any precision, he wondered whether it was justified to make them a separate category. Some declarations clearly affected other States; that had been the case when some States had considered that they could extend the limit of their territorial sea to 200 miles. In other cases, such as the human rights conventions, it appeared that interpretative declarations by States affected only their own citizens, although some maintained that human rights were not simply a domestic matter to be left to individual States. Furthermore, conditional interpretative declarations could not be linked to the 1969 Vienna Convention, as, under the terms of that Convention, the treaty must be interpreted in context and in the light of its object and purpose. The idea of conditional interpretative declarations, as conceived by the Special Rapporteur, was thus very interesting, but care must be taken to ensure that it did not cause more difficulties than it solved.

55. Mr. HE suggested that the temporal element could be introduced into draft guideline 1.2.4 by using the same expression as in draft guideline 1.1.2 (Moment when a reservation is formulated), as proposed by the Special Rapporteur in his third report, namely, "... when that State or that organization expresses its consent to be bound ...". The meeting rose at 1 p.m.

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**2583rd MEETING**

Tuesday, 8 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candidio, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kant, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.


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\(^1\) 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).
given provision, but on the treaty as a whole. That was the
meaning of the conditionality of the interpretative decla-
ration. Further consideration needed to be given to the legal
effects of the two types of declaration.

6. Mr. PELLET (Special Rapporteur) said he could not
fully subscribe to Mr. Rodriguez Cedeño’s assertion that
an interpretative declaration was not intended to produce
legal effects. States did not act gratuitously: in formulating
an interpretative declaration, they did so in order to
produce legal effects, even though the effects produced
differed from those of a reservation. That being said, the
Commission’s immediate concern was with the definition
of an interpretative declaration, and the definition did not
enter into the question of legal effects.

7. The most sensitive issue raised, one to which Mr.
Rodriguez Cedeño had also referred, was the question of
the point in time at which the conditional interpretative
declaration was formulated. Mr. Yamada, citing (2582nd
meeting) the reservation entered by Japan to article 8 of
the International Covenant on Economic, Social and Cul-
rural Rights, had said that it should be possible for a res-
ervation to become effective after the expiration of the
time limit and thus enter into the question of legal effects.

8. He could not entirely agree with Mr. Gaja’s claim
(ibid.) that by making an interpretative declaration a State
intended, in a certain manner, to modify the treaty by
excluding other interpretations. In his opinion, assuming
it was acting in good faith, the State offered the interpre-
tation in the light of which it could consent to be bound by
the treaty. That did not mean the State intended to modify
the treaty by so doing. The fact remained that conditional
interpretative declarations probably should be treated as
though they were reservations. The crucial point was that
draft guideline 1.2.4 sought to reintroduce the temporal
element by aligning conditional interpretative declara-
tions with reservations in that respect and restricting the
scope ratione temporis for making such declarations.

9. He agreed with Mr. Brownlie that the essential differ-
cence between an interpretative declaration and a reserva-
tion lay in the effect intended. But there was another
difference: an interpretative declaration clarified the
meaning of the treaty itself, whereas a reservation con-
cerned the rather different question of the intended effects
of the treaty. If the treaty were drafted in vague or impre-
cise terms, the interpretative declaration could have added
to and clarified them, whereas a reservation subtracted
from the treaty and affected the manner in which it was to
be applied.

10. Mr. Lukashuk had said (ibid.) that the State
attempted to convince itself of a certain interpretation.
That might be, but was not always, true: it might also be
attempting to convince the other parties. Nor was it nec-
essarily true, as Mr. Economides contended (ibid.), that a
conditional interpretative declaration constituted a
“deviation” from the treaty but not one sufficient to con-
stitute a reservation. The matter would become clearer
once an authentic interpretation had been given, or when
a jurisdictional body had issued a ruling with force of res
judicata. A priori, it was a clarification, and one could not
infer from thereof that the State was “deviating” from the
treaty. That, however, was a question of philosophical
approach, on which Mr. Economides and he were often
divided. There was not necessarily one and only one cor-
correct interpretation of a treaty, one and only one legal truth.

11. On the other hand, Mr. Economides’ remark to the
effect that an interpretative declaration was in some sense a
derogation, and that, to produce effects it must be ac-
cepted, was probably correct, as it would be in the case of
reservations, with which the legal regime of condi-
tional interpretative declarations should be broadly
aligned. The problem of legal regimes was one to which
the Commission would have to return.

