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Summary record of the 2938th meeting

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26. Mr. Nolte had been right to counter Mr. McRae's argument that, many years after a reservation had been made, it might be interpreted in an unforeseen manner, by pointing out that, in that case, the accepting State would not be bound by that interpretation, in accordance with the principle of relative *res judicata*. Mr. McRae had given the impression that a decision of an international court was of universal application, whereas in fact it was binding only on the parties to the dispute and in respect of that particular case. He was therefore most uncomfortable with the idea that acceptance might be revoked on the strength of a court's interpretation of a reservation. It would be more logical for the State in question to formally declare that it had accepted a reservation on the understanding that it was to be interpreted in a particular manner.

27. In other respects he was inclined to agree with the criticisms of his wording of the draft guidelines in his twelfth report.

28. Ms. ESCARAMEIA, responding to Mr. Pellet's comment concerning draft guideline 2.8.12, that the result of the suggestion she and Mr. McRae had made would be that a treaty which had already entered into force would cease to operate between the two States in question, said that almost no instances of that happening had ever been recorded. In 99.9 per cent of cases, the treaty would remain in force if an acceptance was withdrawn, because even in the event of an objection being made to a reservation, the treaty normally entered into force as between the reserving and the objecting State.

29. Mr. PELLET (Special Rapporteur) said that if his answer was a poor argument, so was the "quantitative" objection to it.

The meeting rose at 10.55 a.m.

2938th MEETING

Wednesday, 18 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (continued) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the twelfth report of the Special Rapporteur (A/CN.4/584), which contained draft guidelines 2.8 to 2.8.12.

2. Ms. XUE, said that the wording of draft guideline 2.8 (Formulation of acceptances of reservations) was precise and logical, but was perhaps somewhat too abstract for the practitioner and ought to be simplified.

3. Noting that in paragraph 17 [197] of the report the Special Rapporteur stated that "[i]t arises from both the text of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires* and the practice that tacit acceptance is the rule and express acceptance the exception", she pointed out that tacit acceptance was more a common practice than a rule, not so much because it was the *opinio juris* of States, but for reasons of procedural convenience.

4. With regard to draft guidelines 2.8.1 and 2.8.1 *bis* (Tacit acceptance of reservations), she said that she much preferred the latter because although the content of the two was identical, the wording of draft guideline 2.8.1 *bis* was clearer than that of 2.8.1, which contained an impractical cross-reference.

5. She endorsed the content of draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), but upon reflection it seemed to her that it might pose a number of practical problems. For example, when a treaty establishing an international organization was concluded, it was possible that all the contracting States might sign the final act, but that some might not ratify it in due time. Under the terms of the 1969 and 1986 Vienna Conventions, however, the latter States were also entitled to be notified of all legal acts on the part of the other contracting States. If they formulated an objection to a reservation made by a signatory State, the reserving State might contest their status.

6. Draft guideline 2.8.4 (Written form of express acceptances) was well founded from a theoretical point of view but might pose practical problems, which she would discuss when she addressed draft guideline 2.8.8.

7. As to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), the Special Rapporteur had raised very pertinent questions in paragraph 69 [249] and had dealt with them in a sensible manner.

8. With regard to draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument), she said that at first sight it had seemed very clear, but after having listened to the questions raised by a number of members she had had second thoughts. She now wondered how the draft guideline could be applied in practice and what was meant by the phrase "shall not be presumed". If it meant that acceptance should be express, and express only, it would be preferable to say so. Or, bearing in mind draft guideline 2.8.4, did it mean that the international organization must always express its acceptance in writing? It was common knowledge that organizations did not always do so in practice. The words "shall not be presumed" might

be taken to mean that acceptance should be expressed in conformity with the rules of the international organization concerned, in other words that the organization should take a decision or a position *vis-à-vis* such a reservation. There again, she wondered whether that corresponded to practice. She would return to that point when she addressed draft guideline 2.8.9.

9. Noting that draft guideline 2.8.8 also provided that “[g]uideline 2.8.1 is not applicable”, meaning that the time period of 12 months was not applicable to the reservations in question, she enquired whether that meant that the time period should be longer or shorter, or that acceptance should only be express.

10. In respect of draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), she said she agreed with those members who had argued that it should be up to the member States to decide, but she would not object if it was the competent organ that took that decision.

11. With regard to draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), she recalled that the type of instrument in question often stipulated that the instrument would enter into force when a certain number of States had ratified it. However, she wondered what would happen if all States which ratified the instrument formulated a reservation at the same time—what rule should be applied? Since it was sometimes desirable for political reasons for the instrument to enter into force as soon as possible, it was probable that ratification would be accepted and that the instrument would enter into force before the end of the 12-month time period.

12. She was sceptical about draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument). States could always make a political declaration, and she did not see any point in mentioning that in a guideline.

13. She had no difficulty with draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) and was in favour of referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee.

