

Document:-
A/CN.4/SR.2581

Summary record of the 2581st meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
1999, vol. I

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ARTICLE 26 (Granting of the right of option by the predecessor and the successor States)

Articles 25 and 26 were adopted.

Part II was adopted.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the whole set of draft articles.

It was so agreed.

The draft articles on nationality of natural persons in relation to the succession of States were adopted on second reading.

20. Mr. ECONOMIDES said that, if there had been a vote on the draft articles just adopted in their entirety, he would have abstained, in view of the criticisms he had expressed with regard to a number of draft articles.

21. The CHAIRMAN thanked all members of the Commission for their cooperation in the adoption of the draft articles. With regard to the form they should take, if he heard no objection, he would take it that the Commission wished to recommend that the draft articles should be adopted by the General Assembly in the form of a declaration.

It was so agreed.

22. The CHAIRMAN welcomed the adoption of a new set of draft articles. He expressed his thanks to Mr. Mikulka, who had been Special Rapporteur on the draft articles before becoming Secretary to the Commission, and also Mr. Candiotti, the Chairman of the Drafting Committee.

23. Mr. Sreenivasa RAO commended the excellent work done by the Special Rapporteur, thanks to which the Commission had adopted the draft articles on second reading speedily and without difficulty. He proposed that, as was customary, the Commission should adopt a resolution expressing its gratitude to the Special Rapporteur.

24. The CHAIRMAN welcomed that proposal and said that a resolution paying tribute to the former Special Rapporteur, Mr. Mikulka, would be submitted in due course.

25. Mr. PELLET noted with satisfaction that the Commission had adopted the draft articles on nationality of natural persons in relation to the succession of States on second reading, but asked whether it had yet taken a final position on the question of nationality of legal persons or, more broadly, on the question of the rights and obligations of legal persons in relation to a State succession.

26. The CHAIRMAN said that the Commission would first have to consider the commentary to the draft articles on nationality of natural persons in relation to the succession of States which had just been adopted. After the members had had an opportunity to hold informal consultations, it would then decide what action it intended to take concerning the question of nationality of legal persons in relation to the succession of States.

27. Mr. KUSUMA-ATMADJA said he wished to express his personal gratitude to the Chairman of the Drafting Committee, the Chairman of the Commission and the Special Rapporteur. He was satisfied with the draft articles adopted, although he had some reservations on a few terminological and conceptual matters. He pointed out that there were differences even among countries rooted in the Roman law system; thus, some South-East Asian countries had a code based on the Swiss code, while that of others was based on the German code.

28. Mr. ADDO thanked the Chairman, who had proved an effective Chairman of the Working Group on nationality in relation to the succession of States.

29. The CHAIRMAN said that his task as Chairman of the Working Group and of the Commission had been greatly facilitated by the high quality of the draft articles submitted.

The meeting rose at 11.25 a.m.

2581st MEETING

Thursday, 3 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties¹ (A/CN.4/491 and Add.1-6,² A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,³ A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to take up the topic of reservations to treaties. At the fiftieth session, the Special Rapporteur had started to introduce chapter I,

¹ For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

² See *Yearbook ... 1998*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1999*, vol. II (Part One).

section C, of his third report (A/CN.4/491 and Add.1-6) concerning interpretative declarations, but the Commission had not had time to consider all of the draft guidelines included in the third report. Only draft guideline 1.2 (Definition of interpretative declarations), in chapter I, section C, had been transmitted to the Drafting Committee. He invited the Special Rapporteur to continue his introduction of the draft guidelines included in chapter I, section C, and then to proceed with the introduction of chapter II of the third report and his fourth report (A/CN.4/499 and A/CN.4/478/Rev.1).

2. Mr. PELLET (Special Rapporteur) said that, unfortunately, some delay had occurred in the submission of his fourth report, and he had been absent during the early part of the current session for unexpected reasons. However, if the Commission succeeded in adopting the 14 remaining draft guidelines and all of the commentaries, as well as the 3 other draft guidelines referred to the Drafting Committee by the Commission at its fiftieth session, it would have completed satisfactory work.

3. He intended first to take stock of the situation, which would correspond to the introduction to his fourth report, and then to introduce, one by one, the draft guidelines still to be considered.

4. At the fiftieth session, the Commission had managed to consider only the part of his third report which dealt with the definition of reservations and interpretative declarations. Great progress had been made on reservations, with the adoption of a general definition in draft guideline 1.1 (Definition of reservations) and five draft guidelines, including one guideline with no number whose placement in the draft Guide to Practice would be decided at a later date. As the Commission had not followed his own numerical order in adopting the draft guidelines, to avoid confusion he would refer to both sets of numbers where necessary.