12. As for Mr. Sreenivasa Rao’s comments (ibid.) con-
cerning the complexity of the problem, it was precisely
because the issue was so complicated that it should be
dealt with in the draft guidelines. Lastly, Mr. He had made
the constructive proposal (ibid.) that the numbering might
be simplified and a reference included to the moment at
which consent to be bound had been definitively given.
That question could be taken up by the Drafting Commit-
tee in the first instance.

13. Mr. BROWNlie said he wished to reiterate a point
he had made (ibid.). The attitude of other members—and,
apparently, of the Special Rapporteur—towards draft
guideline 1.2.4 was that the emphasis was on conditional
interpretative declarations. In his view, however, draft
guideline 1.2.4, as now drafted, was not, of course, a res-
ervation at all. The fact of the matter was that the concep-
tual and technical world of reservations came under the
umbrella of treaty obligation. The reserving State might
squirm a little within the obligation system, but basically
it accepted that system. That was why draft guideline 1.1
(Definition of reservations) referred to “a unilateral state-
ment [...] whereby the State or organization purports to
exclude or to modify the legal effect of certain provisions
of the treaty in their application to that State or to that
international organization”. Draft guideline 1.2.4 referred
to “a unilateral declaration [...] whereby the State or inter-
national organization subordinates its consent to be
bound by the treaty to a specific interpretation of the
treaty**”. It might be that as a matter of convenience and
exposition the problem should be dealt with in the frame-

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4 See 2582nd meeting, footnote 7.
work of the draft guidelines, but a problem of classification remained. The conditionality was thus of rather a radical character, and did not clearly fall within the umbrella of treaty obligation. In short, draft guideline 1.2.4 had certain special features that required clarification.

14. Mr. GOCO said that the process of consent to a treaty involved several stages and that signature of a treaty did not constitute consent to be bound thereby. Should a State make an interpretative declaration at that initial stage, the effect was to be construed as subordinating the State’s consent to a particular interpretation of the treaty or of certain provisions thereof—an interpretation which at that stage had yet to be specified. Ultimately, it remained an interpretative declaration purporting to clarify, and not a reservation, whereas at the outset, consent to be bound had been made conditional on a specific interpretation of the treaty.

15. Mr. LUKASHUK said he fully agreed with the Special Rapporteur that interpretative declarations were not without legal effect, and that a provision on the legal effects of consent was entirely justified. A unilateral interpretative declaration was unilateral only at its initial stage: it needed the consent of the other parties, whereupon the relationship became a bilateral one.

16. His chief concern, however, was a more complex issue: subsequent practice could lead to substantial changes to the provisions of a treaty. That subsequent practice might be initiated by a unilateral declaration given the name “interpretative declaration”, which not only interpreted the treaty but also, in the event of recognition by the other party, resulted in a modification of its content. The Special Rapporteur should ponder that very important question.

17. Mr. ELARABY said he agreed with the Special Rapporteur that there was no conventional wisdom with respect to interpretative declarations, and that the outcome would depend on how the Commission chose to innovate. It was clear from draft guideline 1.1 that a reservation purported to exclude or modify certain provisions of a treaty, whereas, under draft guideline 1.2 (Definition of interpretative declarations), an interpretative declaration purported to clarify the meaning or scope thereof. Draft guideline 1.2.4, however, while attempting to create an intermediate category, succeeded only in creating a grey area. In his view, the situation covered by draft guideline 1.2.4 in fact fell within the realm of reservations.

18. Mr. PELLET (Special Rapporteur), responding to Mr. Goco, said he did not agree that there was a temporal progression between the three categories. It was possible, at any of the stages of consent to a treaty, to make either a simple interpretative declaration, a conditional interpretative declaration, or a reservation.

19. He entirely agreed with Mr. Lukashuk that interpretation was an ambiguous exercise, as it was well known that treaties were sometimes profoundly modified by what purported to be an interpretation. That was sometimes a good way of “allowing the law to breathe”. Care should be taken, however, not to do violence to the law in the name of interpretation. As for Mr. Brownlie’s comments, he certainly did not claim that interpretative declarations were reservations, and the idea of setting the definition of draft guideline 1.2.4 against the definition of reservations in draft guideline 1.1 seemed rather questionable. If anything, it should be set against draft guideline 1.2, which contained the definition of an interpretative declaration. If Mr. Brownlie meant that interpretative declarations were not reservations because they did not purport to modify or exclude the application of the treaty, he could go along with that view, which, however, could be inferred from draft guideline 1.2.

