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Summary record of the 2599th meeting

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2599th MEETING

Thursday, 8 July 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (concluded) (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]

DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE⁴ (concluded)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the titles and texts of the draft guidelines proposed by the Drafting Committee (A/CN.4/L.575).

GUIDELINE 1.4 (Unilateral statements other than reservations and interpretative declarations)

Guideline 1.4 was adopted.

GUIDELINE 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments)

2. Mr. LUKASHUK said that, as the Commission's discussion was concerned with legal obligations, the word "commitments" did not seem sufficiently specific.

3. Mr. CANDIOTTI (Chairman of the Drafting Committee) replied that the word "commitments" in the title was a translation of the term *engagements* in the original French version of draft guideline 1.1.5 proposed by the Special Rapporteur in his third report (A/CN.4/491 and Add.1-6), and that a general meaning was intended. However, in view of the fact that the term "obligations" was used later in the draft guideline, in the different language versions, there was perhaps some justification for using it in the title as well. The article as a whole concerned cases

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).

⁴ See 2597th meeting, para. 1.

in which a unilateral statement purported to add an obligation which was not in the treaty, i.e. the declaring State wished to assume legal obligations additional to those in the treaty. On that basis, he could accept a further change of wording if members of the Commission so wished.

4. Mr. HAFNER said that confusion might arise if the heading was changed to read "unilateral obligations". In his experience, in the context of international relations the term "commitment" was used to avoid the word "obligation". The sense in which he understood "commitments" in the English title clearly corresponded to the term *engagements* in the French version.

5. Mr. PELLET (Special Rapporteur) said that the point had been to render the idea that unilateral statements were not reservations, but that they still implied a certain type of commitment on the part of their authors. Opinions had differed sharply within the Drafting Committee, where he had proposed a more radical solution, namely, that they were unilateral acts creating legal obligations for their authors. However "commitments" represented a juridically neutral term, one that was sufficiently vague for all members to agree on. He intended to include a note in the commentary. Personally, he agreed with Mr. Lukashuk that a more precise term was required.

6. Mr. LUKASHUK said that, even if "commitments" was retained in the title, the fact remained that it was inconsistent with the use of "obligations" in the draft guideline. What was the difference between the two terms?

7. Mr. GOCO said that the thrust of the guideline was to convey the idea that obligations beyond those imposed on the author by the treaty constituted a commitment which was outside the scope of the Guide to Practice. On that basis, "commitments" in the title and "obligations" in the text had different roles to play, and both should be retained.

8. Mr. ROSENSTOCK suggested that, for the sake of consistency, "obligations" should be replaced by "commitments" in the body of the text.

9. The CHAIRMAN, speaking as a member of the Commission, said he saw no contradiction between the two terms. It was clear that the "unilateral commitments" in the title referred to statements formulated by a State in relation to a treaty, whereas "obligations" related to the assumption of obligations which went beyond those imposed by the treaty and thus constituted a commitment which fell outside the scope of the Guide to Practice.

10. Mr. CANDIOTTI (Chairman of the Drafting Committee) suggested replacing "commitment" in the main body of the text by "statement", so that the last part would read "... constitutes a unilateral statement which is outside the scope of the present Guide to Practice".

11. Mr. PAMBOU-TCHIVOUNDA said he disagreed with that proposal. The term "unilateral statement" was already used at the beginning of the draft guideline and it would not be appropriate to equate the two terms as long as no decision had been reached as to what a unilateral commitment actually constituted. Presumably it was a commitment to take on more obligations.

12. Mr. KABATSI said he agreed with the views expressed by the Chairman and Mr. Goco. The term “commitment” in the body of the text clearly referred to an undertaking that went beyond treaty obligations. Moreover, the proposal by the Chairman of the Drafting Committee to delete “commitment” from the text would unbalance the overall guideline, as the word would disappear from the body of the text and remain only in the heading.

13. Mr. CANDIOTI (Chairman of the Drafting Committee) said that draft guideline 1.4.1 [1.1.5] came under section 1.4 of the Guide to Practice, which was concerned with the exclusion of unilateral statements that were outside the scope of the Guide. It was not the Commission’s task to engage in research on the legal nature of unilateral commitments or undertakings. Rather, its discussions should reflect the intention behind the guideline, which was simply to state that certain such commitments fell outside the scope of the Guide. From the outset, the discussion of the draft guideline had focused on statements that purported to increase obligations, namely legal obligations rather than commitments. Therefore, in order to be consistent, the title should refer to “unilateral obligations”, and “obligations” should be retained in the body of the text. Furthermore, the replacement of “unilateral commitment” by “unilateral statement” at the end of the draft guideline would avoid the danger of the Commission becoming involved in a lengthy discussion on the legal difference between commitments and obligations.