5. The five numbered draft guidelines that had been adopted were 1.1.1 (Object of reservations), 1.1.2 (Instances in which reservations may be formulated), 1.1.3 (Reservations having territorial scope), 1.1.4 (Reservations formulated when notifying territorial application) and 1.1.7 (Reservations formulated jointly). The unnumbered guideline stated that defining a unilateral statement as a reservation was without prejudice to its permissibility and its effects under the rules relating to reservations, and it thus made an extremely important clarification. When adopting the draft guidelines that were still to be considered, the Commission must bear in mind that it was not regulating but was exclusively defining, without entering into the area of permissibility or effects.

6. At its previous session, the Commission had decided to return draft guidelines 1.1.5 (Statements designed to increase the obligations of their author) and 1.1.6 (Statements designed to limit the obligations of their author) to the Drafting Committee, which was currently considering them. Those two draft guidelines, which attempted to clarify the very difficult problem of so-called extensive reservations, had mistakenly been reproduced in paragraph 540 of the French version of the report of the Commission to the General Assembly on the work of its

fiftieth session⁴ as if they had been provisionally adopted. He requested the secretariat to take the necessary steps to correct that error.⁵ In accordance with decisions taken at the second part of the fiftieth session in New York,⁶ the Drafting Committee was invited to depart from the usual practice and propose new wordings for draft guidelines 1.1.1 and 1.1.3. He had fully agreed with the possibility of reviewing draft guideline 1.1.1 in the light of the definition of unilateral declarations but remained reserved on the need to review draft guideline 1.1.3 together with draft guideline 1.1.1. As the Drafting Committee had nearly concluded its consideration of draft guideline 1.2, it would soon be turning its attention to draft guidelines 1.1.1 and 1.1.3.

7. Another difficulty encountered at the fiftieth session was that a large majority of the members of the Commission had contested the proposed draft guideline on reservations relating to non-recognition, numbered 1.1.7 in his third report. Their reaction had convinced him to withdraw that guideline and propose a different text in his fourth report, which he suggested the Commission should take up at a forthcoming meeting. He trusted the Commission would succeed in resolving at the current session all the problems to which he had referred.

8. Two other matters not covered at the fiftieth session were the definition of interpretative declarations, something which the Commission had merely skimmed, and chapter II of the third report concerning reservations and interpretative declarations in respect of bilateral treaties, which it had not taken up at all. He would confine himself to interpretative declarations; the question of "reservations" to bilateral treaties might be taken up when the general questions concerning interpretative declarations had been concluded.

9. Interpretative declarations were as long-standing a phenomenon as reservations. Although their principle was not contested, the 1969 and 1986 Vienna Conventions made no mention of them; hence the importance of their inclusion in the Guide to Practice. Such was the aim of draft guideline 1.2, which was the counterpart for interpretative declarations of draft guideline 1.1 on reservations. One of the differences between the two was that the Commission could not depend on the texts of generally-accepted treaties for draft guideline 1.2, as none existed. It read:

“‘Interpretative declaration’ means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.”

However, the English version omitted the word *préciser*. The phrase in question might therefore read "... purports to specify or to clarify ...". The Commission had considered the text at its fiftieth session and had generally approved it. It seemed that the Drafting Committee, which had met the day before, had also been generally favour-

⁴ Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10).

⁵ The final text appears in *Yearbook ... 1998*, vol. II (Part Two), p. 99.

⁶ Ibid., footnotes 207 and 208.

able to it and the Commission could in all likelihood proceed to consider draft guidelines 1.2.1 (Joint formulation of interpretative declarations), 1.2.2 (Phrasing and name), 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited), 1.2.4 (Conditional interpretative declarations), 1.2.5 (General declarations of policy) and 1.2.6 (Informative declarations) on the basis of draft guideline 1.2.

10. Draft guidelines 1.2.1 to 1.2.6 were designed to supplement the general definition in draft guideline 1.2 on several points. As draft guidelines 1.2.7 (Interpretative declarations in respect of bilateral treaties) and 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) dealt with bilateral treaties, he proposed that the Commission should skip from draft guideline 1.2.6 to draft guidelines 1.3.0 et seq. concerning the distinction between reservations and interpretative declarations and return to draft guidelines 1.2.7 and 1.2.8 when it came to consider draft guideline 1.1.9 (“Reservations” to bilateral treaties). He proposed that the Commission proceed to take up the draft guidelines in the order he had suggested, beginning with draft guideline 1.2.1.