14. Mr. FOMBA noted that the Special Rapporteur proposed to focus on the question of how and under what procedural conditions a State or international organization could expressly accept a reservation while leaving open the question of whether and in what circumstances an express acceptance was necessary in order to “establish the reservation”. Thus he differentiated between two types of things: on the one hand, between the possibility of the express acceptance and the need for—and hence justification of—such acceptance, and, on the other hand, between cases in which the aim was to “establish the reservation” and cases in which the objective was to “make the reservation”. That raised the two questions. The first was whether the matter of justification was unimportant, or whether it would be taken up later. The second concerned the underlying reason for the second distinction: was it linked to the question of legal effects?

15. With regard to the issue of the express or tacit acceptance of reservations, the Special Rapporteur’s interpretation of “silence”—more specifically, of the consequences that should be drawn from it—was logical, consistent and persuasive. As to the proposals to distinguish between tacit and implied acceptances or to introduce the notion of early acceptance when the reservation was permitted by the treaty, he agreed with the Special Rapporteur that such proposals should not appear in the Guide to Practice, because they would complicate matters for its users. The Special Rapporteur did, however, seem to have a preference for the term “tacit”, although he sometimes used both words indiscriminately. Regarding the question as to whether in some cases an objection to a reservation was not tantamount to tacit acceptance, a question that the Special Rapporteur had deemed “paradoxical”, asserting that it was not a simple hypothesis but above all a problem of the effects of acceptances of objections on reservations, he agreed with the Special Rapporteur that at the current stage, it was sufficient to refer to the matter in the commentary to draft guideline 2.8.1; he would nevertheless reserve his reply for the part of the Guide to Practice that would deal with effects.

16. Draft guideline 2.8 (Formulation of acceptances of reservations) did not pose any particular problem of substance. As to what ought to be done with the words in square brackets, the argument based on the “definitional role” of the guideline was relevant and decisive. He therefore proposed that paragraph 2 should be redrafted to read: “The absence of objections to the reservation may arise from an express acceptance stemming from a unilateral statement in this respect or from a tacit acceptance arising from silence kept by a contracting State or contracting international organization within the time periods specified in guideline 2.6.13.” That wording was terminologically repetitive, but could be improved, the main point being to reflect the idea of express acceptance and tacit acceptance in the actual body of the guideline. As to the scope *ratione personae* of draft guideline 2.8, he strongly endorsed the line of reasoning set out by the Special Rapporteur in paragraph 16 [196]. The Special Rapporteur’s assertion that draft guideline 2.8 was not intended to establish cases in which it was possible or necessary to resort to either of the two possible forms of acceptances was understandable; nevertheless, he would have to deal with it, at least theoretically, and, most importantly, he would have to consider whether in some cases it would not be preferable to reverse the order of things and make express acceptance the rule rather than the exception.

17. The justification given for draft guideline 2.8.1 *bis* (Tacit acceptance of reservations) in paragraph 24 [204] seemed to him valid. He asked the Special Rapporteur whether he could provide an example that illustrated the situation described in the phrase in square brackets. As to the possible options, given that the wording of draft guideline 2.8.1 *bis* repeated part of the text of draft guideline 2.6.13, on the time period for formulating an objection to a reservation, it would be wiser and more sensible simply to refer to draft guideline 2.6.13. In any case, the justification which the Special Rapporteur gave in paragraph 27 [207] was acceptable. He also wondered whether, by evoking the dialectic between acceptance and objection (and by stating that objection excluded acceptance

and vice versa), the Special Rapporteur was not already providing a negative answer to the paradoxical question raised in paragraph 12 [192].

18. In the light of the reference to draft guideline 2.6.13, it was not absolutely necessary to retain the phrase “unless the treaty otherwise provides”. As to the time period, he wondered whether there was not a contradiction in the ideas which the Special Rapporteur set out in paragraph 40 [220], namely that, first, States and international organizations that were not already parties to the treaty apparently did not enjoy a period of reflection; secondly, they usually had more than 12 months to consider the reservation that had been formulated; and, thirdly, in any case they had at least one year to consider reservations. He endorsed the Special Rapporteur’s interpretation, in paragraph 43 [223], of cases in which unanimity remained the rule.

19. Neither the objective nor the wording of draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations) posed any particular problem. As to the question of the link between the validity of a reservation and the simple possibility of expressing consent—tacitly or openly—to a reservation, he agreed with the Special Rapporteur that this aspect of the topic should not be elucidated in the section of the Guide dealing with procedure, but in the one that dealt with effects, which would be the subject of a future report.

20. With regard to draft guideline 2.8.3 (Express acceptance of a reservation), he said that allowing for such a possibility did not seem at all problematic; on the contrary, it constituted an important argument from a teleological point of view. Moreover, he agreed with the Special Rapporteur’s interpretation in paragraph 47 [227].

21. He wished to draw attention to a mistake in the French version: in paragraph 52 [232], the text of article 23, paragraph 1, of the 1986 Vienna Convention as quoted contained an erroneous repetition of the phrase “aux États contractants et autres organisations contractantes”.