14. Mr. SEPÚLVEDA said that the proposal by the Chairman of the Drafting Committee to refer to a “unilateral statement” in two places in the text might lead to confusion in the Spanish version, especially as the distinction between the two uses had not been clarified. Therefore, he proposed that phrase should read “... constitutes a legal unilateral commitment ...”. That would emphasize the fact that the commitment in question related to obligations which fell outside the scope of the Guide to Practice, and would avoid the repeated references to “obligations” and “unilateral statement”.

15. Mr. ADDO said that he agreed with the Chairman’s comments as to why “commitment” should be retained. Clearly, a commitment could be of a legal or non-legal nature. In the present case, the commitment was of the legal kind, but since it fell outside the scope of the Guide to Practice, there was no need to labour the point.

16. Mr. LUKASHUK said he shared the views expressed by the Chairman of the Drafting Committee and supported his well-justified proposal. The topic at hand concerned guidelines on reservations—it was not the time to tackle the thorny problem of what constituted a unilateral act. The proposed replacement of “unilateral commitment” by “unilateral statement” was an attempt to clarify the text and make it more consistent. He felt that at least that part of the proposal should be approved.

17. Mr. YAMADA said that the main problem, as the Chairman of the Drafting Committee had pointed out, concerned whether it was a unilateral commitment or a unilateral statement which fell outside the scope of the present Guide to Practice. If “unilateral statement” was retained, he would like to further amend the end of the

sentence to read “constitutes a unilateral statement outside the scope of the present Guide to Practice”.

18. Mr. KATEKA said that, in the present context, legal obligations meant those which were binding on the parties to a treaty. Anything else of a unilateral nature formulated by a State was not a legal obligation, but something additional to which the State wished to commit itself, however that notion might be expressed. In order to avoid confusion, the word “obligations” should be replaced by “commitments”. Also, he agreed with Mr. Sepúlveda that it would be best to avoid repeating the term “unilateral statement” in the body of the text.

19. Mr. PELLET (Special Rapporteur) said he was radically opposed to the proposal made by the Chairman of the Drafting Committee.

20. Mr. CANDIOTI (Chairman of the Drafting Committee) pointed out that several of the subsequent guidelines concerned with unilateral statements began with an explanation relating to unilateral statements and ended by stating that a statement was “outside the scope of the present Guide to Practice”. The general idea behind the guideline was to refer to international legal obligations assumed unilaterally by States in addition to treaty undertakings. That being so, the intention behind his proposal was to replace “commitments” with a more precise term that avoided the danger of overlap with other guidelines.

21. Mr. AL-BAHARNA said that as unilateral commitments were mentioned in the title, there was no need to refer to them again in the text. The guideline was concerned with what fell within the scope of a reservation and what fell outside of it. He proposed deleting the phrase containing “unilateral commitment” in the body of the text so that the relevant part read “to undertake obligations going beyond those imposed on it by the treaty is outside the scope of the present Guide to Practice”. The title would then be amended to read “Statements outside the scope of the topic”. In that context, the Commission was not concerned by what constituted a unilateral commitment or statement.

22. The CHAIRMAN said it would not be possible to change the title of draft guideline 1.4.1 [1.1.5], as that would also necessitate similar changes to the succeeding guidelines which, although also concerned with statements outside the scope of the Guide to Practice, differed in substance.

23. A full and frank exchange of views had taken place. For the sake of compromise, and bearing in mind the fact that the Special Rapporteur was vigorously opposed to the proposal made by the Chairman of the Drafting Committee, he suggested that the Commission should adopt the text as it stood. It should be remembered that the formulation was the result of thorough discussion in the Drafting Committee and was still only at the stage of first reading.

24. Mr. LUKASHUK asked whether the Special Rapporteur agreed with the deletion proposed by Mr. Al-Baharna.

25. Mr. PELLET (Special Rapporteur) said that he favoured retaining the draft guideline in its present form.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.1 [1.1.5] as proposed by the Drafting Committee.

It was so agreed.

Guideline 1.4.1 [1.1.5] was adopted.