20. Replying to Mr. Elaraby, he agreed that matters were made complicated, but that was simply because the drafters of the 1969 Vienna Convention had not complicated matters enough and had left behind a legal void in regard to interpretative declarations. In any event it was not the Commission but States practice which created an intermediate category. Conditional interpretative declarations were not at all infrequent and in fact probably constituted the majority of interpretative declarations. He concurred that the legal regime on conditional interpretative declarations should be clarified later in the part of the report that would deal with the effects of reservations and interpretative declarations.

21. Interpretative declarations were almost as numerous as reservations and the conditional kind probably formed the large majority. They were an important international legal phenomenon and the Commission could hardly pretend they did not exist. During the debate in the Sixth Committee, the Commission’s decision to consider the legal regime of interpretative declarations in parallel with reservations had been widely approved.

22. Mr. BROWNLIE said he had no objection whatsoever to including conditional declarations in the draft guidelines, but they did appear to have sui generis characteristics. Obviously, they were not reservations, but with all due respect to Mr. Pellet, they did not really fall within the purview of draft guideline 1.2. In the case both of reservations (draft guideline 1.1) and of interpretative declarations (draft guideline 1.2), the declaring State was standing under the umbrella of obligation but was trying to vary the content of the obligation. Whether or not it succeeded related to another stage. What was striking about draft guideline 1.2.4 was the fact that the declaring State was attempting to state its position vis-à-vis the entire system of obligation, as was indicated by the very strong and clear wording, “subordinates its consent to be bound by the treaty to a specific interpretation”. He accepted the value of including interpretative declarations and draft guideline 1.2.4, but he wished to point out its rather unusual characteristics.

23. Mr. ELARABY said that some years ago the Commission had the exercise of making a distinction between reservations and interpretative declarations, taking into account the lacuna in the 1969 Vienna Convention. It had adopted a definition for reservations and one for interpretative declarations. With reference to draft guideline 1.2.4, what yardstick could be used for the distinction? Either the State purported “to modify or exclude” or purported “to clarify the meaning or scope”. If draft guideline 1.2.4 essentially purported “to clarify the meaning or scope”, it was an interpretative declaration. As to
the phrase in square brackets, “[which has legal consequences distinct from those deriving from simple interpretative declarations]”, he wondered whether a conditional interpretative declaration should be considered a reservation or whether, although conditional, it should be dealt with like any other interpretative declaration.

24. Mr. KAMTO said that draft guideline 1.2.4 raised the problem of creating a category of “disguised reservations”: certain conditional interpretative declarations might appear to be disguised reservations and they might therefore be placed in the category of reservations from the standpoint of their legal effects. However, when establishing a definition the Commission must be aware of the legal regime. Perhaps the legal effects of conditional interpretative declarations might be set out in the commentary. As they might in certain cases modify the scope of a legal rule or modify a legal regime, they could come very close to the definition of a reservation and their legal effects might be the same as those of reservations. That situation should be covered in the draft guidelines, but should be directly linked to the legal effects attached to conditional interpretative declarations. Generally speaking, if the Commission wished its classifications to be easily implemented, whenever it established a definition it should be aware of the ensuing legal effects.

25. Mr. PAMBOU-TCHIVOUNDA asked whether, in addition to the case mentioned in draft guideline 1.2.4, the Special Rapporteur had encountered other considerations which might be invoked by a potential party to a treaty as a condition for accession.

26. Mr. PELLET (Special Rapporteur) said that the answer to Mr. Pambou-Tchivounda’s question was in the negative. To his knowledge, the draft guidelines covered, in that respect, all situations which had arisen in connection with declarations made when acceding to a treaty.

27. As to Mr. Brownlie’s and Mr. Elaraby’s comments, there was nothing extraordinary about establishing two categories, reservations and interpretative declarations, and a subdivision of the latter, conditional interpretative declarations. The criterion for distinguishing reservations from interpretative declarations was the goal that was being sought by the State: was it purporting to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State, or was it purporting to clarify the meaning or scope attributed to the treaty or to certain of its provisions? The second category, interpretative declarations, contained a subcategory based, as Mr. Brownlie had said, on a particular criterion: conditionality. That criterion made it possible to distinguish between simple interpretative declarations and conditional interpretative declarations. He had set out the relevant criteria in draft guidelines 1.3.0 (Criterion of reservations), 1.3.0 bis (Criterion of interpretative declarations) and 1.3.0 ter (Criterion of conditional interpretative declarations), which he would be introducing in due course.