11. The CHAIRMAN noted that draft guidelines 1.1.5 and 1.1.6 had indeed not been adopted; and they had been omitted from all the language versions of the Commission’s report except the French.

12. Mr. HE expressed appreciation to the Special Rapporteur for the draft guidelines and the part of the third report concerning interpretative declarations, which represented a topic of special interest in international law circles and would constitute a valuable contribution to the law of treaty reservations.

13. The present approach to the subject focused on reservations and considered interpretative declarations by way of contrast. He wondered whether that was preferable to a parallel approach. Given the common elements between the reservations and interpretative declarations, the crucial criterion for distinguishing them was the teleological factor: while a reservation was intended to exclude or modify the legal effect of the treaty’s provisions, an interpretative declaration sought only to interpret the treaty or some of its provisions. Clarifying the difference between the two was particularly helpful in situations where States tried to cloak reservations as interpretative declarations when a treaty prohibited reservations.

14. As its name indicated, an interpretative declaration was intended to interpret. He was pleased in that connection to hear that the Drafting Committee had completed its consideration of draft guideline 1.2. Although the 1969 Vienna Convention did not mention them, he believed that interpretative declarations could be made under the provisions set forth in articles 31 and 32, in conformity with the letter and spirit of the relevant treaty and its corresponding provisions. On the other hand, any unilateral statement designed to preclude or modify the legal effect of certain provisions of the treaty should be regarded as a reservation, even when presented under the heading of interpretative declaration.

15. Mr. LUKASHUK congratulated the Special Rapporteur on his detailed reports on a topic that was of cur-

rent interest. The style of the Guide to Practice should be almost the same as that of a manual, but that was not always the case. The definition of reservations in draft guideline 1.1 included a phrase referring to the time when a reservation was made. There was no need for that phrase and it should be placed in a separate guideline. The Special Rapporteur himself seemed to understand that, for in paragraph 132 of his third report he had written that the idea of including limits *ratione temporis* to the possibility of formulating reservations in the definition itself of reservations was not self-evident and, in fact, such limits were more an element of their legal regime. That was entirely correct, and it was for that very reason that the phrase should be in a separate guideline.

16. The Special Rapporteur seemed to have forgotten that it was unwise to go looking for trouble, for example, in the provision on joint reservations. Admittedly, in practice States at present did not resort to joint reservations, but the draft guideline on joint reservations itself raised a whole series of legal problems. Did one of the authors of the reservations have the right to withdraw it, and under what conditions? However, the main issue was that, in proposing a provision on situations that were unlikely to arise, the Commission could be creating the impression that there was no real material for codification, since the situations were merely hypothetical. It would be better advised to concentrate on real problems that actually existed.

17. Mr. PELLET (Special Rapporteur), responding to the comments made by Mr. Lukashuk, said it was surprising to see that he was reopening the question of the time element, which had already been decided with the Commission’s adoption of draft guideline 1.1, which in any event merely reproduced the provisions of the 1969 Vienna Convention.

18. As to whether one should be proactive or not, his personal preference was to forge ahead rather than to lag behind. Since joint reservations were beginning to appear on the horizon, the Commission would do better to address the issue, rather than to leave the matter hanging in the void to be dealt with by those who might have to carry on the work in the future and their endeavours might be made all the more difficult by the Commission’s very failure to give any guidance.

19. He agreed to some extent with Mr. He’s questions about his approach and would try to follow a middle path, using reservations as the central axis but pursuing in future chapters the analysis of the rules applicable to interpretative declarations, in counterpoint to the work on reservations. There was no question that reservations were the linchpin of the draft Guide to Practice, but he was increasingly convinced that, if interpretative declarations were left to one side, the Commission’s work would not prove satisfactory. He would perhaps revert to the issue in presenting the remaining part of the fourth report in order to hear what members of the Commission had to say about it.

GUIDELINE 1.2.1

20. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.1, proposed in his third report, dealt with the joint formulation of an interpretative declaration and was the counterpart, as far as interpretative declarations were concerned, of draft guideline 1.1.7 concerning reservations provisionally adopted by the Commission at its fiftieth session. For the sake of consistency, the Commission might wish to transpose draft guideline 1.2.1 to the end of the section of the Guide to Practice on interpretative declarations, as it had done in the case of reservations.