GUIDELINE 1.4.2 [1.1.6] (Unilateral statements purporting to add further elements to a treaty)

27. Mr. HAFNER pointed out that the draft guideline bore very little resemblance to the original text proposed by the Special Rapporteur in his third report. He accepted the reasoning put forward in the Drafting Committee for the changes, with one exception. The phrase “a new provision” had been replaced by “further elements”, but the change was not advantageous. The new wording lacked clarity, as demonstrated by the fact that a reservation could be considered a further element added to a treaty. He would prefer to revert to the original phrase, “a new provision”, which concorded better with the reference to “a proposal” to modify the content of the treaty, in the latter part of the draft guideline. It was also clearer than “further elements” in terms of the intention of the author of the statement.

28. Mr. CANDIOTI (Chairman of the Drafting Committee) said the purpose of the guideline was to cover proposals to add further elements to a treaty that were not in the nature of reservations or interpretative declarations, inasmuch as they were not intended to modify a treaty or to exclude the legal effects of or interpret any of the provisions. That idea could perhaps be explained in the commentary.

29. Mr. PELLET (Special Rapporteur) said he agreed with those remarks. One example of the proposals that the guideline was intended to cover was that of the Israeli “reservation” concerning the addition of the Red Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conventions of 12 August 1949,⁵ which had followed on a Turkish declaration proposing the addition of the Red Crescent to the Red Cross under the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.⁶ When a State did something like that, one could not speak of a reservation: the State was seeking to add something to a treaty. Since the matter would be fully explained in the commentary, and although he agreed with Mr. Hafner that the original wording was preferable because it was clearer, he could live with the compromise version adopted after lengthy discussion by the Drafting Committee.

30. Mr. AL-BAHARNA said he had been in favour of Mr. Hafner’s proposal, but having heard the explanations given by the Special Rapporteur, he thought that the present formulation was the most appropriate. He assumed that the commentary would explain the reasoning behind that formulation.

⁵ See 2597th meeting, footnote 9.

⁶ See J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 181 and 256.

31. Mr. GOCO, referring to Mr. Hafner’s proposal, said his concern was whether the moment at which the decision was made to add “a new provision” was a material factor. In draft guideline 1.1.6 as proposed by the Special Rapporteur, reference was made to the “time” when the State or international organization expressed its consent to be bound by a treaty. Was the guideline intended to contemplate a situation in which the parties had already consented to a treaty and further elements were added subsequently or was it prior to the consent of the parties that further elements might be submitted?

32. The CHAIRMAN recalled that the problem had already been thoroughly discussed in the Commission and in the Drafting Committee. Lack of a time limitation in the guideline proved that it was not restricted to a specific moment. Whenever the Drafting Committee wished to limit the time frame, wording to that effect had been included, for example, in draft guideline 1.2.1 [1.2.4].

33. Mr. TOMKA asked whether there was any particular reason why the draft guideline spoke of modifying “the content of” the treaty instead of using the standard reference to modification of the treaty. The phrase “the content of” seemed superfluous, for if the treaty was modified, so was its content.

34. Mr. PELLET (Special Rapporteur) said that was true, but it was sometimes useful to spell out what went without saying. The reference to content precluded any inference that it was the legal effects of the treaty that were concerned. Reservations were aimed at legal effects, but in the case covered by the guideline, it was the content itself that was involved. A treaty was both an *instrumentum* and a *negotium*, but the guideline was clearly addressed to the *negotium*.

35. Mr. HAFNER said he assumed that the content of a treaty constituted its provisions, and that a proposal to add a new provision would be a proposal to modify the content of the treaty. He was not very convinced by the explanations concerning the words “further elements”, but in view of the thorough discussion in the Drafting Committee and the extensive explanation to be provided in the commentary, he would not press his proposal to change the wording.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.2 [1.1.6] as proposed by the Drafting Committee.

It was so agreed.

Guideline 1.4.2 [1.1.6] was adopted.

GUIDELINE 1.4.3 [1.1.7] (Statements of non-recognition)

37. Mr. KABATSI said he was not convinced that statements of non-recognition were outside the scope of the Guide to Practice. He believed that they were, in essence, reservations, and were covered by the definition in draft guideline 1.1.5 [1.1.6]. The phrase “if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity” meant that the

State would abide by certain obligations in respect of State A but not of State B.

38. Mr. PELLET (Special Rapporteur) said he was of the same view as Mr. Kabatsi but was disturbed by his comments, because they might reopen the substantive discussion on the issue. The Commission had debated it at very great length at its fiftieth session and he had been the only one to maintain that such statements were reservations. Bowing to the views of the vast majority of members, however, he had changed the wording of the draft guideline and, in his fourth report (A/CN.4/499 and A/CN.4/478/Rev.1), he had set out the views that clashed with his own and explained why it was possible to contend that such statements were not reservations. He appealed to members of the Commission to exercise similar discipline and not to reopen debate on the subject.