28. Replying to Mr. Kamto, he said a disguised reservation was a statement that was called an interpretative declaration but actually met the definition of reservation. Conditional interpretative declarations, on the other hand, met the definition of interpretative declarations within the meaning of draft guideline 1.2 but carried an additional criterion, that of conditionality. Thus the problem of disguised reservations and that of conditional interpretative declarations did not necessary overlap. If a conditional interpretative declaration actually sought to modify the effect of a treaty it would become a disguised reservation, but that was not the nature of a conditional interpretative declaration in itself. Concerning Mr. Kamto’s second remark, he agreed that a definition could not be separated from its legal effects. He had not provided preliminary considerations on the possible legal effects of interpretative declarations and conditional interpretative declarations out of a desire to avoid errors. In that connection, he noted that the Commission was in familiar territory concerning reservations, with articles 19 et seq. of the 1969 Vienna Convention; interpretative declarations, about which there were simply a few scattered remarks in international law textbooks, were quite a different matter. The Commission must first make some classifications to see how problems arose, taking an intuitive approach, and delve more thoroughly into the legal effects at a later stage.

29. The CHAIRMAN said he imagined the Drafting Committee would have a difficult job placing conditional interpretative declarations in the draft. The discussion had been very useful and had highlighted members’ doubts and differences of opinion. He believed everyone accepted the existence of conditional interpretative declarations. The difficulty lay in classifying them in terms of the already-existing reservations and simple interpretative declarations. Some members appeared to feel that conditional interpretative declarations were in fact disguised reservations, others were of the opinion that they were interpretative declarations and still others felt they were a new species whose specific differences had to be identified. They would ultimately be dealt with by the Drafting Committee, on the basis of the discussion.

30. Mention had also been made of the phrase between square brackets at the end of draft guideline 1.2.4. As the Commission was still in the stage of defining the draft guidelines, the square brackets indicated the Special Rapporteur’s hesitation to add material which went beyond definitions and dealt with legal consequences. As the Special Rapporteur had indicated, the Drafting Committee would consider whether the phrase in square brackets was necessary. Speaking as a member of the Commission, he said that he agreed with those who considered conditional interpretative declarations to be closer to reservations than to simple unilateral declarations.

31. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to refer draft guideline 1.2.4 to the Drafting Committee.

It was so agreed.

GUIDELINE 1.2.5

32. Mr. PELLET (Special Rapporteur) drew the attention of the members of the Commission to the definitive text of draft guideline 1.2.5 (General declarations of policy), which appeared in his third report (A/CN.4/491
and Add.1-6). So far the Commission had met only two major categories of unilateral declarations, namely reservations, covered in draft guidelines 1.1 et seq., and interpretative declarations, covered in draft guidelines 1.2 to 1.2.4. In practice, however, when they concluded treaties, States frequently made statements whose purpose was neither to exclude nor to modify the treaty’s legal effects, nor to interpret them nor clarify their meaning or scope. It was useful from a legal standpoint to identify such statements, as the rules governing reservations and interpretative declarations, or more generally the law of treaties, were probably not applicable to them. The Commission had already encountered unilateral statements of that type when discussing reservations, especially so-called extensive reservations, even though a satisfactory formulation had not yet been found. That was the case with declarations whereby a State said it was going to do more than was required by the treaty. The same was true of general declarations of policy, covered by draft guideline 1.2.5. That provision related to remarks about the treaty or the subject area covered by the treaty which States customarily made regarding instruments which dealt with sensitive areas that had been the subject of difficult negotiations. Examples were found in paragraphs 360 to 364 of his third report. Such statements were made about a treaty, but the treaty was not really their subject. Thus the law of treaties did not apply to them, and the draft guideline might say so, either negatively, as in the phrase in square brackets, or positively, in a phrasing such as “and is subject to the law applicable to unilateral acts of States”. Although that would be prejudging their legal regime, since general declarations of policy were neither reservations nor interpretative declarations, the Commission would almost certainly not be taking them up again later in the draft, and the exclusion clause in draft guideline 1.2.5 might be useful. However, if the members of the Commission wished simply to delete the material in square brackets he would not object.

