained a reservation, "however phrased or named". But the practice certainly did not facilitate the analysis of reservations.

34. The fourth important consideration was that all the existing definitions of interpretative declarations began with definitions of reservations, whether those advanced in the doctrine or those proposed in the *travaux préparatoires* of the 1969 Vienna Convention. In those defini-

⁴ See *Yearbook . . . 1956*, vol. II, p. 110, document A/CN.4/101, article 13 (I).

⁵ See *Yearbook . . . 1962*, vol. II, pp. 31-32, document A/CN.4/144, article 1 (I).

⁶ *Ibid.*, p. 161, article 1 (f).

⁷ See *Yearbook . . . 1965*, vol. II, pp. 46-47, document A/CN.4/177 and Add.1 and 2.

⁸ *British and Foreign State Papers, 1814-1815*, vol. II (London, 1839), pp. 3 et seq.

⁹ *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478, annexes II and III.

tions, interpretative declarations were described first and foremost as not being reservations, it being indicated either that “an interpretative declaration is not a reservation because . . .” or that “an interpretative declaration differs from a reservation in that . . .”. The adoption of that approach was logical, and would be all the more so for the Commission today since, thanks to the Vienna Conventions, it had a definition of reservations that it had decided to leave intact. It was also entirely acceptable to start from what one knew in order better to define what one did not know. And it was that empirical approach, notwithstanding the criticisms to which it had been subjected by Horn,¹⁰ that he had used to arrive at the definition couched in positive terms that he was proposing in draft guideline 1.2, which he read out.

35. The definition contained elements common to both reservations and interpretative declarations: both were unilateral declarations by States or international organizations, a formal similarity that did not make the distinction any easier, especially as both declarations were qualified by the words “however phrased or named”. Obviously, it would be absurd to say that a reservation was a reservation “however phrased or named” when in all other respects it met the criteria for reservations, but not to do so for interpretative declarations. If a reservation could be called a “declaration” by its author—an inevitable consequence of the definition in the Vienna Conventions—then by the same token, all unilateral declarations that called themselves “declarations” or “interpretative declarations” were not necessarily interpretative declarations, and some unilateral declarations termed “reservations” could in fact be simply interpretative declarations.

36. Since identical causes produced identical effects, those common points of reservations and interpretative declarations called for identical explanations, and that was why he was proposing draft guideline 1.2.1, which was the counterpart for interpretative declarations of draft guideline 1.1.1 for reservations and which provided for the possibility of joint formulation of interpretative declarations. While he had not been able to find any examples of reservations formulated jointly, the practice of joint formulation of interpretative declarations seemed to be well established, as shown by the examples in paragraph 268 of his third report.

37. The rejection of nominalism in the definitions of both reservations and interpretative declarations seemed sufficiently “immoral”, however, for one to ask whether States should not be taken at their word: when a State termed its declaration a “reservation”, it should be considered as such, and when it called it an “interpretative declaration”, that, too, should be accepted. Such had been the position of Japan in 1964,¹¹ and that was also what Mr. Lukashuk had suggested (2550th meeting). He welcomed the desire to confer morality under the law but did not think it was possible to go that far, for basically two reasons that he explained in paragraphs 277 and the following of his third report. First, that position was incompatible with the Vienna definition, and secondly, it was so far removed from practice that if the Commission was to

adopt it, it would be neither codifying nor progressively developing the law, but purely and simply legislating, and that was not its role.

38. On the other hand, the Commission could make a few small steps along that road, and that was what he proposed in draft guidelines 1.2.2 and 1.2.3. Relying chiefly on the jurisprudence of the Human Rights Committee, the Commission on Human Rights and the European Court of Human Rights and on what was suggested in some of the doctrine, he proposed to acknowledge that while the title of an interpretative declaration was not proof of its legal nature, it nevertheless established a presumption, although it was not irrefragable, especially when the declarant termed some of its declarations concerning a treaty “reservations” and others “interpretative declarations”. Such was essentially the purpose of draft guideline 1.2.2.

39. When a reservation was prohibited by a treaty, there appeared to be grounds for a presumption, again, not irrefragable, that the author of an interpretative declaration had intended to act in good faith and in conformity with the law, and that the declaration was therefore an interpretative declaration and not a prohibited reservation. Such was the purpose of draft guideline 1.2.3.