39. The CHAIRMAN endorsed the Special Rapporteur's appeal not to revert to an issue extensively discussed at the fiftieth session.

40. Mr. HAFNER said he had no problems with the content of the draft guideline but had difficulties with the structure, especially when compared with draft guideline 1.1.7 as proposed by the Special Rapporteur in his third report. Draft guideline 1.4.3 [1.1.7] referred to one statement by which a State indicated that it did not recognize another State and at the same time purported to exclude the application of the treaty. Was it really only one statement, or were there in fact two different ones—one about non-recognition and another about exclusion of application of the treaty in the relations between the two States? Perhaps the Chairman of the Drafting Committee could explain the reason for combining the two issues. It might be preferable to separate them by replacing the words “if it” by the phrase “if it entails a declaration which”, before “purports to exclude the application of the treaty between the declaring State and the non-recognized entity”.

41. Mr. AL-BAHARNA said he agreed with Mr. Hafner. He had no objection to the draft guideline but had difficulty with the last phrase (“even if ... non-recognized entity”), which should perhaps be deleted. He would like to know from the Special Rapporteur whether that phrase did not implicitly or explicitly give effect or recognition to the unilateral statement made by the declaring State.

42. Mr. KATEKA observed that, hitherto, in State practice statements of non-recognition were regarded as constituting reservations. Before the recent changes in the political world, such statements used to be placed on record by a State, especially from one region, and the party for which they were intended would add that in the substance of the matter, it would treat that State with complete reciprocity. In other words, there were no treaty relations between the two parties.

43. Mr. MELESCANU said that after a long discussion in the Commission it had been agreed that such statements were political declarations whereby a State wished to assert its position regarding another State. In many instances of international practice, despite such statements, multilateral treaties applied perfectly well in the relations between all participating States. The wording of the draft guideline could perhaps be improved. As it

stood, however, it could be accepted, as it adequately reflected the basic idea that States sometimes felt the need to make a declaration that was highly political but did not modify the legal effects of a treaty.

44. Mr. CANDIOTI (Chairman of the Drafting Committee) said the draft guideline was derived from draft guideline 1.1.7 bis proposed by the Special Rapporteur in his fourth report. The idea was that the statements in question were neither reservations nor interpretative declarations because they concerned not the treaty itself or its provisions but rather the capacity of the non-recognized entity to be bound by a treaty. It was a useful kind of statement, frequently made by many countries, including his own, concerning an entity which was not recognized as having State capacity to become a party to the treaty. It was a statement of non-recognition.

45. The purpose of the last phrase was to dispel any doubt that all kinds of statements of non-recognition were covered. He experienced no difficulty with the formulation proposed by the Drafting Committee and would prefer to retain it.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.3 [1.1.7] as proposed by the Drafting Committee, but replace the words “and is outside” by “which is outside”.

It was so agreed.

Guideline 1.4.3 [1.1.7], as amended, was adopted.

GUIDELINE 1.4.4 [1.2.5] (General statements of policy)

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the draft guideline, but replace the words “and is outside”, by “which is outside”.

It was so agreed.

Guideline 1.4.4 [1.2.5], as amended, was adopted.

GUIDELINE 1.4.5 [1.2.6] (Statements concerning modalities of implementation of a treaty at the internal level)

48. Mr. HAFNER said he had raised a question in the Commission to which he had received no satisfactory answer. The subject covered in the guideline was normative treaties, particularly human rights treaties. The beneficiaries of the obligations under human rights treaties fell in many categories. Why, then, did the draft guideline refer to the obligations only of “the other contracting parties”? That restrictive wording might give rise to confusion and problems. To avoid any difficulties, it might be preferable to replace the phrase “of the other contracting parties” by “under the treaty”.

49. Mr. AL-BAHARNA said he had no objection to the draft guideline but thought the word “merely” was awkward and should be deleted.

50. Mr. KABATSI said he agreed, but the word “merely” could be replaced by the word “only”.

51. Mr. PAMBOU-TCHIVOUNDA confirmed that, in the French version too, the word *purement* was superfluous.

52. Mr. CANDIOTI (Chairman of the Drafting Committee) said that Mr. Hafner's proposal was also possible, but he would like to hear the views of the Special Rapporteur on that point.