33. Mr. KABATSI said that, although he agreed with the spirit of draft guideline 1.2.5, he was somewhat uncomfortable with the formulation. First, he was not certain that all such statements referred to policy. Secondly, the heading contained the word “policy” whereas the body of the draft guideline did not. It might therefore be clearer if the beginning of the draft guideline were to read “A unilateral declaration of policy”, but that matter would best be left to the Drafting Committee. He agreed with the Special Rapporteur about the material in square brackets. Perhaps it was not necessary, but again it could be refined by the Drafting Committee.

34. Mr. ROSENSTOCK said he wondered whether it really was necessary or useful to include draft guideline 1.2.5. The Lord’s Prayer, declarations of war and many other things were not reservations or conditional interpretations. Why, in addition to reasonably helpful definitions of interpretative declarations and reservations, was there a need to deal with the question as one of the things which the aforementioned were not? As he saw it, it was an unnecessary complication and the declarations in question did not form a separate category. Such material might, however, usefully appear at different places in the commentaries to other identified categories.

35. Mr. PELLET (Special Rapporteur) said that an interesting problem of principle arose. If the Commission followed Mr. Rosenstock, at least it would not have to trouble itself too much about draft guideline 1.2.5. He thought that it was necessary to clarify matters and say, in negative terms, that a unilateral statement might be neither a reservation, nor an interpretative declaration, because it was usually dealt with as though it was indeed a reservation or an interpretative declaration. The best illustration was to be found in Multilateral Treaties Deposited with the Secretary-General, which some call “the Bible”, the longest section of which concerned the two major categories of declarations and reservations formulated when notifying territorial application. All the examples he had given in his third report, such as China’s interpretation of the Comprehensive Test-Ban Treaty or the Holy See’s interpretation of the Convention on the Rights of the Child, figured in Multilateral Treaties Deposited with the Secretary-General in a completely indiscriminate fashion. It was not specified that they were general declarations of policy, but they were statements which belonged under that heading. Of course, it was possible to do without draft guideline 1.2.5, but he was afraid that if the Commission wanted to produce a Guide to Practice that did not require States constantly to consult the commentary—which was very inconvenient and was never a good solution—then it would be a shame not to say that such statements were neither reservations nor interpretative declarations. He noted that, at the fifteenth session, in connection with a number of non-reservations to which he had alluded, several members raised the problem, but eventually it had been decided that it was better to have both positive and negative provisions. The provisions in draft guidelines 1.2.1 et seq. served to explain section 1.2, and the latter was made clearer by giving examples of both what interpretative declarations were and what they were not. It was done for practical reasons, namely to warn the reader of the publication, which was often used by States or international organizations, that it was not because a text appeared in “the Bible” that it was the truth. Hence, the need to retain the provision was based more on practical than on theoretical considerations.

36. Mr. DUGARD said that, like Mr. Rosenstock, he had questions about the purpose of the provision, but that unlike him, thought that it was useful. As the Special Rapporteur himself had explained, it constituted a warning to States that there was a “creature” which did not quite belong in the law of treaties. His own question related to the Special Rapporteur’s point, made chiefly in paragraph 374 of the third report, that statements of that kind were generally made for internal, constitutional or political effect. Perhaps a reference could be made to the fact that such statements were generally made for internal effect and draft guideline 1.2.5 was not really a guideline, but a warning. For that reason, general declarations of policy really had no place in the law of treaties.

5 Multilateral Treaties Deposited with the Secretary-General (United Nations publication (Sales No. E.99.V.5), document ST/LEG/SER.E/17), p. 859.
6 Ibid., pp. 222-223.
37. Mr. HAFNER said that like Mr. Rosenstock, he saw no pressing need to include draft guideline 1.2.5. For one thing, such declarations were commonly made, for example when an instrument was officially signed. The question, then, was whether it was necessary to deal with the legal nature of such declarations in the context of reservations and interpretative declarations. For the sake of consistency, the Commission should follow the same approach as it had with the topic of State responsibility, from which all definitions couched in negative terms had been excluded. A positive definition would certainly suffice. One source of confusion might concern which declarations were meant. Was it necessary to distinguish between the declarations in draft guideline 1.2.5 and others made in the context of treaties? Did a different legal regime have to be applied to those particular declarations? The inclusion of such a definition could also give rise to other questions of a legal nature. For instance, all questions relating to interpretative declarations could also be asked about such statements, and he did not think that that was necessary.

