Document:-
A/CN.4/SR.2552

Summary record of the 2552nd meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

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).

sions of the treaty and the practice of States in the implementation of the treaty, including interpretative declarations, must be taken into account. The regime and legal status of interpretative declarations had obviously not been established, but it was senseless to carry out an in-depth study of the regime of reservations and say absolutely nothing about the regime of interpretative declarations.

6. Mr. BENNOUNA said the Special Rapporteur had been quite right to make the classification of a reservation or a unilateral declaration a precondition for the consideration of its permissibility.

7. The Commission had started with a draft Guide to Practice in respect of reservations and was currently faced with the problem of interpretative declarations which, while differing from reservations, encroached on some of their terrain. They were two different but overlapping phenomena. If the Commission went beyond the topic of reservations to take up the subject of interpretative declarations, it would be entering an immense universe, as demonstrated by the part of the third report under consideration. He thought it would be better not to head off in that direction. Perhaps the title of the Guide to Practice should be changed to read: "Practice in respect of reservations and interpretative declarations".

8. Draft guideline 1.4 made the concept of "permissibility" apply equally to both reservations and interpretative declarations, but that seemed inappropriate. While one could certainly speak of the permissibility of a reservation, what term should be used in respect of interpretative declarations? The Drafting Committee would undoubtedly find a solution.

9. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur had been right to conclude that the silence of international law on the subject of interpretative declarations was one more reason for the Commission to concern itself with them. Both reservations and interpretative declarations emanated from unilateral acts of States and they had the same object: they were thus very similar. But reservations were governed by positive law, while interpretative declarations were governed only by practice, which could be considered to have been institutionalized, even if not always in written form.

10. The Special Rapporteur was proposing what he called a "saving clause" which established the principle that classification as an interpretative declaration determined whether a declaration was permissible or not. The importance attached by the Special Rapporteur to the idea of permissibility, which was only one aspect of the problem of unilateral declarations, could be questioned: he could equally well have referred to the applicable regime. That was why he himself would propose that the middle part of the draft guideline be amended by the replacement of the phrase "is without prejudice to its permissibility under the rules" by the words "does not affect the permissibility or the regime".

11. In conclusion, he wondered if the dichotomy between reservations and interpretative declarations and the problem of where to put the draft guideline within the Guide to Practice were not two good reasons for the Commission to assign itself another topic: interpretative declarations on treaties.

12. Mr. ECONOMIDES said he could find nothing wrong with draft guideline 1.4, which raised the problem mentioned already by Mr. Bennouna and Mr. Pambou-Tchivounda, that of the "permissibility" of interpretative declarations under the rules of international law. While one could say that a reservation was impermissible, the same was not true for interpretative declarations, the "rules" of which had never been codified. One usually spoke of a declaration as being "operant" or "not operant", rather than "permissible" or "impermissible"—in other words, productive of legal effect or not. That terminological difficulty was not a reason to delete draft guideline 1.4, which had been presented as a saving clause, but it could be couched in more straightforward terms, such as: "The implementation of a reservation or an interpretative declaration as defined in part . . . of the Guide to Practice depends upon the permissibility of the reservation or the operant nature of the declaration under the international law applicable to reservations and interpretative declarations."

13. He endorsed the referral of draft guideline 1.4 to the Drafting Committee.

14. Mr. SIMMA and Mr. HAFNER said that they, too, would like to see draft guideline 1.4 referred to the Drafting Committee.

15. Mr. PELLET (Special Rapporteur) said that while it was true that the regime of interpretative declarations had never been codified, that did not mean that there were no rules applicable to them. Consequently, in contrast to what Mr. Bennouna and Mr. Economides maintained, an interpretative declaration could be considered impermissible. That concept certainly applied in respect of conditional interpretative declarations, which resembled reservations very closely, and which could be considered to be impermissible.

16. Was it really necessary to enter into the domain of interpretative declarations? He had thought to avoid that problematic legal device, but as the discussion went on, it was becoming necessary to envisage it at every turning point of the thinking on reservations.

17. Mr. BENNOUNA raised a methodological question that seemed to need clarification. As the Special Rapporteur had pointed out, conditional interpretative declarations were very similar to reservations, to the point that it was sometimes difficult to tell them apart. The main difference was that interpretative declarations were part of the world of treaties, which the declarant read in a certain way.

18. The Special Rapporteur was right to say that the problem of interpretative declarations had to be brought up at successive points in the consideration of reservations, but that such declarations were already defined under international law.