40. On the other hand, interpretative declarations differed from reservations on two other points: in the temporal element, the moment when the declaration could be made, and in the teleological factor, the objective pursued by the author of the declaration. As to the teleological factor or objective, which was at the heart of the distinction, whereas a reservation purported to exclude or to modify the legal effect of provisions of a treaty in their application to its author, the same was not true of an interpretative declaration, which had the object, to state the obvious, of interpreting the treaty or certain provisions therein, in other words to clarify the meaning and scope thereof, as had been frequently stated by PCIJ and ICJ. The definition of interpretation given by ICJ, though somewhat perfunctory, would seem to be sufficient for the work on reservations to treaties. If one acknowledged that to interpret meant to clarify the meaning and scope of a text, then that was clearly not the same as to modify and exclude: interpretation left intact the provisions to which it was directed and their legal effect. Although that seemed fairly obvious, it was absolutely essential and he would like to know what members of the Commission thought: was it sufficiently clear from the definition he was proposing in draft guideline 1.2, or would it be preferable to repeat it in the more specific draft guidelines, such as 1.3.0 and 1.3.0 *bis*? Draft guideline 1.3.0 indicated that the classification of a unilateral declaration as a reservation depended solely on the determination as to whether it purported to exclude or to modify the legal effect of the provisions of the treaty, and draft guideline 1.3.0 *bis*, that the classification of a unilateral declaration as an interpretative declaration depended solely on the determination as to whether it purported to clarify the meaning or the scope that the declarant attributed to the treaty or to certain of its provisions. He would bow to the Commission’s wisdom on that point, and for his part, saw advantages and disadvantages both in specifying those criteria and in not doing so, but he believed the attention

¹⁰ See 2545th meeting, footnote 4.

¹¹ See *Yearbook . . . 1966*, vol. II, pp. 301-305, document A/6309/Rev.1, annex.

of States should be drawn to the matter in the Guide to Practice.

41. Equally important was to decide on the method that was to be used for putting the distinction into action: chapter I, section C.3, was devoted to that question. Paragraphs 394 to 407 indicated that the method was the one envisaged in articles 31 and 32 of the 1969 Vienna Convention: quite simply, the general rule of interpretation of treaties. In other words, an interpretative declaration must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context—subject to verification of the results yielded by that method by the use of supplementary means of interpretation which included the *travaux préparatoires*. Such was the conclusion to be drawn from an analysis of the practice of States and above all of the jurisprudence of the Inter-American Court of Human Rights, the Commission on Human Rights and the European Court of Human Rights, as well as of the Arbitral Tribunal in the *English Channel* case;¹² and it was that conclusion that the Special Rapporteur proposed to the Commission in draft guideline 1.3.1.

42. Because of the definitions of interpretative declarations and of reservations, two categories of declarations of which he gave numerous examples in paragraphs 362 to 366 and 371 to 376 of his third report had to be left aside. They were, first, general declarations of policy that a State or an international organization could make at the moment of signing a treaty or of expressing its consent to be bound by a treaty, and whose object was the same as the treaty's but whose effect was not to modify the treaty, exclude certain provisions from it or interpret it; rather, such declarations merely purported to express the author's policy towards the object of the treaty. It was that type of declaration that was the subject of draft guideline 1.2.5, with which he was not satisfied and which he would be revising in a corrigendum to be distributed to members of the Commission.

43. The second category was that of informative declarations, in which a State or an international organization indicated the manner in which it intended to discharge its obligations at the internal level, without any implications for the rights and obligations of other States. That was the subject of draft guideline 1.2.6. In neither case was such a declaration a reservation or an interpretative declaration: he thought it was useful to make that clear.

44. One remaining element of the definition of reservations whose inclusion in the definition of interpretative declarations had to be approved or rejected was the temporal element, in other words the moment at which the unilateral declaration was made. As he pointed out in his third report, the response must be categorically no, that the temporal element must not be included in the general definition of interpretative declarations. On the other hand, he was in favour of introducing it in the definition of a specific category of interpretative declarations, namely conditional interpretative declarations, for the following reasons.

45. As he had already indicated, he did not think that the Commission's earlier membership had been right at the

time in deciding to include the temporal element in the definition of reservations. That element concerned the legal regime and, in his opinion, could simply have been dealt with in article 23 of the 1969 and 1986 Vienna Conventions. What was done was done, and one had to accept it, but that was no reason to perpetuate the same mistake in the definition of interpretative declarations. There was a purely pragmatic reason why special rapporteurs on the law of treaties had included the temporal element in the definition of reservations: they had felt that reservations were a threat to the stability of legal relations and the unity of treaties. But the same considerations did not carry the same weight in relation to interpretative declarations. Practice agreed with theory in that regard: reservations were linked to the conclusion of treaties, as demonstrated by the inclusion of the rules on reservations in Part II of the 1969 Vienna Convention, whereas interpretative declarations were linked to the application of treaties, as shown by the inclusion of rules on such declarations in Part III of the Convention. On that point he was entirely in agreement with his predecessor, the former Special Rapporteur, Sir Humphrey Waldock, who had stated of interpretative declarations that they could be made at any moment during the negotiations, at the time of signature, ratification, etc., or later, in subsequent practice.¹³ In practice, it was precisely to escape the temporal limitations on the possibility of formulating reservations established by article 2, paragraph 1 (*d*) and article 23 of the 1969 Vienna Convention that States made interpretative declarations, thereby demonstrating their conviction that such declarations were possible at times when reservations were not. The primary conclusion was therefore that the temporal element must not be included in the definition of interpretative declarations, for it had to be possible to formulate them at any time after the birth and during the life of a treaty.