38. As pointed out by Mr. Kabatsi, the title was not consistent with the content of the draft guideline. He therefore shared the view that the Commission should not trouble itself too much about the provision. Regarding Mr. Dugard’s remarks, a warning might be included—but only in the commentary—that such general declarations existed and must be distinguished from reservations and interpretative declarations. When trying to define reservations and interpretative declarations, it would be wise to have a reference to the existence of other kinds of statements. But that did not warrant the inclusion of draft guideline 1.2.5 in the Guide to Practice.

39. Mr. ECONOMIDES said that draft guideline 1.2.5 was unquestionably useful. It was important to deal with as many cases as possible in the Guide to Practice, not only reservations but also unilateral statements which were not reservations or interpretative declarations. It would render a service to States if any declaration sent to an international depositary could be analysed and defined. Clearly, the case contemplated under draft guideline 1.2.5 often occurred in practice.

40. The title obviously had to be changed. It would be better to speak of “Declarations of a political nature”, because that covered everything. Mr. Kabatsi was right to say that the body of the provision should also contain the wording of the title. In the earlier version of the draft guideline, there was a time limit for making such a declaration. It was his impression that in practice, the declarations in question were made when the State ratified the treaty. That aspect should appear at some point, at least in the commentary.

7 The original version of draft guideline 1.2.5 as proposed by the Special Rapporteur read:

“A unilateral declaration formulated by a State or an international organization when that State or international organization expresses its consent to be bound which does not purport to exclude or modify the legal effect of the treaty in its application to that State or that international organization, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties].”

41. The new version of draft guideline 1.2.5 contained either the treaty or the subject area of the latter. In his opinion those two elements were too restrictive, because other questions could also be involved. Hence the need either to include an indicative enumeration, which he favoured, or to improve upon the formulation of the draft guideline. Lastly, he concurred with other members that the phrase in square brackets was not necessary. Such a remark was not made in any of the other draft guidelines either.

42. Mr. KATEKA agreed with those who had expressed doubts as to the need for the draft guideline under consideration, a general omnibus guideline which might bring confusion to the Vienna regime. For example, what was meant by “policy”? Even if the qualification proposed by Mr. Economides, namely the reference to “a political nature” was included, the formulation was still so broad as to include everything. Mr. Dugard had said that such statements might be used for internal purposes, but draft guideline 1.2.6 (Informative declarations) would cover that matter.

43. If the Commission decided to retain draft guideline 1.2.5, he would suggest replacing the word “interpret” by “clarify”. Again, he too shared the view of those who wanted to delete the phrase in square brackets.

44. Mr. RODRÍGUEZ CEDEÑO said that clearly a State might make a general statement of policy, as indicated by the Special Rapporteur. He thought that the provision was useful, but he agreed with Mr. Rosenstock and others that it should not be included in the set of guidelines. The Commission was producing a Guide to Practice, whereas draft guideline 1.2.5 did not have legal effect, but had very clear political effect. He preferred to include it in the commentary on general interpretative declarations. Even if such a guideline was incorporated in the Guide to Practice, it should not be included under interpretative declarations, because strictly speaking, it was no such thing.

45. Mr. HE said he agreed with those who were opposed to the inclusion of draft guideline 1.2.5. The question was whether it was within the Commission’s mandate to codify all statements which were unrelated to reservations or interpretative declarations. Moreover, the title of the provision was not consistent with the content.

46. Mr. ELARABY said that he would like to come to the defence of the Special Rapporteur. Draft guideline 1.2.5 might need some redrafting, but it was nevertheless useful. After all, it related to something frequently encountered in State practice.

47. He asked the Special Rapporteur what the difference was between a State or international organization expressing its view on a treaty and its purporting to clarify
the meaning of the scope of the treaty. That seemed to be splitting hairs. As for the title, he agreed with other members that some reference must be made to a declaration of a political nature, and that such a phrase should also be included in the body of the text. On a minor point, draft guideline 1.2.5 was very close to the definition in draft guideline 1.2 and should therefore be placed immediately after it.

48. Mr. ADDO said he agreed with Mr. Rosenstock and others who did not see the point of including draft guideline 1.2.5. It seemed only too obvious that the kind of statement in question did not aim to modify the legal effect of a treaty’s provisions or interpret them, and surely it was neither a reservation nor an interpretative declaration. If, as Mr. Dugard had said, its inclusion was meant solely to issue a warning, then it might as well be omitted. States always made such statements, either for informative or policy purposes. But if, strictly speaking, they were neither reservations nor interpretative declarations, there was no need to define what they might be.