19. Mr. ROSENSTOCK said that those issues did not have to be resolved before draft guideline 1.4 was referred to the Drafting Committee. To allay the concerns of members who worried about speaking of the "permissibility"

of an interpretative declaration, perhaps the words "or effect" could be inserted after "its permissibility".

20. Mr. KATEKA pointed out that the Commission was entering into a discussion on specific features of the interpretative declarations to which the Special Rapporteur had devoted chapter I, section C, of his third report and said he would like to have the opportunity to put forward general remarks on that section as a whole.

21. Mr. GOCO said he was surprised that the Commission had already taken up draft guideline 1.4 when there were still a great many important issues to resolve. He, for example, had questions to raise about draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation was prohibited).

22. Mr. SIMMA (Chairman of the Drafting Committee) said he was sympathetic to the concerns expressed by Mr. Kateka and that it would be useful to outline the course ahead. The Drafting Committee would soon put the final touches on the draft guidelines concerning reservations and would submit the results of its work to the Commission in plenary. Since draft guideline 1.4 had raised a number of questions both in the Commission and in the Drafting Committee, however, it might be useful to decide what to do with it at the current time and to refer it to the Drafting Committee simultaneously with the draft guidelines on reservations. Clearly, it was out of the question to send the draft guidelines on interpretative declarations to the Drafting Committee at the current stage.

23. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.4 to the Drafting Committee.

It was so agreed.

DRAFT GUIDELINES 1.2 TO 1.3.1

24. Mr. KATEKA said that the topic of reservations to treaties, which was extremely complex in itself, was further complicated by the issues raised by interpretative declarations. The Special Rapporteur had pointed out in paragraph 254 of his third report that it must be admitted that the terminology in that area was marked by a high level of confusion. It was therefore important to draw a distinction between reservations and interpretative declarations.

25. In paragraphs 320 and 321 of his third report, the Special Rapporteur mentioned the specific problem of conditional interpretative declarations, stressing the significant distinction between application and interpretation. He himself was of the view that conditional interpretative declarations were true reservations and had to be treated as such. True, the Vienna regime was silent on the subject of interpretative declarations, but perhaps a formula similar to that used for reservations could be applied: when a treaty said nothing about reservations, States were authorized to formulate them, unless they were incompatible with the object and purpose of the treaty. It would be useful to incorporate that principle in the Guide to Practice. The same held true for the fact that a reservation had to be formulated in writing: that principle should be applied to interpretative declarations as well and included in the Guide.

26. Under cover of interpretative declarations, States had sometimes been known to try to formulate true reservations. Draft guideline 1.2.2 (para. 291) settled the matter by underlining the fact that it was not the phrasing or name of a unilateral declaration that determined its legal nature but the legal effect it sought to produce. The Special Rapporteur ended his analysis on a fairly pessimistic note, saying that regardless of how carefully reservations were defined and distinguished from interpretative declarations some uncertainty would always persist. It was to be hoped that he would continue to make his very useful contributions to the cause of eradicating uncertainty.

27. He was likewise concerned by interpretative declarations made in respect of bilateral treaties. He had expressed the hope (2551st meeting) that the Special Rapporteur would raise the matter, his idea being that such declarations should be prohibited, or at least discouraged. That was why he was dissatisfied with draft guideline 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party).

28. Mr. PELLET (Special Rapporteur) announced that the part of his third report concerning the problem of unilateral declarations made in respect of bilateral treaties would soon be issued. His colleagues would certainly wish to become familiar with it before making statements on the problem.

29. Mr. HAFNER said he wished to make a few general remarks on interpretative declarations and on chapter I, section C, that dealt with them. As the Special Rapporteur had emphasized, it was sometimes very difficult to distinguish between interpretative declarations and reservations, as many specific examples clearly showed. The Austrian Government had proposed that Parliament make an interpretative declaration concerning Protocol I to the Geneva Conventions of 12 August 1949, but Parliament had transformed that interpretative declaration into a reservation without changing the text in any way.[2]

30. The Vienna regime was not totally silent on the subject of interpretative declarations, in contrast to what had been said by some speakers. The general rules of interpretation in section 3 of the 1969 Vienna Convention could be considered to apply.

31. Though it was true that it was unnecessary to examine interpretative declarations in detail, the fact remained that the criteria for distinguishing them from reservations had to be clearly defined.

32. Mr. BROWNLIE said that being vigilant regarding the various types of behaviour engaged in by States did not mean it was indispensable to undertake the codification of interpretative declarations, which had no normative content. It might be sufficient to make a few remarks in the commentary, while avoiding any mention of the phenomenon in the Guide to Practice.