21. The draft guideline should not pose any major difficulties. At its fiftieth session, the Commission had accepted the idea that, although they were unilateral statements, reservations could be formulated jointly by a number of States or international organizations. In so doing, the Commission had engaged in progressive development of international law rather than of codification *stricto sensu*, for, as far as he knew, no reservation had yet been formulated jointly. In contrast, joint formulation of interpretative declarations had already entered into practice, and a number of examples were given in paragraph 268 of his third report. By including a guideline on joint formulation of interpretative declarations, the Commission would merely be acknowledging a practice that had the merit of making life easier for States, particularly for depositaries, which could treat as a single document a unilateral declaration that came jointly from several States or international organizations. In view of the Commission's discussions at the previous session on the corresponding draft guideline for reservations, however, draft guideline 1.2.1 should be reviewed at the current time to align it with draft guideline 1.1.7 provisionally adopted by the Commission. That task could easily be accomplished by the Drafting Committee if, as he hoped, the Commission submitted draft guideline 1.2.1 to the Drafting Committee together with a recommendation that it should decide on the proper position for the draft guideline.

22. Mr. GAJA said he wondered whether bringing draft guideline 1.2.1 into line with draft guideline 1.1.7 would change its meaning in some way. As already pointed out, when a declaration was formulated jointly, there might either be a series of unilateral acts or a collective act. States might have difficulty in disengaging themselves from something done jointly with other States. The Special Rapporteur's formulation of the draft guideline was more neutral and seemed preferable.

23. Mr. ECONOMIDES said he experienced no difficulty with draft guideline 1.2.1, but would like to know whether the Special Rapporteur was intending to propose at some future date provisions on the withdrawal of joint reservations and interpretative declarations formulated jointly. What should be done with regard to withdrawal when several States had formulated a reservation or made an interpretative declaration? Was unilateral withdrawal possible in such a situation? When would collective withdrawal be required?

24. Mr. PELLET (Special Rapporteur) said that the question would necessarily lead to consideration of the regime for joint reservations or jointly formulated interpretative declarations, to the extent that they raised a

number of specific problems already touched on at the previous session. He had been intending for the current session to devote a chapter to withdrawal of reservations and interpretative declarations in which he would take up the specific issue of withdrawal of joint reservations and jointly formulated interpretative declarations. Such issues would inevitably arise in practice, and it would be best to be prepared for that eventuality in the interests, not of inventing problems, but of anticipating those that might occur, in order to try and help States resolve them.

25. Mr. Gaja's comments reverted to a discussion the Commission had already held at length at the previous session. The somewhat academic formulation he had originally proposed had been modified, in the light of the Commission's comments, in the direction of greater precision. The acts in question had been clearly identified as unilateral declarations, something that complicated the Commission's task, but it had been a considered decision on the Commission's part. It was essential to align the provision on interpretative declarations with that of reservations and the Drafting Committee was called upon to engage in what was purely a drafting exercise.

26. Mr. GAJA said that as long as the problem of withdrawal was going to be addressed, the alignment of the texts on reservations and on interpretative declarations was more acceptable.

27. Mr. LUKASHUK said that unlike joint reservations, interpretative declarations formulated jointly gave rise to no legal consequences in respect of the relations among the States that had acted jointly. Reference could be made to estoppel in that connection. But as the Special Rapporteur had already pointed out, the situation addressed by draft guideline 1.2.1 was already starting to arise in practice. The draft should accordingly be approved.

28. Mr. PELLET (Special Rapporteur) said he did not agree with Mr. Lukashuk that interpretative declarations had no legal consequences: they did, but not the same consequences as did reservations.

29. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.1 to the Drafting Committee.

It was so agreed.

GUIDELINE 1.2.2

30. Mr. PELLET (Special Rapporteur), introducing draft guideline 1.2.2 on the phrasing or name of a unilateral declaration, said that the expression was infelicitous but had been taken from the Vienna definition of reservations. The reason for its inclusion in the draft was that, according to the definition of reservations in the 1969 and 1986 Vienna Conventions, which was incorporated in draft guideline 1.1, the phrasing or name that a State chose to apply to a statement was of no effect in determining whether the statement was a reservation or not. The same was naturally true, by extension, with respect to interpretative declarations, and he had accordingly included the words "phrased or named" in draft guideline 1.2. No objection had been made in the Commission to that for-

mulation, which was also introduced into draft guideline 1.2.1.

31. However, the indifference inherent in the phrasing or name that a State deliberately chose to use to refer to its unilateral declaration was somewhat immoral. It amounted to acknowledging that a State could knowingly practise deceit by designating as a reservation something it knew perfectly well was an interpretative declaration, or conversely, and more frequently and with more serious consequences, by calling an interpretative declaration something that was, in reality, a reservation.