46. But what was true for interpretative declarations in general was not true for a specific type of interpretative declaration whose existence had been admirably described by McRae.¹⁴ In that very well-documented study, the author drew a distinction between mere interpretative declarations and qualified interpretative declarations. An interpretative declaration was conditional in that the State or international organization that formulated it made its consent to be bound by the treaty conditional upon the interpretation it was putting forward, just as the author of a reservation made its commitment to the treaty conditional upon the reservation. That corresponded to what was indisputably a practice, of which paragraph 310 of the third report gave a striking, though not very commendable, example: the interpretative declaration made by France when signing Additional Protocol II of the Treaty for the Prohibition of Nuclear Weapons in Latin America,¹⁵ a declaration that was reproduced in the report, and which he read out.

47. That declaration was clear enough, but that was not always the case, and it was by using the general rule of interpretation set out in article 31 of the 1969 Vienna

¹³ See *Yearbook . . . 1965* (footnote 7 above), p. 49.

¹⁴ D. M. McRae, "The legal effect of interpretative declarations", *The British Year Book of International Law*, 1978, vol. 49, p. 155.

¹⁵ Ratification of Additional Protocol II (United Nations, *Treaty Series*, vol. 936, p. 419).

¹² See 2541st meeting, footnote 14.

Convention, supplemented if necessary by the supplementary means of interpretation outlined in article 32 of the Convention, that one could determine whether a unilateral declaration was a simple or conditional interpretative declaration: in other words, whether it met the criterion of conditional interpretative declarations that he reproduced for safety's sake in draft guideline 1.3.0 *ter*.

48. If it did, then one was obviously dealing with an interpretative declaration that was much closer to a reservation than were simple interpretative declarations, since reservations, too, were "conditional". The time had not yet come to look into the legal regime for conditional interpretative declarations, but the reluctance to include a temporal element in the definition of interpretative declarations in general appeared not to be valid for conditional interpretative declarations. Since the declarant made its commitment conditional upon its declaration, such a declaration could obviously be made only before or at the moment when the commitment was made. And while it did not seem necessary to include the temporal element in the general definition of interpretative declarations, it had to be included in the definition of conditional interpretative declarations in the same form as for reservations. Those were the considerations that had resulted in draft guideline 1.2.4 as set out in the third report.

49. He thought to have reviewed as briefly as possible, considering the complexity of the subject, the entire set of draft guidelines to be found in chapter I, section C, of his third report, with the exception of draft guideline 1.4. It was derived from a promise he had made after a discussion in the first part of the current session and in response to points raised by Mr. Economides and Mr. Hafner, among others. To define was not to regulate, and all the definitions in the first part of the Guide to Practice were given without prejudice to the relevant legal regimes, and in particular to the permissibility of the reservation or interpretative declaration. A reservation could indeed be permissible or impermissible, but it remained a reservation as long as it corresponded to the established definition, and an interpretative declaration could be permissible or impermissible, but it still remained an interpretative declaration. One could even say that it was because a unilateral declaration was either a reservation or an interpretative declaration that one could determine whether or not it was permissible. It was in the light of those observations that draft guideline 1.4 had been elaborated and was at the current time submitted to the Commission.

The meeting rose at 1.05 p.m.

2552nd MEETING

Thursday, 30 July 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

Later: Mr. Igor Ivanovich LUKASHUK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-

Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,¹ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

GUIDE TO PRACTICE (*concluded*)

DRAFT GUIDELINE 1.4

1. Mr. PELLET (Special Rapporteur) said that he had given a full explanation (2551st meeting) of the object and purpose of draft guideline 1.4 on the scope of definitions. The draft guideline, which he would call a saving clause, was in fact a general pronouncement to make it perfectly clear that the Guide to Practice did not seek to go beyond the definition of concepts.

2. The text before the Commission established the principle that a unilateral declaration must be classified before the permissibility or impermissibility of its content was determined and the relevant regime was implemented, situation permitting. When applied to reservations, that principle made it possible to conclude that impermissible reservations existed.

3. He proposed that draft guideline 1.4 be referred to the Drafting Committee.

4. Mr. LUKASHUK said it was unfortunate that the Guide to Practice did not state that an interpretative declaration could under no circumstances obstruct the implementation of a treaty, either at the domestic level or internationally. Even though no regime was yet attributed to a jointly formulated interpretative declaration, such a declaration imposed upon the parties at least the principle of good faith, in other words that the declarant State must hold to the interpretation that it had given.

5. As for interpretative declarations in general, he wondered what should be done with that international legal device. Such declarations played a very important role, since a treaty established functional inter-State relations that evolved in accordance with the will of States. In that sense, a treaty was always being interpreted, as was well demonstrated by the Special Rapporteur in his third report on reservations to treaties (A/CN.4/491 and Add.1-6). The Vienna Conventions provided that in the interpretation of a treaty, any understandings reached between the parties regarding the meaning to be given to the provi-

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).