33. The CHAIRMAN invited the Special Rapporteur to introduce the draft guidelines relating to interpretative declarations.

[2] United Nations, *Treaty Series*, vol. 1289, pp. 303-304.

34. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2, which he had introduced (2551st meeting), had seemed necessary because the 1969 Vienna Convention did not define interpretative declarations. Draft guideline 1.2.2, to which Mr. Kateka had directed his comments, indicated that it was the objective pursued that made the difference between reservations and interpretative declarations, in accordance with the definition of reservations given in the Convention. Mr. Kateka seemed to equate impermissible reservations with conditional interpretative declarations. If, however, one took the example of the United Nations Convention on the Law of the Sea, which explicitly prohibited reservations but permitted interpretative declarations, the question arose as to whether a conditional interpretative declaration made by a State concerning that Convention would be permissible. While the regime of conditional interpretative declarations could be aligned with that of reservations in a great many instances, the two concepts could not be completely fused.

35. He agreed with Mr. Hafner that articles 31 and 32 of the 1969 Vienna Convention provided indications of the legal regime for interpretative declarations, even though the expression was not used therein. But the Convention did not give a definition, and the Commission was doing useful work in proposing one. As for the declarations attached to treaties of accession in the area of community law, for example, it was difficult to imagine them as being unilateral declarations under international law insofar as they were the subject of lengthy negotiations and were accepted with the conclusion of the treaty of accession. Perhaps they should be considered a type of interpretative declaration.

36. Mr. Brownlie had questioned the need for codification of interpretative declarations, which had no normative content. He himself believed that such declarations did not have to have normative content in order for the Commission to try to define them. The provisions of a treaty that defined a term were not strictly speaking of a normative character either, but they affected the subsequent application of the relevant mechanism. Without getting into the codification of interpretative declarations, the Commission should at least propose a definition thereof and answer the question of whether or not the legal regime for reservations could be carried over to such declarations.

37. Mr. SIMMA said that Mr. Brownlie had drawn attention to a real problem: by trying to push too far with the codification of interpretative declarations, the Commission might lose sight of the objective of the draft guidelines it was elaborating—to facilitate a distinction between reservations and interpretative declarations. All the Special Rapporteur's proposals except draft guideline 1.2.1 (Joint formulation of interpretative declarations) met that criterion.

38. The relationship between interpretative declarations and the provisions in the 1969 Vienna Convention on the interpretation of treaties could be envisaged from two different viewpoints. Article 31, paragraph 2 (*b*), stated that a treaty could be interpreted with the assistance of, among other things, any "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". But another provision (art. 31, para. 3 (*b*)) stated that any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" could be used to define interpretative declarations formulated at a later date. The Special Rapporteur was referring to that article when, in draft guideline 1.3.1, he proposed to apply the general rule of interpretation of treaties set out in article 31 of the 1969 Vienna Convention. The Commission must nevertheless be alert to the fact that the general rules laid down in the Convention had the purpose of clarifying the meaning of an agreement entered into voluntarily by two or more parties, whereas the interpretative declarations covered in the draft guidelines involved unilateral declarations. The Commission had to determine whether rules designed to regulate the expression of consent at the bilateral or multilateral level could be applied to a unilateral interpretative declaration.

Mr. Lukashuk took the Chair.

39. Mr. ILLUECA pointed out that the definition given in draft guideline 1.2 applied to both bilateral and multilateral treaties. Although the Special Rapporteur wanted the Commission to concern itself primarily with multilateral treaties, some bilateral treaties developed into multilateral treaties or had effects on third States.

40. The criteria proposed by the Special Rapporteur for distinguishing between reservations and interpretative declarations were not the same for conditional interpretative declarations. Aside from the problem of terminology, the definition performed a unique function in determining the permissibility of a unilateral declaration. The Special Rapporteur was right to say that it had to be determined whether an interpretative declaration was involved before deciding whether it was permissible or not.

41. He drew attention to article 46 of the 1969 Vienna Convention on the provisions of internal law regarding competence to conclude treaties and recounted an incident connected with the Panama Canal Treaty.[3] A group of senators from the United States of America had formulated an objection because the reservations, amendments and conditions appended to the Treaty had not been submitted to a referendum in Panama, in contrast to what was provided by the Panamanian Constitution, although the Treaty itself had been approved by a referendum organized under United Nations auspices. Panama had maintained that the reservations, amendments and conditions concerned had been accepted by the Panamanian Government at the time of ratification of the Treaty and did not need to be submitted to a new referendum. It had likewise argued that the reservations, amendments and conditions were part of the interpretation of the Treaty. The United States Government had conceded that Panama's position had a good legal foundation and that it was not in violation of Panama's internal law within the meaning of article 46 of the 1969 Vienna Convention.