53. As to deleting the word "merely", it was important to bear in mind the words "as such", which underscored that the statements concerned were only of an informative nature, so as to distinguish them from other statements which might be informative but could also have other effects.

54. Mr. PELLET (Special Rapporteur) said that he endorsed the suggestion to delete the word "merely", but he was far from enthusiastic about Mr. Hafner's proposal. For one thing, the problem Mr. Hafner had raised was resolved in part by the words "as such", which clearly referred to the idea that the rights and obligations stemmed from the treaty. But the phrase "the other contracting parties" should not be deleted, because that would mean that their commitments did not purport as such to affect the rights and obligations of the declaring State itself. That was not true, because the declaring State assumed commitments, even if they did not have an international effect. The classic example was that of the Niagara "reservation".⁷ At the internal level, the United States of America was certainly bound by a declaration which, in his opinion, it had imprudently made. He was not sure whether it was not bound at international level as well, since there could be a form of estoppel, and that was why the draft guideline said "as such" and the possibility was not excluded that, owing to additional factors, there might be rights and obligations for the other parties, and in the present case, that could only be rights. He was not persuaded that Mr. Hafner's proposal corresponded to a legal reality. The proposal was unwise and, what was more, it was not true as far as the internal level was concerned.

55. Mr. HAFNER said that the consequences under the present formulation of the draft guideline would be that, if a State made a unilateral statement on how it intended to implement the treaty at the internal level, which could imply even a change of its obligations under the treaty, then it was not a reservation. Why? For example, in an environmental treaty stipulating that all parties had to protect their own environment, a State could make a declaration on how to implement that obligation at the internal level in a way that clearly had an effect on the content and scope of the obligation imposed on the State. What, then, were the rights of the other States? It was essential to indicate clearly that a State could make a declaration on implementation at the internal level, but it must not affect the obligations imposed on the State. If it did, it must be treated as a reservation.

56. Mr. MELESCANU said he feared the discussion was getting out of hand. The question under consideration was very simple and practical. The object was not on any account to influence the legal effects of a treaty. It was for

a State to say that, at the internal level, one particular body, and not another, would deal with the matter. Members should not try to give the guideline a meaning that was not intended.

57. Mr. HAFNER said that the intention was one thing. The result was another, and it did not seem to correspond to the intention. The reader could go only by the content, not by the intention. As it stood, the draft guideline seemed to invite States to make declarations which were in fact reservations, in particular concerning standard-setting treaties. That should not be the objective.

58. The CHAIRMAN said that the Commission was at an early stage in the proceedings and was merely dealing with definitions, whereas what Mr. Hafner was suggesting went beyond the scope of that part of the Guide to Practice.

59. Mr. GAJA proposed that, to meet Mr. Hafner's concerns, the phrase "the rights and obligations of the other contracting parties" should be replaced by "the rights and obligations towards the other contracting parties".

60. Mr. PELLET (Special Rapporteur) said he failed to see the problem encountered by Mr. Hafner. The purpose of the statement was precisely not to affect the treaty. A statement that purported to exclude or to modify the legal effects would, of course, come under the definition of a reservation. Accordingly, he endorsed Mr. Gaja's proposal, which was a useful clarification. It would be even clearer to say "its rights and obligations towards the other contracting parties".

61. Mr. HAFNER, said that there were now two definitions: one concerned reservations, and the other was under consideration. It was not clear which one had priority. He could go along with Mr. Gaja's proposal on the understanding that it would be explained in the commentary.

62. Mr. ADDO said that Mr. Hafner had a point, but Mr. Gaja's proposal more or less took his concern into account. He therefore endorsed it.

63. The CHAIRMAN said the proposals were that the phrase "the rights and obligations of the other contracting parties" should be replaced by "its rights and obligations towards the other contracting parties"; the word "merely" should be deleted; and the phrase "and is outside the scope" should be changed to "which is outside the scope". If he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.5 [1.2.6] as amended.

It was so agreed.

Guideline 1.4.5 [1.2.6], as amended, was adopted.

SECTION 1.5 (Unilateral statements in respect of bilateral treaties)

GUIDELINE 1.5.1 [1.1.9] ("Reservations" to bilateral treaties)

64. The CHAIRMAN suggested that, for the sake of clarity, the words "however phrased or named" at the end

⁷ See 2584th meeting, para. 8.

of the draft guideline should be moved to the beginning and inserted after the words “A unilateral statement”.