32. Many writers, adopting a moralistic stance, believed that States must be taken at their word in order to prevent them from modifying their initial position concerning the nature of their unilateral declarations. He sympathized with that stance, which also had the advantage of being straightforward: when a State said that it had made a reservation, the rules for reservations would apply, and in the case of interpretative declarations, the rules for such declarations would apply.

33. But it was neither possible nor reasonable nor logical to go that far, for two reasons that were detailed in paragraphs 277 to 283 of his third report. First, such a categorical stance would be completely incompatible with the clear terms of the Vienna definition, and secondly, it would run counter to what was clear and consistent State practice and legal precedents that were well founded if somewhat scarce. The Commission would not only not be engaging in codification or progressive development: it would in fact be legislating, something which was not its task.

34. On the other hand, a small step could and should be taken in the direction of moral rectification of State practice, and that was what he proposed in draft guidelines 1.2.2 and 1.2.3. The proposal was not, however, a proposal *de lege ferenda*. The phrasing or name of a unilateral declaration was never sufficient to designate it as a reservation or as an interpretative declaration, but it could help in proceeding to make such a designation. A number of examples in support of that position, drawn from legal precedent and doctrine, were given in paragraphs 284 to 287 of his third report.

35. Draft guideline 1.2.2 thus struck a good balance between the amorality of total indifference to the phrasing or name given by a State to a unilateral declaration and the unrealism of an absolute presumption in favour of the terminology adopted by the declarant State itself. Although a State might sometimes wish to deceive others by deliberately choosing an erroneous designation, there were also times when a State deceived itself. States did have ulterior motives at times, but that did not mean they constantly sought to deceive their partners. The dark doubts raised in radical elements of the doctrine about the good faith of States were no more justified than were the assumptions about the angelic nature of their intentions. It would be inadmissible for States to be inexorably cornered by errors committed in good faith.

36. In pursuing a proper balance, the draft guideline eschewed such words as “presumption” in favour of “indication” of the desired objective and it emphasized a particularly striking situation: one in which a State or an

international organization simultaneously formulated several unilateral statements, designating some of them as reservations and others as interpretative declarations. The situation was illustrated by the position taken by the European Court of Human Rights in the *Belilos* case: everything pointed to the conclusion that the declarant State had not acted haphazardly but had deliberately made a distinction between what it considered to be a reservation and what it considered to be an interpretative declaration, using two different names. Such a deliberate distinction had to be taken into account in favour of the State or, where necessary, against it. The 1977 decision by the arbitration tribunal in the *English Channel* case was also in keeping with that general philosophy.

37. The Commission would accordingly be doing useful work by including in the Guide to Practice a provision expressing the ideas laid out in draft guideline 1.2.2, which he hoped the Commission would transmit to the Drafting Committee. There was certainly room for considerable improvement of the wording, although he had no specific proposals to make at present. He would also be grateful for the views of members of the Commission as to whether the draft guideline should be placed, not in section 1.2 as it was at the current time, but in section 1.3 (Distinction between reservations and interpretative declarations), since the draft guideline dealt with a problem that arose in connection with both types of statement and not just with interpretative declarations.

38. Mr. SIMMA agreed with the Special Rapporteur that draft guideline 1.2.2 belonged more properly in section 1.3 of the Guide to Practice and suggested that draft guideline 1.2.3, which seemed to address the same issue, should also be moved.

39. Mr. GOCO, noting that the implication of draft guideline 1.2.2 was that the phrasing or name of a unilateral declaration was immaterial, asked whether it would be necessary, under those circumstances, to rely on a particular interpretation of the unilateral declaration to determine the legal effect it sought to produce.

40. Mr. PAMBOU-TCHIVOUNDA joined other members in congratulating the Special Rapporteur on the calibre of his work and said that he agreed with the suggestion to move draft guideline 1.2.2 to section 1.3. However, he had misgivings about the wording, which not only lacked elegance but also detracted from the clarity of the definition of an interpretative declaration in draft guideline 1.2. The first sentence cautioned against accepting the phrasing or name at face value because what was really important was the legal effect that the declaration sought to produce. But how was that effect to be determined a priori? If there had been a reference to content rather than legal effect, he could have found the wording acceptable. Otherwise, the Commission would be engaging in a pedagogical exercise. For stylistic reasons, he also suggested beginning with “The phrasing or name” rather than “It is not the phrasing or name” and rearranging the sentence accordingly.