49. Mr. LUKASHUK said he endorsed the views of those in favour of retaining the provision. If the Commission was developing a legal instrument, then that would be another matter, but the statements under consideration did not apply to such a legal instrument and had no legal consequences. The Commission was preparing a Guide to Practice, and when it became clear that the statements involved, which were very common, were neither interpretative declarations nor reservations but something quite different, then the provision would prove useful. Mr. Kabatsi was, of course, correct to say that the title “General declarations of policy” was not felicitous, but to speak of a declaration of a political nature would be even worse, since all declarations were of a political nature. It might perhaps be more accurate to refer to an “Exclusively political declaration”, but at the present stage, he was in favour of retaining the title as it stood.

50. As to the phrase in square brackets, general policy declarations were not only not subject to the application of the law of treaties—they did not have any legal nature whatsoever. To make the point clear, perhaps it should be said that such statements were neither interpretative declarations nor did they have legal consequences.

51. Mr. BROWNIE said he was in favour of including the draft guideline for reasons of ease of exposition and general practicality, because the overall title of the exercise was “Guide to Practice”. It was not reasonable to suppose that the inclusion of the provision or other similar ones would mislead Governments, and if the Commission started segregating guidelines as though they were all normative, it would be rather like having a bathymetric chart which stopped at a political boundary on the continental shelf. It would be very impractical. The term “guideline” had perhaps caused problems and made it seem that what the Commission was doing was more normative than was the underlying intention.

52. Like other members, he did not see the need for the phrase in the square brackets. Including it might even be ambiguous, because in a way that kind of declaration was subject to the law of treaties, if only in the negative sense.

53. Mr. KAMTO said he agreed with those who supported the inclusion of the provision. The problems concerning draft guideline 1.2.5 had to do with the unique nature of the exercise in which the Commission was engaged. It was not a classic case of codification.

54. The title of the provision should be retained, because if it was changed to refer merely to political declarations, that would advert to other types of declarations, whereas by speaking of “general declarations of policy”, such types of declarations were placed on another level, one which it was easy to understand in practice. Indeed, he was concerned as to whether the current classification covered all of the various categories of declarations to be found in practice. He suggested indicating that any other future development could form the subject of other provisions, so as not to give the impression of having been completely exhaustive.

55. Lastly, he hoped for some enlightenment from the Special Rapporteur as to the precise difference between general declarations of policy and informative declarations.

56. Mr. TOMKA said he was in favour of retaining draft guideline 1.2.5. If the Commission was drafting a legal text, it would certainly be preferable to avoid negative definitions, but the Guide to Practice would probably be used most frequently by civil servants employed in the treaty departments of foreign ministries, who were not necessarily familiar with legal niceties. It was common practice for States to make general declarations, especially at the time of ratification of or accession to a treaty. The Secretary-General was required to inform States of all such declarations and to publish them in the United Nations Treaty Series.

57. Perhaps the reference to “policy” in the title should be dropped. He suggested “Declarations of a general nature” as a possible alternative.

58. Mr. Sreenivasa RAO joined Mr. Brownlie in emphasizing that the Commission was not engaged in a normative exercise, but was producing guidelines for the benefit of States and newcomers to the field. He was against the deletion of a guideline solely on the grounds that it gave rise to differences of opinion. His objections to earlier guidelines had been motivated by the impression that they were inventing new categories of interpretative declarations that would merely confuse States. But the category addressed in draft guideline 1.2.5 certainly did exist, although the title was perhaps misleading. The unilateral statements described in chapter I, section C, of the third report were not necessarily declarations of policy; some concerned what might be described as a modality of implementation. He proposed deleting the phrase within square brackets, amending the title and referring the draft guideline to the Drafting Committee.

59. Mr. PAMBOU-TCHIVOUNDA said he thought that draft guideline 1.2.5 served a useful purpose in section 1.2, if only because it clarified the concept of an interpretative declaration by means of an a contrario approach.

60. The use of the plural form of the word “declarations” in the title was perhaps an intentional allusion by
the Special Rapporteur to the diversity of declarations of policy, as illustrated by the examples cited in chapter I, section C, of the third report. Paragraph 363 referred to China’s position on the Comprehensive Test-Ban Treaty and the Holy See’s position on the Convention on the Rights of the Child. He used the word “position” advisedly because he thought it might be used in place of the word “views” in the new version of the draft guideline, which was somewhat vague and abstract. A State or international organization could have any number of views on a particular treaty, depending on its perception of the treaty’s political import for itself, for the States parties or for the international community as a whole. He suggested that the Special Rapporteur should reproduce the content of paragraphs 362 and 363 of chapter I, section C, of the third report in the commentary to the draft guideline.