22. Draft guideline 2.8.4 (Written form of express acceptances) did not call for any particular comment, and the Special Rapporteur’s explanation of it was very clear. However, it seemed that the text constituted something of a contradiction in terms, since the Special Rapporteur said, first, that by very definition, an express acceptance must be formulated in writing; secondly, that the simple fact that an acceptance was express did not necessarily mean that it was in writing; and, thirdly, that insofar as Sir Humphrey Waldock’s various proposals and drafts were concerned, a written version was required in every case.

23. With regard to draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation), he said that there was some confusion in the questions addressed. In paragraph 57 [237], the Special Rapporteur spoke of the confirmation of express acceptances; in the title, however, he referred to the confirmation of an objection. Even better, or worse, the title did not correspond to the content, which did in fact deal with express acceptance. The title should

therefore be corrected by replacing the word “objection” with the term “express acceptance” (assuming that this was actually the subject of the draft guideline). As to the formulation of an acceptance prior to the expression of consent to be bound by a treaty, he could agree for the time being with the Special Rapporteur that there was no reason to establish a parallel with “preventive objections”, for the reasons set out in paragraph 59 [239]. Nevertheless, he wondered whether the question of the concrete responsibility of such acceptance had been exhaustively considered. With regard to the acceptance of reservations to the constituent instrument of an international organization, the Special Rapporteur stated in paragraph 65 [245] that “the diversity of bilateral relations between States or member organizations is largely inconceivable”. He wondered whether “largely” meant that it was conceivable elsewhere or that it was, *a contrario*, conceivable.

24. Turning to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), he said that although it was legitimate and useful to stress at that point the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations, a number of questions which the positive law of Vienna did not regulate—rightly or wrongly—did in fact arise: the definition of a constituent instrument, the definition of the organ competent to decide on acceptance of a reservation and the determination of the consequence of the acceptance formulated by the competent organ on the power or right of member States of the international organization to react individually.

25. With regard to draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument), he said that there he subscribed to the Special Rapporteur’s view that it was useful to reiterate the idea that the presumption of acceptance by the competent organ of the organization did not apply in that context. The actual wording of the draft guideline did not call for any particular comment. Interesting ideas had been put forward concerning the definition of the words “constituent instrument of an international organization”, such as making a distinction between constituent instruments *stricto sensu* and hybrid constituent instruments, or between “organizational” and “substantive” provisions, by establishing a differentiated legal regime. That was all intellectually stimulating, but it might prove very complicated for the practitioner, namely the user of the Guide to Practice. He therefore agreed with the Special Rapporteur that there was no value in defining the concept of “constituent instrument” of an international organization in a draft guideline. It would be wiser to discuss the difficulties associated with that concept in the commentary to draft guideline 2.8.7, which introduced it, or, if absolutely necessary, in the commentary to draft guideline 2.8.8.

26. Taking up draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he said that the wording of the guidelines should be harmonized by saying, wherever necessary, “constituent instrument of an international organization” (2.8.7, 2.8.8, 2.8.9, etc.). On the whole, he agreed with the line of reasoning followed by the Special Rapporteur, particularly in

paragraph 78 [258] of the report. Like the Special Rapporteur, he thought that it would be helpful to indicate in the Guide to Practice how the term “competent organ” was to be understood. However, he wondered whether the residuary criterion of competence to interpret the constituent instrument applied regardless of the political, quasi-jurisdictional or jurisdictional nature of the organ in question. With regard to the specific case in which the competent organ did not yet exist, the proposal to find a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument was interesting, but the example of an “interim committee responsible for setting up the new international organization” did not seem to be based on common practice, as it mainly concerned treaties concluded under the auspices of the United Nations.

27. Draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established) was clearly useful, but its wording should be reviewed; in particular, the phrase “all the States and international organizations concerned” might give rise to questions. Did it include States and international organizations which intended to become parties? As to the question of whether the competence of the organ of the organization precluded individual reactions by other members of the organization, he strongly endorsed the view expressed by the Special Rapporteur in paragraphs 86 [266] and 88 [268].

28. In the case of draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he said he thought that it was indeed useful to specify that the right of members of an international organization to take a position individually was not altered by the competence of the organ of the international organization, since the positive law of the Vienna regime did not address the question and, even more importantly, in view of the fact that “the organization’s consent is nothing more than the sum total of acceptances of the States members of the organization” (para. 83 [263]). With regard to the second sentence of the draft guideline, on the other hand, he wondered what point there was in taking a position if it was devoid of any effect.

29. Noting the Special Rapporteur’s observation with regard to draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) that the effects produced by an express acceptance were no different from those produced by a tacit acceptance, he asked whether the Special Rapporteur was already anticipating the conclusion of the forthcoming report on that question. In order to justify the idea that acceptance—whether express or tacit—should be final, the Special Rapporteur had put forward two main arguments, namely the dialectical relationship between the objection and the acceptance (objection excluded acceptance and *vice versa*) and the need to stabilize treaty relations through the framework for the objections mechanism. At first glance, that line of reasoning was logical and valid, and thus acceptable. In fact, however, everything depended on how the dialectical relationship between the objection and the acceptance was perceived. A strict and uncompromising position

would lead one to endorse the Special Rapporteur’s proposal, whereas a relativistic view would ultimately allow for the possibility of reversible acceptance, the point being to be able to assess its actual impact on the certainty of treaty relations, but also, and most importantly, to identify any relevant case or cases in which the exception might or ought to come into play. In that regard, some of the ideas that had been expressed should perhaps be closely examined. Ultimately, the question was whether the Commission was prepared to send the message that the will of the State should be given free rein, at the risk of undermining—unduly and without any restriction—the fundamental principles of the integrity of treaties, legal certainty and good faith.