42. Referring again to the Panama Canal Treaty, he said it was a good example of a bilateral treaty with multilateral effects, which in that instance derived from the

[3] Signed at Washington on 7 September 1977 (United Nations, *Treaty Series*, vol. 1280, p. 3).

Canal's regime of permanent neutrality. The rights and interests of third States were taken into consideration under a regime that was part of general international law but was likewise governed by a bilateral treaty and a protocol concerning the permanent neutrality of the Canal to which several States had adhered.

43. In conclusion, he said that the Special Rapporteur's work was extremely interesting in that he had taken into account the situation of third States and the problem of compatibility with general international law.

44. Mr. ADDO, referring to the comments by Mr. Kateka and the Special Rapporteur's response on the subject of conditional interpretative declarations, requested clarification on one particular point. If, when ratifying a treaty, a State made an interpretative declaration indicating that it would become a party to the treaty only if its interpretation was accepted by other parties, and if another State rejected that interpretation, could that rejection pose an obstacle to the treaty's entry into force between the State that had made the interpretative declaration and the one that had objected?

45. Mr. AL-BAHARNA said that the definition set out in draft guideline 1.2 was entirely appropriate. He proposed that it be used to elaborate a provision explicitly stating that States had the right to make interpretative declarations as long as they met two criteria. The first, set out in paragraph 231 of the third report, was that such declarations must not seek to modify or exclude the legal effect of certain provisions of the treaty, and the second, drawn from article 19, subparagraph (*c*), of the 1969 Vienna Convention and adapted to interpretative declarations, was that they must not be incompatible with the object and purpose of the treaty. Finally, since the interpretative declarations thus defined could not be reservations, the relevant draft guideline should be placed at the end of the Guide to Practice.

46. Mr. HERDOCIA SACASA said that the definition proposed in draft guideline 1.2 corresponded well to the need to dispel the misunderstandings, deliberately engendered or not, surrounding the concept of the interpretative declaration and what distinguished it from reservations. The tools for the analysis of reservations were furnished in articles 1 and 19 to 23 of the 1969 Vienna Convention; other criteria had to be elaborated for interpretative declarations. Under the proposed definition, such declarations had to purport to clarify the meaning or scope of the treaty, and it was the intention and content of the declaration, and not its name or form, that were decisive. But a limitation mentioned by the Special Rapporteur in paragraph 231 of his third report should perhaps be introduced: that interpretative declarations sought neither to modify nor to exclude the legal effect of certain provisions of the treaty.

47. Mr. ECONOMIDES said he had four comments to make about the definition of interpretative declarations. First, a crucial term was absent from the definition: the verb "to interpret". Secondly, a reservation modified or excluded the legal effect only of certain provisions of a treaty, but under the proposed definition, an interpretative declaration would have the object of clarifying the meaning or scope of the entire treaty. He was not convinced that that distinction was borne out in practice. Thirdly, the phrase "attributed by the declarant to the treaty" introduced a subjective element, that risks weakening the rules concerning the interpretation of treaties. Lastly, limits must be placed on interpretative powers by indicating that an interpretation must be in accordance with the letter and spirit of the provision concerned, even though that element was perhaps more in line with the legal regime than with the definition of interpretative declarations. Accordingly, he proposed that the final part of draft guideline 1.2 be amended to read: "purports to interpret certain provisions of the treaty by clarifying their meaning or scope".

48. Mr. BENNOUNA said that he, too, questioned the advisability of using the phrase "attributed by the declarant to the treaty". The Drafting Committee should perhaps reformulate the definition in the light of the primary objective of all exercises of interpretation—to give the exact meaning of what was being interpreted. Interpretation derived, in addition, from a concern to facilitate compatibility between international law and internal law. The United Nations Convention on the Law of the Sea, to which the Special Rapporteur had referred, contained many provisions that necessitated the revision of domestic legislation and consequently provided for the possibility of formulating interpretative declarations concerning its implementation. Perhaps draft guideline 1.2 should contain similar language to the effect that interpretative declarations purported to clarify not only the meaning or scope of the treaty but also the conditions for its implementation.

49. Mr. GALICKI said that the definition proposed in draft guideline 1.2 aptly highlighted both the major differences between reservations and interpretative declarations and the purpose of interpretative declarations. Since the text was in some sense a basic provision from which several others were derived, however, it might be useful to include language in the negative mode, stating what interpretative declarations were not.