65. Mr. HAFNER asked whether the word “which”, in the phrase “in respect of which”, referred to the treaty.

66. Mr. ROSENSTOCK said that that was his understanding.

67. Mr. CANDIOTI (Chairman of the Drafting Committee) said that, in the French original, the word “which” referred to the modification of the provisions, and not the treaty.

68. Mr. PELLET (Special Rapporteur) said that he had no opinion whatsoever on the English version. A State which wanted to make a “reservation” to a bilateral treaty stated that it ratified the treaty, provided that it was modified in a particular manner. Obviously, it was subordinating its consent to the modification of the provisions of the treaty. The French version was perfectly clear, and the English version, which in any case was of no importance because it was not the original text, must be brought into line with the French version.

69. Mr. GAJA suggested that the word “modification” should be added after “which” in order to make the text clear.

70. Mr. CANDIOTI (Chairman of the Drafting Committee) proposed that the words “in respect of which” should be replaced by “to which modification”.

71. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.5.1 [1.1.9], as amended.

It was so agreed.

Guideline 1.5.1 [1.1.9], as amended, was adopted.

GUIDELINE 1.5.2 [1.2.7] (Interpretative declarations in respect of bilateral treaties)

72. Mr. TOMKA said that he was afraid the draft guideline might be misinterpreted to mean that only guidelines 1.2 and 1.2.1 [1.2.4] were applicable to bilateral treaties and that all the other guidelines were therefore applicable to multilateral treaties. It was his understanding that guidelines 1.2 and 1.2.1 [1.2.4] were also applicable to multilateral treaties. Perhaps it could be made clearer by adding the word “also” after “are”.

73. Mr. PELLET (Special Rapporteur) said that it would be preferable to say that guidelines 1.2 and 1.2.1 [1.2.4] were applicable “to both bilateral treaties and multilateral treaties”.

74. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.5.2 [1.2.7], as amended.

It was so agreed.

Guideline 1.5.2 [1.2.7], as amended, was adopted.

GUIDELINE 1.5.3 [1.2.8] (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party)

Guideline 1.5.3 [1.2.8] was adopted.

GUIDELINE 1.6 (Scope of definitions)

75. Mr. Sreenivasa RAO, referring to the phrase “the rules applicable to them”, sought clarification on which rules were meant. Presumably that would be explained in the commentary.

76. Mr. CANDIOTI (Chairman of the Drafting Committee) said that “rules applicable to them” were the rules which would be dealt with later on. The question of permissibility and the effects of such statements would be dealt with in later chapters. As to statements which did not fall within the application of the guidelines, they were rules of general international law which had to do with the effects and validity or permissibility of other statements. Draft guideline 1.6 was a general “without prejudice” clause.

77. The CHAIRMAN said that it would be useful to make that clear in the commentary. If he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.6.

It was so agreed.

Guideline 1.6 was adopted.

State responsibility⁸ (continued)* (A/CN.4/492,⁹ A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,¹⁰ A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(continued)*

78. Mr. CRAWFORD (Special Rapporteur) said that the purpose of chapter I, section D (Countermeasures as provided for in part one, chapter V and part two, chapter III), of his second report on State responsibility (A/CN.4/498 and Add.1-4), which had been provisionally issued as document ILC(LI)/CRD.1, was not to suggest precise formulations for articles on measures, but to answer the question whether to retain the articles on countermeasures in part two and, if so, what the consequences would be for article 30 (Countermeasures in respect of an internationally wrongful act). Since it had proved virtually impossible to formulate a satisfactory article 30 without knowing whether countermeasures would be covered in more detail in part two, he had undertaken to provide a section of the report on the subject. To that end, it had been necessary to consider two other issues which would require much debate at the next session and on which guidance would be greatly appreciated.

79. The general question went to the heart of the whole issue of dispute settlement in the draft. The provisions on countermeasures in part two rested on an assumption which could not be taken for granted, namely that the

* Resumed from the 2592nd meeting.

⁸ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

⁹ Reproduced in *Yearbook ... 1999*, vol. II (Part One).

¹⁰ *Ibid.*

draft articles would deal with dispute settlement in the form normally taken in a convention. Opinions varied on the form the articles should take and even whether, in the form of a convention, the matter of dispute settlement should, in accordance with practice in the Commission, be left to be resolved by a diplomatic conference. The manner in which the articles in part two regulated countermeasures would depend on the decision regarding dispute settlement.

80. A second, more specific point concerned the linkage of dispute settlement and countermeasures in part two, which, he believed, could not be sustained. The Commission could, however, decide that articles on countermeasures should be retained without that linkage yet defer its final position on the form of the articles on dispute settlement.