30. He was in agreement with referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee.

31. Mr. PELLET (Special Rapporteur) thanked Mr. Fomba for his close reading of the twelfth report on reservations to treaties and confirmed that there was an error in paragraph 52 [232] of the French version, which appeared in the quotation of article 23, paragraph 1, of the 1986 Vienna Convention. In addition, draft guideline 2.8.6 should read “*Inutilité de la confirmation d’une acceptation faite avant la confirmation formelle de la réserve*” (“Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation”). The mistake had apparently been reproduced in all language versions of the report, and a corrigendum should therefore be issued.

32. Mr. WISNUMURTI said that the twelfth report on reservations to treaties reflected an in-depth analysis of the various legal aspects relating to the procedure for acceptances of reservations, which formed the basis of the Special Rapporteur’s proposed draft guidelines. On the whole, he had no difficulties with the draft guidelines, but he nevertheless wished to make a few comments. In paragraph 8 [188] of the report the Special Rapporteur analysed the concept of express and tacit acceptance of reservations and referred to the distinction made by some authors between “tacit” and “implicit” acceptances on the basis of the two cases covered by article 20, paragraph 5, of the 1969 Vienna Convention. An acceptance was tacit if a State or international organization raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation. It was implicit if a State or international organization made no objection to the reservation when it expressed its consent to be bound by the treaty. In paragraph 10 [190], the Special Rapporteur provided a logical explanation of the different grounds of the two concepts stemming from article 20, paragraph 5, of the Convention. In his own view, that doctrinal distinction had the value of providing a better understanding of the subsequent draft guidelines.

33. He noted that the Special Rapporteur proposed two alternative provisions relating to tacit acceptance of reservations, namely draft guideline 2.8.1 *bis* (para. 25 [205]) and draft guideline 2.8.1 (para. 26 [206]), each of which had advantages and disadvantages. He thought that draft guideline 2.8.1 should be retained because it made a specific cross-reference to draft guidelines 2.6.1 to 2.6.14.

That approach not only avoided repetition but also clearly showed the necessary link between draft guideline 2.8.1, draft guideline 2.6.13 and article 20, paragraph 5, of the 1969 Vienna Convention. In other words, draft guideline 2.8.1, on tacit acceptance of reservations, was not a stand-alone provision but a further elaboration of the provision dealing with the time period for formulating an objection (draft guideline 2.6.13). As draft guideline 2.8.1 made a cross-reference to previous draft guidelines, and in particular to draft guideline 2.6.13, which contained the phrase “unless the treaty otherwise provides”, the phrase should not be repeated in draft guideline 2.8.1. He noted that in paragraph 32 [212], the Special Rapporteur explained that the phrase meant that the presumption of tacit acceptance in the absence of an objection was not absolute, in the sense that the 12-month period could be altered if the States or international organizations parties to the treaty so wished.

34. He did not see why the Special Rapporteur thought that the notion of implicit acceptance of reservations should not be reflected in the Guide to Practice. In the report, the Special Rapporteur had discussed at length the two cases contemplated in article 20, paragraph 5, of the 1969 Vienna Convention, i.e. tacit acceptance and implicit acceptance, as well as the doctrinal distinctions underlying the different rationale for each, and he was not convinced that it would be wise to exclude either. Would it not be logical to have a draft guideline on implicit acceptance, given that, as in the case of tacit acceptance, it was contemplated in article 20, paragraph 5, of the Convention and in draft guideline 2.6.13? It would be useful for legal advisers of foreign ministries and practitioners if the Guide to Practice contained a draft guideline indicating that a State or international organization was considered to have accepted a reservation if it had formulated no objection thereto when it had expressed its consent to be bound by the treaty. That would certainly be a factor which States and international organizations would have to take into account before they decided to express their consent to be bound by the treaty.

35. As to draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he agreed with the Special Rapporteur that member States and international organizations should be able to take individual positions on a reservation, irrespective of draft guideline 2.8.7, which provided that a reservation required the acceptance of the competent organ of the organization concerned. However, like Ms. Escarameia and Mr. McRae, he had difficulty with the wording of the draft guideline and thought that it should be reformulated so as to avoid giving the impression that a member State or organization of an international organization had the right to challenge a decision of the competent organ of that international organization outside the framework of the latter if that decision differed from its own position, especially if the State or international organization was permitted to take a different position on the validity or appropriateness of a reservation already accepted by the competent organ. That might undermine the integrity of the constituent instrument and the international organization concerned. For those reasons, draft guideline 2.8.11 should simply

indicate that, notwithstanding draft guideline 2.8.7, States or international organizations could express their own opinion on a reservation to a constituent instrument of the organization. If that watered-down formulation was retained, it no longer seemed necessary to include the safeguard clause in the last sentence of draft guideline 2.8.11, the title of which should then be adjusted accordingly.