50. Mr. AL-BAHARNA pointed out that the verb "to interpret" could be interpreted in various ways itself, so that the use of the term might deprive the definition of some of its operational relevance. The comments made on the word "attributed" were very pertinent: it would indeed be more prudent to say that an interpretative declaration purported to clarify the position of the declarant State with regard to the treaty in its entirety or to certain of its provisions.

51. Mr. PELLET (Special Rapporteur), responding to the various comments made during the meeting, said that the fact that many aspects of the regime of reservations applied to conditional interpretative declarations was not enough, in his opinion, for conditional interpretative declarations to be described as reservations. As for the idea that a conditional interpretative declaration might contain a false interpretation, it raised the legal and philosophical question of whether an interpretation could be false. Many speakers had opined that the definition should include a negative formulation. He had preferred to make it symmetrical to the definition in draft guideline 1.1, the opposite approach being used in draft guidelines 1.3.0, 1.3.0 *bis* and 1.3.0 *ter*. He was not, however, opposed to having the definition indicate that an interpretative declaration did not purport to modify or exclude the legal effect of a treaty or certain of its provisions.

52. Simplifications that complicated matters should, however, be avoided: the definition of interpretative declarations was not the place to describe the legal regime applicable to them, and it seemed premature to transpose to interpretative declarations article 19 of the 1969 Vienna Convention, on the formulation of reservations.

53. Similarly, the warnings given about the verb "attributed" and the concerns expressed about limiting the power of interpretation went back to the question of the legal regime for interpretative declarations. On the other hand, the remark that an interpretative declaration purported to clarify, not the meaning or scope of a treaty, but the position of the declarant State in respect of the treaty, was relevant at the stage of definition. To introduce the term "interpret" into the definition would make it somewhat repetitive.

54. On the other hand, to indicate that an interpretative declaration could apply to the treaty in its entirety was well in line with practice, and it would not be wise to rule out the solution of transverse interpretative declarations by retaining the limitations wrongly imposed by the 1969 Vienna Convention.

55. Lastly, to have the definition say that an interpretative declaration also purported to clarify the conditions for implementing a treaty would be to introduce into the definition the problem of relations between international law and internal law, a problem that actually related to draft guideline 1.2.6.

56. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2 to the Drafting Committee.

It was so agreed.

The meeting rose at 12.05 p.m.

2553rd MEETING

Friday, 31 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. 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. Sreenivasa Rao, Mr. Rosenstock, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), introducing chapter II, section C, of his first report on State responsibility (A/CN.4/490 and Add.1-7) concerning part one, chapter II, of the draft articles (The "act of the State" under international law), said that draft articles 5 to 15, which made up chapter II, related to the first of the two conditions for State responsibility set in article 3 (Elements of an internationally wrongful act of a State), that is to say, that the conduct in question must be attributable to the State, the other condition being that it must constitute a violation of an international obligation of the State. Since the adoption of the articles on first reading in the 1970s the jurisprudence on the topic had grown considerably, as a result of the work both of ICJ and of various other arbitral or human rights courts. Some of the draft articles were cited in that jurisprudence and must therefore be handled with care, but for others the room for manoeuvre was greater. The comments of Governments on the chapter had certainly come from a small number of States but were no less substantial for that. Generally speaking, the main concern of Governments was to ensure that attribution could be made on a sufficiently broad basis to prevent a State from escaping its responsibility by means of formal definitions of its organs or agents and to prevent the recent tendency for privatization of the public sector from leading to any reduction of the scope of the rules of attribution. The Commission had to take the comments of Governments into account as it continued its work on the topic. However, no Government was proposing any change to the basic structure of the positive-attribution articles; thus his own few proposed changes were essentially for clarification. There were two distinct groups of articles in that basic structure: articles 5 to 8 and 10, which dealt with attribution in general, and articles 9 and 11 to 15, which dealt with specific problems; he had added a draft article 15 *bis* on a special case which had not been addressed in the articles.

ARTICLES 5 TO 8 AND 10

2. The "general" articles on attribution gave rise to two problems of terminology. The first was that the Commission had preferred the term "attribution" to the term "imputability"[4] used at the outset by the former Special Rapporteur, Mr. Roberto Ago.[5] ICJ had continued to use "imputability" in later cases. The Commission's choice

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* Resumed from the 2547th meeting.

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.

[4] See *Yearbook . . . 1971*, vol. II (Part One), p. 214, document A/CN.4/246 and Add.1-3, para. 50.

[5] See *Yearbook . . . 1970*, vol. II, pp. 187 et seq., document A/CN.4/233.