81. If the Commission agreed to that approach, some members might be in favour of a broader provision pertaining to dispute settlement, which would mean that the subject would have to be debated at a later date. The size of the problem had been illustrated by the first of the cases brought before the International Tribunal on the Law of the Sea, the *M/V "Saiga"* case,¹¹ which had demonstrated how difficult it was to create a linkage between a key jurisdictional fact and the compulsory jurisdiction of a specific tribunal. He hoped that the Commission could provide guidance on the general question related to part two and clear the way for the Drafting Committee in connection with the formulation of article 30. It should be emphasized that he was not seeking precise views on the content of articles 47 to 50, but was unsure whether they should be included at all. Those articles were discussed at length in chapter I, section D, of his second report. Attention should be drawn to the dramatic difference between the commentaries to parts one and two. The commentaries to part one were learned disquisitions; those to part two resembled mere guidelines whereas they should strike a balance and reflect more of the wisdom and substance of the reports of the former Special Rapporteur, Mr. Gaetano Arangio-Ruiz.¹²

82. He did not consider it necessary to take up the issue raised by article 40 (Meaning of injured State) on the extent to which all injured States were entitled to take countermeasures. Part of the problem was that article 40 treated all injured States in the same way and gave them the same rights, including the right to take countermeasures, a position that was controversial and posed serious consequential questions in the event of "collective countermeasures". A law of collective self-defence was beginning to emerge, but no law of collective counter-

measures yet existed. The matter would have to be discussed at the fifty-second session of the Commission.

83. He also referred in paragraphs 374 to 379 of his second report to the comments and observations received from Governments on State responsibility (A/CN.4/492).¹³ Some Governments advocated the suppression of the articles on countermeasures, others were strongly in favour of them, while still others wanted substantial amendment, but not elimination, of the articles in part two.

84. It was necessary to examine the key underlying issues. Since the articles on countermeasures had been drafted, ICJ had heard a case concerning that very subject. The Court had clearly been of the opinion that countermeasures had been potentially relevant, but it had concluded that, although some of the preconditions for countermeasures had been met, the diversion of the Danube had not been a justifiable countermeasure under the general heading of proportionality. In paragraph 381, he had quoted the relevant passages of the Court's decision in the *Gabčíkovo-Nagymaros Project* case [see paragraphs 82 to 84 of the judgment]. The Court had applied a stricter test of proportionality than that implied in the Commission's draft articles, although the Court had cited them in support of its general approach. It had not, however, relied on them to the same extent as it had done on, for example, article 33 (State of necessity). In a sense, the Court had maintained that the chief requirements in respect of proportionality were that a countermeasure had to be commensurate with the wrong, designed to counter the effects of the wrongful act and be essentially reversible. Although Czechoslovakia had been entitled to adopt countermeasures, having regard to the importance of the area of law concerned, its conduct had not been commensurate. The conditions laid down by the Court as justification for countermeasures under general international law would therefore have to be borne in mind when the articles in part two came to be redrafted. Just as the Court's judgment had provided some assurance that neither the doctrine of necessity nor the doctrine of a fundamental change of circumstance was going to be abused to the instability of legal relations, it had also shown that a relatively strict approach would be adopted to countermeasures. Nonetheless, the institution did exist under general international law.

85. In paragraph 383, he had outlined some of the advances made in respect of countermeasures. Nevertheless, two crucial questions still had to be addressed, the first being the specific link between the countermeasures and dispute settlement. Under the draft articles, if countermeasures were taken, the target State was entitled to force the State taking the countermeasures to go to compulsory arbitration. That was the only compulsory third-party judicial settlement of a dispute provided for in the draft. There was compulsory conciliation, but no compulsory arbitration and conciliation was subject to any other agreement the parties might have reached, or any other procedure to which they might have consented, such as the jurisdiction of ICJ under the optional clause.

¹¹ Application for prompt release, judgement of 4 December 1997.

¹² Preliminary report: *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1; second report: *Yearbook ... 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1; third report: *Yearbook ... 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1; fourth report: *Yearbook ... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3; fifth report: *Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1-3; sixth report: *Yearbook ... 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1-3; seventh report: *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2; eighth report: *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/476 and Add.1.

¹³ See 2567th meeting, footnote 5.