36. He agreed with Ms. Escarameia and Mr. McRae that the wording of draft guideline 2.8.12 was too categorical. The Special Rapporteur had proposed the draft guideline in absolute terms to protect the integrity of the constituent instrument, but States and international organizations should have the possibility of withdrawing their acceptance if a fundamental change of circumstances required them to do so on the basis of their higher interests. On the other hand, he did not share the view that in such cases the State or international organization concerned should only be required to make a statement or interpretative declaration concerning the reservation to accommodate the new circumstances instead of withdrawing or amending the acceptance.

37. Mr. HMOUD thanked the Special Rapporteur for his twelfth report on reservations to treaties, which dealt with the procedure for acceptances of reservations. The report contained a thorough analysis of the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions and the practice of States and international organizations on the question and was thus instrumental to a better understanding of the reasoning behind the draft guidelines in the report. The draft guidelines were very useful for the application of the legal regime of reservations to treaties, as they reflected the content of the Conventions and covered areas on which the Conventions were silent.

38. He did not see any need to make a distinction between implicit acceptance and tacit acceptance. Instead, a single term should be used to signify the lack of express objection. Accordingly, acceptance should be regarded as tacit in both situations contemplated in article 20, paragraph 5, of the 1969 Vienna Convention. He preferred draft guideline 2.8.1 *bis* to draft guideline 2.8.1, but agreed with Mr. Fomba that the phrase “in accordance with guidelines 2.6.1 to 2.6.14” should be replaced by “in accordance with guideline 2.6.13”, the only draft guideline on objections that was related to tacit acceptance. That said, it was not very clear what was meant by the “presumption” of tacit acceptance. It would seem, based on a reading of paragraph 32 [212], that the term “presumption” indicated that the treaty could provide for a time frame that was different from the 12-month period. Then, in paragraph 36 [216], it was stated that the 12-month time period “provides a time frame for the presumption of tacit acceptance. If a State does not object within a period of 12 months, it is presumed to have accepted the reservation”. Further on, in paragraph 38 [218], the Special Rapporteur wrote that “the objection constitutes the act that reverses the presumption of tacit consent”. The question therefore arose as to whether a different time frame in the treaty reversed the presumption or whether the presumption continued after the 12-month period, in keeping with State practice regarding late reservations. Did the

presumption take effect from the moment the reservation was notified, and would it only be reversed by the formulation of an objection by a State or international organization? Tacit acceptance, and acceptance in general, was not presumed: article 20, paragraph 5, of the 1969 Vienna Convention stipulated that a reservation was “considered” to have been accepted; however, the word “considered” signified a determination, and not a presumption. The Special Rapporteur also argued that, once the time period had elapsed, the State or international organization was considered to have accepted the reservation and could no longer validly object to it. In that connection, draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) should not refer to the presumption of acceptance either, but should be worded to indicate that acceptance must be express or must arise from an act of the organ competent to formulate it, for example the absence of objection to the admission of a reserving member. Draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations) was acceptable, because it addressed considerations of legal certainty. However, as a number of Commission members had pointed out, it ought to be reworded to remove the unintended implication that States and organizations which were not yet parties were included in the “unanimous acceptance of the parties”.

39. The distinction drawn in draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument) between two categories of competent organs, i.e. the one that was competent to decide whether the author of the reservation should be admitted to the organization, or failing that, the one that was competent to interpret the constituent instrument, was in keeping with the practice of international organizations in that area. As Mr. McRae had pointed out, it should be left to the rules of the organization to decide on the matter and to designate another organ or reverse the hierarchy of the two organs referred to in the draft guideline.

40. The general rule set out in draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) was warranted for reasons of legal certainty; the question was whether it should be formulated in such absolute terms. If a State which had accepted a reservation came to the conclusion that in certain circumstances the reservation was no longer compatible with the object and purpose of the treaty, should it not have the exceptional right to revoke its acceptance and even to preclude the entry into force of the treaty between it and the reserving State? That possibility of derogation from the general rule should be looked into more closely. He was in favour of referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee.

41. Mr. PETRIČ said that he had no particular objection to the draft guidelines proposed by the Special Rapporteur in his twelfth report on reservations to treaties. Most of the issues raised by Commission members could be settled in the Drafting Committee, including the question of the phrase in square brackets in draft guideline 2.8 (Formulation of acceptances of reservations), which did not pose any problems of substance.

Personally, he preferred draft guideline 2.8.1 *bis*, which was more explicit and more effective. On the other hand, there were a number of problems with draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations). Although the emphasis on “unanimous acceptance” and the time period of 12 months was justified, it was difficult to place States and international organizations which had already signed or ratified a treaty on an equal footing with States and international organizations that were entitled to become parties to the treaty or had signed but not yet ratified it. He agreed with Ms. Xue that the Special Rapporteur might have gone too far in referring to States and international organizations “entitled to become parties”. Draft guideline 2.8.4 (Written form of express acceptances) also posed a problem: it was not certain that it had to be so categorical and restrictive. Express acceptance of a reservation could certainly be formulated very clearly, but in another way—for example, in a statement by a Head of State or Minister for Foreign Affairs. However, he would not object if the majority of Commission members thought that the draft guideline should be retained as it stood.