41. According to the second sentence, the phrasing or name provided an indication of the desired objective. More emphasis should be placed on the fact that it was only one of several possible indications of the desired

objective. Again, he wondered whether there was any point in including the third sentence. A reservation purported to exclude or modify the legal effect of certain provisions of a treaty, whereas an interpretative declaration purported to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions. The distinction was thus clear from the content of the unilateral declaration.

42. Mr. ECONOMIDES noted that the definitions of both a reservation and an interpretative declaration contained the phrase “however phrased or named”. But a guideline entitled “Phrasing and name” was included only in the section on interpretative declarations. Was the discrepancy intentional or simply an omission? Perhaps an identical guideline should be inserted in the section on reservations.

43. He found the word “phrasing” in draft guideline 1.2.2 somewhat ambiguous, since it could designate both the title of a declaration and its entire content. As to Mr. Pambou-Tchivounda’s suggestion to replace the words “legal effect” by the idea of content, the content of a legal instrument or declaration was, of course, far more pertinent and instructive than its title. And it was the content that produced, at a later stage, the legal effect contemplated by the signatory or declarant. He suggested that the draft guideline should refer to both content and legal effect in order to reflect both stages of the exercise.

44. Apparently, the Special Rapporteur had been referring to a preliminary indication in the phrase “an indication of the desired objective”. In the vast majority of cases, when a State made a reservation or an interpretative declaration, it respected the designation it had chosen. In exceptional cases, however, the designation might be spurious: a reservation might be misrepresented as an interpretative declaration and vice versa. Hence, it was not the phrasing and name but the content that was important. The commentary should reflect that fact and should also state that, in practice, the phrasing and name were only an indication of content.

45. It was too soon to decide on where to place draft guideline 1.2.2. Some provisions were applicable to both reservations and interpretative declarations. Others related solely to one or the other. The Commission might later opt for a threefold division into common rules, rules governing reservations and rules governing interpretative declarations. At the present stage, it should seek to assign each draft guideline to one of the three categories.

46. Mr. HERDOCIA SACASA congratulated the Special Rapporteur on his work and his willingness to reflect the proposals of other members of the Commission in the Guide to Practice.

47. With regard to draft guideline 1.2.2, article 2, paragraph 1 (a), of the 1969 Vienna Convention stipulated that a treaty was an international agreement concluded between States “whatever its particular designation”. That principle was reflected in the draft guidelines. But the statement that the phrasing and name of a unilateral declaration provided an indication of the desired objective went a step further and would perhaps motivate States to make a greater effort to coordinate the names of instruments and their content.

48. He agreed with Mr. Economides on the desirability of including a reference to both content and legal effect. In addition, as draft guideline 1.2.2 effectively covered both reservations and interpretative declarations, he supported the proposal to move it to section 1.3.

49. Mr. MELESCANU, referring to the suggestion to replace “legal effect” by the idea of content, said that draft guideline 1.2.2 was based entirely on the notion of legal effect. The phrasing, name or even content of a unilateral declaration were unimportant when it came to assigning it to a particular category. What mattered was the legal effect. If a unilateral declaration modified the legal effect of the provisions of a treaty, it was a reservation. If not, it was an interpretative declaration. He therefore endorsed the present wording of the draft guideline.

50. He agreed with Mr. Economides that the question of the structure of the Guide to Practice could be settled at a later stage in the discussions. For the time being, however, he supported the proposal to move draft guideline 1.2.2 to section 1.3.

51. As a member of the Drafting Committee, he reserved the right to make drafting proposals on reservations to treaties in the Drafting Committee.

52. Mr. Sreenivasa RAO thanked the Special Rapporteur for providing important practical guidelines for Governments that were about to accede to treaties or had already become parties. The way in which States sought to implement a treaty was determined by the types of statements they made at the outset.

53. As to whether the nature of a declaration should be determined by its content or the effect it produced, he believed that the legal effect was ultimately the crucial factor. However, content was also important and he therefore submitted that the two factors played an interactive role. For example, when a State, on acceding to a treaty on the elimination of child labour, undertook to comply to the extent that its resources or prevailing social conditions permitted, the question arose as to whether its unilateral declaration amounted to a reservation or an interpretative declaration. The manner in which the unilateral declaration was drafted, i.e. its content, was very important. It could be counterproductive to denounce as inadmissible reservations any limitations placed by States on compliance with obligations that they were otherwise willing to accept. The policy of promoting the broad objectives of a treaty must be kept in view in deciding on the legal effect of a unilateral declaration. The whole idea of reservations and interpretative declarations was to encourage more parties to accede to a treaty. The Special Rapporteur had carried out an admirable clinical analysis, but a little more flexibility and less emphasis on cut-and-dried principles would encourage more States to use the Guide to Practice.