61. The phrase “or on the subject area covered by the treaty”, which added nothing to the substance of the draft guideline, should be deleted. Again, there was no reference to “policy” in the text. He suggested inserting one immediately after the word “treaty”, for example a phrase such as “in order to emphasize its policy”, so as to highlight the meaning and content of a State’s views and to demonstrate their political import. An international treaty was always the expression of a power relationship, underlying which diverse political approaches were discernible.

62. At the beginning of the draft guideline, the words “of a general nature” could well be inserted after “unilateral statement”.

63. Mr. GOCO said he appreciated the usefulness of draft guideline 1.2.5, but thought the Drafting Committee should decide on its placement and rubric. When a State made a unilateral statement that neither purported to exclude or modify the legal effect of a treaty nor sought to clarify its provisions, a problem of classification arose. In his view, States did not make innocuous statements. He proposed the descriptive appellation “unilateral declaration” to be a reservation or an interpretative declaration.

64. Mr. PELLET (Special Rapporteur), responding to what he described as a very meaty and interesting discussion, said that the opinions of the Commission were clearly divided on the question of whether to include draft guideline 1.2.5 in the Guide to Practice. However, a majority seemed to be in favour of retaining it and nobody was categorically opposed to its inclusion. As noted by Messrs Brownlie, Kamto and Sreenivasa Rao, the nature of the exercise was the crucial factor. The Commission was not drafting a protocol, in which case it would be inadvisable to state a point first in the affirmative and then in the negative. The purpose of the Guide to Practice was to assist States in adopting a position. It might be important for a State to have a clear perception of whether it was dealing with a reservation, an interpretative declaration or something entirely different that was not subject to the law of treaties. Although, from an intellectual point of view, he was inclined to agree with members who wished to delete the draft guideline on the grounds that it repeated what had already been said in a different way, he strongly urged the Commission to retain it in order to help States decide on the legal nature of statements. He had been somewhat taken aback by the paradoxical arguments that saying nothing would clarify matters or that general declarations of policy were so common they should not be mentioned. It was precisely because they were so common that it might be useful to explain to States what exactly they were doing.

65. He had no strong views about the title, which could be omitted if the Commission so wished. The draft articles had been given titles only in the annex to the third report. He had an open mind on the question of whether to reflect the title in the text of the draft guideline. He was troubled, however, by the idea that a declaration of policy must, ipso facto, be devoid of legal effect. He agreed with Mr. Goco that States did not make innocuous statements but invariably had some ulterior motive. Whenever a State made a public statement, a legal effect was liable to ensue. Even if it had no effect on the application of a treaty, it might have other consequences such as estoppel. He was not hostile to including the idea of a “general declaration of policy” in the actual content of the guideline—perhaps along the lines proposed by Mr. Pambou-Tchivounda—referring to the State’s political position vis-à-vis the treaty or its subject area.

66. A majority of members of the Commission seemed to be in favour of deleting the phrase within square brackets at the end of the draft guideline. He deferred to their opinion and suggested that the idea it contained might be reflected in the commentary.

67. In response to Mr. Dugard, he would point out that paragraph 374 of the third report referred to draft guideline 1.2.6. The statements covered by draft guideline 1.2.5 usually had an international rather than a national purpose, whereas the contrary was often true of the statements covered by draft guideline 1.2.6.

68. He thought that Mr. Economides’ interpretation of draft guideline 1.2.5 had been syntactically erroneous. In the French text, it did not say ses vues sur le sujet du traité but ses vues au sujet du traité, which meant its views “in connection with” or “on the occasion of” the signing of the treaty. States might be using the treaty as a pretext for making a declaration. For example, the Holy See had taken the opportunity of its accession to the Convention on the Rights of the Child to express its concern for the well-being of children or families. That statement had a connection with the subject area of the treaty but did not address its content.

69. Lastly, he concurred with Mr. Lukashuk’s comments and urged the Commission to refer the draft guideline to the Drafting Committee.

70. Mr. ROSENSTOCK said that eliminating the unnecessary was fundamental to the Commission’s craft. Just as the accumulation of material could be confusing, so the deletion of what was superfluous could be clarifying.

71. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.5 to the Drafting Committee.

It was so agreed.