42. He had no difficulty with draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation) or draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument). With regard to draft guideline 2.8.7 (Acceptance of reservations to the constituent instrument of an international organization), he agreed with the comment made by Mr. Nolte at the previous meeting that the Commission should perhaps distinguish between the various provisions of the constituent instrument. As to draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he shared Mr. McRae’s view that it would be preferable to explain what the competent organ was and to establish a closer link between the international organization and its constituent instrument, without being specific or restrictive. Draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument) was also problematic, and, like Ms. Xue, he had doubts about its usefulness. States and international organizations always had the right to make statements, to comment and to express their views, but he wondered whether the draft guideline did not give those statements a little too much importance. At the least, the draft guideline could be reformulated, as proposed by Mr. Wisnumurti, because the use of the word “right” in the English text seemed to be excessive. Draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) reflected the sole approach possible in the interest of legal certainty; there was no place for the concept of fundamental change of circumstance. He was in favour of referring the draft guidelines to the Drafting Committee.

43. Mr. PELLET (Special Rapporteur) said that the word “right” in the English version of draft article 2.8.11 was not a good translation for “*faculté*”. The Drafting Committee should return to that question and use a word that was not as strong as “right”, such as “faculty” or “possibility”.

Responsibility of international organizations (continued)* (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

44. The CHAIRPERSON said that as the Commission had not had sufficient time to complete its consideration of the additional draft article proposed by Mr. Pellet, it would hear the comments of members of the Commission on the proposed text rather than continue the general debate on the topic.

45. Speaking in his capacity as a member of the Commission, he said that the introduction of the proposed draft article had been better than the draft article itself. The reasons given in support of the additional draft article had been clearly explained, and he endorsed them, but he thought that the draft article itself was too vague compared to those reasons and that the problem it addressed ought to have been fully explored at the fifty-eighth session, when the Commission had considered and adopted draft article 29 on first reading.²⁷³ The basic assumption behind draft article 29 was that the members of an international organization were not responsible as such for the organization's acts. Yet, Mr. Pellet's proposal was in effect telling member States *ex post facto* that they should create a claims account or insurance fund to help the organization pay reparations to the victims of its wrongful acts. While he would like to see the draft article referred to the Drafting Committee, he nevertheless thought that more work on its substance was still needed.

46. Mr. SINGH said that he fully endorsed the aim of Mr. Pellet's proposal, which was to ensure that an international organization that had incurred responsibility under the draft articles under consideration discharged its responsibility and to guarantee that international organizations settled liabilities arising out of that responsibility. However, the proposal did not take account of the principle that an international organization had an identity which was distinct from that of its member States. Since an international organization was funded by contributions from its member States, it was clear that when the organization was not in a position to meet its liabilities, it would turn to its member States. However, that was a matter which concerned relations between the organization and its member States and had no place in the draft articles.

47. In practice, States took questions concerning the liabilities of international organizations of which they were members very seriously. One good example was that of the International Tin Council, which by the time it had ceased its operations had accumulated some £512 million in debts, debts that its creditors had attempted in vain to recover in the British courts; only after negotiations had the creditors agreed to accept £182.5 million as a final settlement of their claims against the Council, and it was

the member States that had provided the funds that had allowed the Council to pay its debts.²⁷⁴

48. Mr. NOLTE said that in his first statement on the Special Rapporteur's fifth report he had already explained briefly why he had not been persuaded by Mr. Pellet's criticism that the Special Rapporteur should have included a duty on the part of the States members of an international organization to provide it with the means to honour its obligations arising out of its internationally wrongful acts. Mr. Pellet, having introduced a proposal on the subject, felt compelled to give his reasons more fully.

49. To start with, he was not convinced by the reasons given by Mr. Pellet in support of his proposal. Mr. Pellet's first point consisted in an analogy with national constitutional law. It was not true, however, that national parliaments were required under constitutional law to vote the funds which States needed to meet their international obligations. The State as such had that duty under international law, and under its constitutional law it might also even be bound to fulfil its international obligations. He was not aware that the constitutional law of Germany, the United Kingdom or the United States required the parliaments of those countries to provide funds to honour the State's international obligations. The absence of such an obligation stemmed from the basic freedom of parliamentarians to vote in accordance with their own conscience. That freedom was the reason that conclusions applicable to the problem at hand could not be drawn from national constitutional law. The only question that could arise was whether the opposite, *a contrario* conclusion should not be drawn: if the absence of an obligation on the part of national parliaments to provide funds was based on the freedom of parliamentarians, it might be otherwise in cases such as the one before the Commission, in which that freedom was not involved.