54. He suggested that the Special Rapporteur should consider drafting a new guideline on how the legal effect of a unilateral declaration was to be determined.

55. Mr. LUKASHUK stressed the importance of the problem raised by Mr. Sreenivasa Rao. A reservation turned hard law into soft law. Perhaps it would be possible to make determination of the legal effect of a unilateral declaration the subject of a separate provision.

56. Mr. KUSUMA-ATMADJA said he had at first been heartened by what had appeared to be a consensus in favour of placing draft guideline 1.2.2 in section 1.3. However, differing views had emerged subsequently. There did seem to be agreement that there was a difference between reservations and interpretative declarations. The topic was a highly complex one, which the Special Rapporteur had subjected to a detailed analysis that would be of value to academics and practitioners alike.

57. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the name given by a State to an instrument—whether a declaration or a reservation—ultimately had no decisive bearing on its real substance. On the other hand, the classification assigned by a State to an instrument could not be wholly disregarded: the fact that a State chose to designate an instrument as a “reservation” must be in some way significant.

58. In passing, he noted an inconsistency in the matter of definitions: in draft guideline 1.1, a reservation was defined as “a unilateral statement”, whereas in draft guideline 1.2 an interpretative declaration was defined as “a unilateral declaration”. The difference between the terms “declaration” and “statement” was not immediately apparent to him, and there might perhaps be a case for harmonizing the terminology employed.

59. As to declarations, reliance on a purely textual analysis of their content was too passive an approach. More important was an analysis of the State’s intention, but even that approach could not fully explain the meaning of an instrument, for the result and the intention might differ. And it was the final result—what the Special Rapporteur attractively termed the “legal effect”—that, in his view, was the most important criterion. The problem of a potential conflict between the intended legal effect and the actual legal effect would also need to be taken into account. Mr. Economides had proposed a compromise solution whereby both terms would be used. All those comments should be taken into account by the Drafting Committee in determining the final form the guideline should take. As to the question of placement, his first reaction was that draft guideline 1.2.2 belonged in section 1.3, in which the relationship between the two types of instrument was analysed. However, that question could be decided at a later stage.

60. Mr. ECONOMIDES, developing his earlier proposal, said it was not the phrasing or name of a unilateral declaration that determined its legal nature, but the legal effect derived from its content.

61. Mr. ELARABY said that in making a distinction between interpretative declarations and reservations one must always take into consideration what the State had in mind. The content, as intended by the State, was very important, and he thus supported Mr. Economides’ comment concerning the need for a reference thereto.

62. Mr. PELLET (Special Rapporteur) said that, although it was important for the Commission to take a final position on draft guideline 1.2.2 in the course of the current meeting, he nonetheless needed to respond to a number of points raised. Mr. Kusuma-Atmadja claimed to have detected differences of opinion regarding draft guideline 1.2.2. He himself had detected no such differ-

ences: on the contrary, there seemed to be a considerable convergence of views.

63. There was no need for the Commission to take an overhasty decision on the question of the placement of the guideline, raised by Mr. Simma. He agreed with Mr. Simma that if it was decided to relocate draft guideline 1.2.2 in section 1.3, draft guideline 1.2.3 should be accorded the same treatment.

64. Mr. Economides had made the intriguing claim that there was a lack of symmetry between the treatment accorded to reservations and to interpretative declarations, as draft guideline 1.2.2 had no counterpart applying to reservations. In fact, it was for that very reason that he had proposed moving draft guideline 1.2.2 to section 1.3, which dealt with both types of instrument. However, an immediate decision on that matter was not indispensable.

65. Mr. Goco had asked what the *ratio legis* for draft guideline 1.2.2 was. That question seemed to have been answered adequately by the Chairman, in his statement made as a member of the Commission. The assumption, closely akin to the concept of good faith, was that as a general rule States did not make random assertions. The fact that a State adopted a given position must have some significance, even if, for purposes of definition, the phrasing or name did not play a decisive role. However, though States were almost always consistent, exceptions could nevertheless arise. Thus, the phrasing and name were merely an “indication” of the desired objective. On the other hand, the principle of good faith allowed one to draw certain inferences: the term “indication” thus constituted an attractive compromise. A distinction must also be drawn between draft guidelines 1.2.2 and 1.2.3. The latter on the formulation of an interpretative declaration when a reservation was prohibited, involved a presumption in favour of the interpretative declaration, as States were presumed to act in good faith in international law; whereas in the case of draft guideline 1.2.2, the very definition of a reservation meant that the phrasing did not in itself constitute a presumption. The Commission was tied by the definition contained in the 1969 Vienna Convention.