86. The draft articles drew a distinction between interim measures of protection and countermeasures. The former were measures that could be initiated immediately against an unlawful act, without even notification and certainly without negotiation, whereas full-scale countermeasures could be set in motion only after negotiations had failed. It was a compromise between the differing views of members of the Commission, but technically it did not work very well. There might be advantages in having a graduated regime of countermeasures, because the only opportunity for taking effective, reversible countermeasures, (which ought not, however, to cause significant, long-term harm) might be when the unlawful act actually occurred. The problem lay in the fact that often such measures had to be adopted straightaway and lengthy prior consultation would defeat their purpose. That was the whole point of interim measures of protection. However, two essential difficulties arose. The first was that the judicial terminology of interim measures of protection was used, i.e. terminology borrowed from third-party settlement, which he deemed inappropriate. New terminology was therefore required. The second problem, which could be remedied, was that the definition of interim measures of protection was incorrect and was in fact another way of defining countermeasures, so there was no clear linguistic distinction between the two different types of measures.

87. The linkage between countermeasures and dispute settlement was a more important issue. The critical point was that the right to go to arbitration was unilateral in that it was vested in the State which had committed the internationally wrongful act. It was very odd to have a unilateral right to refer a matter to third-party compulsory settlement, especially when it was vested in the target State. Furthermore, it was strange to yoke it to the notion of countermeasures, which was difficult to apply. For example, if the injured State, instead of adopting countermeasures, resorted to retaliation of dubious legality—in the sense that it might be retaliation or countermeasures—and the target State submitted the matter to arbitration, the tribunal would be compelled to find that the action in question did not constitute a countermeasure, which was plainly an unsatisfactory outcome.

88. Moreover, the *M/V "Saiga"* case had shown how difficult it was to pin the jurisdiction of a court on a substantive legal classification [see paragraph 72 of the judgement]. The point at issue had been whether the seizure of a ship had been carried out in pursuance of Guinea's laws on its exclusive economic zone or its customs laws. Guinea had claimed that it was enforcing its customs laws. The International Tribunal on the Law of the Sea had found that, if that was so, Guinea's action had been unlawful, but it had held on the contrary that Guinea was enforcing exclusive economic zone legislation, which might be lawful, and that it therefore had jurisdiction. The Tribunal had gone on to find that Guinea's acts had been unlawful after all. He therefore thought it technically untenable to say that only the target State should have the right to force a matter to arbitration. It would be a positive incentive to injured States to have recourse to countermeasures in order to prompt such a step, but in the context of judicial settlement States should not have to weigh up how much damage to inflict in order to force the

hand of the other State. The system as it stood was unworkable. Consequently, if the Commission wished to deal with countermeasures, he would propose provisions that might well require the States to do everything they could to resolve their dispute but which would not tie the taking of countermeasures to judicial settlement.

89. The second general issue was the balance to be struck between injured and target States in the field of countermeasures. Views on that matter clearly differed. The broad view of the international community was that countermeasures could be abused, were the sign of a relatively primitive legal system and played into the hands of the stronger States. On the other hand, it was thought that countermeasures were necessary in a context where there was no centralized law enforcement mechanism and no general system of compulsory adjudication. Those views led to disparate conclusions. Some States considered that countermeasures were so dangerous that they should not be regulated at all, while others might be trying to extend their freedom to take countermeasures by retaining article 30 and deleting articles 47 to 50.

90. The Commission had made progress in the formulation of articles on countermeasures and could make further headway. A thorny legal problem in relation to an existing institution of international law was not further complicated by the Commission's endeavours to strike a balance in formulation. The Court had demonstrated that fact by relying on the Commission's formulations in a variety of contexts in recent decisions, which meant that the Commission had a responsible role to play. Article 30 should not be removed from chapter V. To do so would be to decodify international law. He therefore preferred option 4 in paragraph 389, but if it was rejected, his second preference was for option 2, which would go some part of the way to regulating countermeasures. The worst scenario would be to give a vague licence to States under article 30 to adopt countermeasures, but do nothing whatever to regulate their content.

91. Mr. TOMKA said that he fully supported the proposal to follow option 4. Countermeasures should be listed in chapter V of part one among the circumstances precluding wrongfulness. He was in favour of sending the text proposed by the Special Rapporteur to the Drafting Committee, so that a definition of countermeasures could be submitted to the Commission. Some substantive treatment of countermeasures was needed in part two, and he was against any linkage of countermeasures and dispute settlement. He hoped that the imbalance between the commentaries to parts one and two would be remedied. He wished to point out that in the *Gabčikovo-Nagymaros Project* case, variant C had not been viewed as unlawful. It had been regarded as a unilateral diversion of water and hence not in accordance with the principle of proportionality.

The meeting rose at 1.05 p.m.