50. Secondly, in his argument Mr. Pellet had cited the 1954 advisory opinion rendered by the ICJ (*Effect of awards of compensation made by the United Nations Administrative Tribunal*) on the obligation of the General Assembly to approve the necessary funds to honour a judgement of the United Nations Administrative Tribunal. However, that precedent was much more limited than Mr. Pellet suggested. It did not concern general international law, but only the treaty constituting the Charter of the United Nations. Moreover, the judgment did not postulate an obligation on the part of the Member States of the United Nations, but only on the part of the General Assembly. Lastly, it had to do with the special case of the effects of a final judgment within a constitutional system. It might sometimes be possible in national constitutional law for courts to require parliaments to provide or set aside funds in order to implement final judgments, but that possibility was much narrower than Mr. Pellet's interpretation of it. It did not include a general requirement to provide the necessary funds to meet such obligations.

51. Thirdly, in his most general point, Mr. Pellet argued that it would be absurd and pointless to enunciate rules on the responsibility of international organizations if member States were not under an obligation to provide such

* Resumed from the 2935th meeting.

²⁷³ *Yearbook ... 2006*, vol. II (Part Two), p. 121, para. 91.

²⁷⁴ See the International Tin Council cases.

organizations with the funds needed to answer for their internationally wrongful acts. Personally, he did not think that the absence of such an obligation would be absurd. It made perfect sense to leave it to the international organization and to its internal or external political process to find the necessary funds. In that respect, international organizations were in the same position as States. Often, the political pressure to honour their commitments was such that member States felt compelled to make the necessary funds available.

52. In other cases, such as the agreement to which Mr. Singh had referred concerning the International Tin Council, the international organization might be conceived in a way that suggested that the liability of member States was limited to their contributions as determined by the constituent instrument. In yet other cases, the international credibility of the organization and its member States would suffer, just as would that of a State that did not honour its commitments. That political effect was the consequence of the separate legal personality of the international organization, the very feature which Mr. Pellet had so emphasized. It would be unbalanced if the international organization had only the advantages of a legal personality but not its potential disadvantages.

53. He did not mean to say that it was not desirable for States to provide the funds needed for an international organization to fulfil its obligations. However, once it was accepted that an international organization had a separate legal personality with respect to some of its activities, the issue could not be addressed under general international law, but only on the basis of the treaty law in question. The ICJ had taken that approach in its advisory opinion on *Certain Expenses of the United Nations*. It might be possible in some cases to interpret the constituent instrument of an international organization as enunciating a duty on the part of its member States to pay their contributions in accordance with the needs and international obligations of the organization, but it went too far, and would unnecessarily limit the options States had when creating an international organization, to postulate that such a duty existed under general international law for all organizations.

54. Mr. VÁZQUEZ-BERMÚDEZ said that international law placed obligations on international organizations that were responsible for an internationally wrongful act, in particular the obligation to provide reparation for the damage incurred by the act. Thus, as the Special Rapporteur had pointed out in his fifth report, it would be illogical for the responsibility of international organizations not to be incurred. Moreover, although the member States could not themselves be held responsible for the organization's wrongful act, they must provide it with the means of making reparation for the damage. States which had replied to the question which the Commission had asked them on that matter in Chapter III of its most recent report²⁷⁵ had taken the position that there was no direct obligation on the part of States to compensate for the damage. The interest of Mr. Pellet's proposed draft article, which concerned the progressive development of law, was that it made it possible to actually implement the responsibility of international organizations; otherwise,

the notion of such responsibility would simply remain wishful thinking. With such an article, the States members of international organizations would also be more careful to prevent international organizations or their agents from committing wrongful acts.

55. Mr. YAMADA said that he agreed with the substance of the draft article proposed by Mr. Pellet. Member States should not be able to hide behind the legal personality of the international organization. They must do their utmost, in good faith, to ensure that the international organization fulfilled its obligations resulting from its internationally wrongful act. He therefore had no difficulty in endorsing Mr. Pellet's proposal as a political declaration or recommendation of the Commission. However, he wondered whether the proposal could be acceptable as a legally binding provision. If he understood correctly, Mr. Pellet wanted to have the proposal included in Part Two, and not in chapter (x), on the responsibility of a State in connection with the act of an international organization, which had been adopted in 2006. In other words, member States were not responsible for the organization's internationally wrongful act. The proposal was clearly formulated. The obligation of the member States was not to compensate the victim on the part of the international organization but to provide the organization with the means to compensate the victim. However, in the real world, such an obligation often created financial obligations for the member States.

56. The question therefore arose as to the legal justification for linking the two elements under consideration. The first element was the fact that the member States were not responsible for the wrongful act of the international organization. The second element was the fact that the member States were obliged to bear financial obligations. Two approaches were possible. The first would be to recognize the responsibility of member States and to try to deal with it in article 29 in chapter (x). That approach might not be viable, as it had already been vigorously rejected by many States during the debate on it in 2006 in the Sixth Committee of the General Assembly.²⁷⁶ A second approach would be to retain the proposal in Part Two, as Mr. Pellet wished, but to make it abundantly clear that the obligation of member States was one of conduct and not of results. For example, the beginning of the draft article might read: "The member States shall take all appropriate measures to provide the organization with the means ...".