66. Mr. Pambou-Tchivounda had said that draft guideline 1.2.2 detracted from the clear definition contained in draft guideline 1.2. That remark illustrated a Cartesian approach and, as a matter of fact, draft guideline 1.2.2 was a “non-Cartesian” provision, intended to introduce some flexibility into a quite rigid definition, thereby facilitating the task of States. Mr. Pambou-Tchivounda seemed not to be opposed to the provision in principle, but to regard the first sentence as unnecessary. It was true that the first sentence did little more than reproduce the definitions found in draft guidelines 1.1 and 1.2. That was a question the Drafting Committee might wish to consider. However, Mr. Pambou-Tchivounda’s claim that the third sentence of draft guideline 1.2.2 was also unnecessary, serving merely as a particular illustration of the second sentence, the true heart of the provision, was more debatable. The third sentence covered a situation which arose frequently in practice and it ought not simply to be consigned to the commentary.

67. Mr. Pambou-Tchivounda had also raised the question of the legal effect sought by the unilateral declaration, and had been supported in his views by most other members of the Commission, who had emphasized the importance of the content of the declaration. He could not endorse that point of view. He accepted that the content of a provision was important and that it could throw light on a State's intention, but he could not accept that it should be incorporated in the actual definition itself, which was drawn from the 1969 Vienna Convention and was thus sacrosanct. The definition said that the declaration "purported" to produce certain effects. To reconsider the question of definitions would be tantamount to going back to square one. In his view, it was in the context of draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations), which the Commission had yet to consider, that the question of content became essential. That would be the appropriate place in which to incorporate the issue of content, and draft guideline 1.3.1 should perhaps be reviewed from that standpoint. There was thus a significant difference of opinion between some members of the Commission and himself on that issue. That being said, the matter need not be settled at the current meeting, and could be resolved subsequently, preferably in the Drafting Committee.

68. Mr. Economides had also commented on the use of the word "phrasing". True, the words "phrased" and "named" were not very clear. However, the Commission's hands were to some extent tied by the definition contained in the 1969 Vienna Convention. He was not hostile to Mr. Economides' comment that it was the content that produced the legal effect, but that question could, of course, be dealt with in draft guideline 1.3.1, as could Mr. Sreenivasa Rao's observations in that connection. Lastly, he was not fully convinced by Mr. Lukashuk's assertion that reservations turned hard law into soft law. With those remarks, he urged the Commission to refer draft guideline 1.2.2, on which there appeared to be broad consensus, to the Drafting Committee.

69. Mr. PAMBOU-TCHIVOUNDA said it was not clear from the Special Rapporteur's comments whether the 1969 Vienna Convention had defined an interpretative declaration. If that was not the case, it was all the more important that the Commission should highlight its special status as distinct from a reservation.

70. The CHAIRMAN noted that the French text of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention spoke of *une déclaration unilatérale*, whereas the English text referred to "a unilateral statement". The English text of draft guideline 1.2 should thus be amended to read "interpretative declaration" means a unilateral statement".

71. He said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.2 to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

2582nd MEETING

Friday, 4 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/491 and Add.1-6,² A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,³ A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR
(*continued*)

GUIDELINE 1.2.3

1. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited) was similar to draft guideline 1.2.2 (Phrasing and name), with the difference that draft guideline 1.2.3 dealt with the consequences of the fact that reservations were prohibited by the treaty itself in terms of the definition of unilateral declarations formulated in respect of the provisions of that treaty, whereas draft guideline 1.2.2 related to the phrasing chosen by the declaring State. The object of draft guideline 1.2.3 actually raised the question whether it might not be preferable for that provision to appear in section 1.3 (Distinction between reservations and interpretative declarations) of the Guide to Practice. Whatever the answer to the question of the placement of draft guideline 1.2.3 in the Guide to Practice as a whole—a question that was not of fundamental importance—the underlying idea was, basically, that States were not presumed to be acting in bad faith and that, in principle, if a treaty prohibited reservations, the States parties respected the prohibition and the unilateral declarations they formulated in respect of the treaty were not reservations, but interpretative declarations. That was an indication, and probably even a presumption which, short of contradicting the principle that it did not matter what title was chosen, was not irrebuttable. The second sentence therefore specified that, if a declaration sought to exclude or modify the legal effect of

¹ For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

² See *Yearbook ... 1998*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1999*, vol. II (Part One).