57. It should also be made clear that the member States did not bear any financial obligations, whether severally or jointly. Otherwise, it would lead to unacceptable situations. For example, several member States might attempt in good faith to provide the organization with the means for compensating the victim, without being able to secure the approval of the majority of member States. The victim might then claim the total amount of compensation from the sympathetic member States, and it would be up to those States to recover the moneys from the other member States. Clearly, that would be unacceptable. In supporting Mr. Pellet's proposal, Mr. Galicki had argued that a precedent to the proposed provision existed in the

²⁷⁶ See *Official Records of the General Assembly, Sixth Committee, Sixty-first session*, summary records of the 13th to 16th meetings (A/C.6/61/SR.13-16) and of the 18th to 19th meetings (A/C.6/61/SR.18-19), *passim*.

²⁷⁵ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (a).

area of outer space. However, that situation related not to a responsibility regime but to provisions governing the obligation to compensate in the event of an accident and constituted a *lex specialis*, not general international law.

58. Mr. Pellet's proposal should be carefully examined; for Mr. Yamada's part, he remained open to any other suggestions.

59. Mr. WISNUMURTI said that as he had not taken part in the debates in plenary on the topic, he wished to express his appreciation to the Special Rapporteur for his clear and succinct fifth report. The draft articles proposed therein were straightforward and reflected the general pattern of the relevant articles on responsibility of States for internationally wrongful acts.²⁷⁷ He shared many of the Special Rapporteur's views, including on the diversity of international organizations and the consequent need to maintain a level of generality in elaborating the draft articles. Likewise, he agreed with the Special Rapporteur that the international legal personality of organizations did not depend on recognition of the injured party.

60. With regard to Mr. Pellet's proposal, he said that the obligation of the responsible international organization, regardless of its size, to pay reparations to the injured party should not be compromised by an obligation of the organization's member States to provide financial support for the organization to enable it to do so, unless the rules of the organization provided for such an obligation. Thus Mr. Pellet's proposed draft article might not solve the problem. Although it was formulated in general terms that did not directly relate to the financial problem faced by the international organization, it still had the effect of interfering in the internal affairs of the organization. It was incumbent upon the international organization and its members to take the necessary measures to enable the organization to pay reparation for its internationally wrongful act up front, either when States created the organization or when the organization had to deal with a financial problem.

61. Mr. AL-MARRI said that he endorsed the additional draft article proposed by Mr. Pellet. The States members of an international organization, when the latter committed an internationally wrongful act, could distance themselves from it, for example through a statement, but they could not, as member States, avoid their legal obligations. The member States were the source of the organization's financing, and they could not be exonerated from all responsibility when the organization to which they belonged committed an internationally wrongful act and lacked the means to pay reparations.

62. Mr. VALENCIA-OSPINA said that the additional draft article proposed by Mr. Pellet was an attempt to address the legitimate concern expressed by the Commission in the question posed in that connection to States in chapter III of its 2006 report.²⁷⁸ As formulated, the question implied recognition of an additional direct obligation on the part of members towards the party injured by the internationally wrongful act of an insolvent international

organization. That proposition had been rejected by the majority of States which had expressed their views in writing or in the Sixth Committee.²⁷⁹ Interpreting that widely shared sentiment, Mr. Pellet had transformed the direct obligation of members to pay compensation to the injured party into an obligation of members to provide the organization with the means to honour its own obligation to pay reparation. When he had introduced his draft article, Mr. Pellet had defined the proposal's parameters. However, despite the shift of emphasis, the obligation was still additional, to be borne by the members of the organization. Yet even with that change, there was no need for any such obligation.

63. The obligation to help bear the "expenses of the organization", a phrase that had not really been heard during the debate, was in fact inherent in the position of States as members of an international organization. It concerned all expenses, both those under the regular budget and any unforeseen or extraordinary expenses, regardless of the duration of the budget cycle. The fact that an obligation incurring an expense for the organization arose after the annual, biennial or any other regular budget was approved on no account implied that the obligation of the members to help meet that expense was an additional obligation that must be expressly provided for in the draft articles on responsibility of international organizations. In joining an international organization, a State or other international organization undertook to contribute to the expenses of the organization in a proportion determined by the competent organ, in which all the members were usually represented. For the United Nations, that was set out succinctly in Article 17, paragraph 2, of the Charter of the United Nations, a provision also found in the constituent instruments of other international organizations, regardless of their objectives or size. Each member's share was normally calculated as a percentage. An increase in the individual contribution of each member State did not require the imposition of an additional obligation but resulted naturally from the application of the scale of assessments to a total volume of expenses in excess of the amount initially approved in the regular budget.

64. That applied regardless of the origin of the organization's obligation to compensate the injured party and whether or not an internationally wrongful act was involved. Various examples had been cited during the debate, and Mr. Pellet had drawn attention to the jurisprudence of the ICJ, as attested to in its advisory opinion on the *Effects of awards of compensation made by the United Nations Administrative Tribunal*, a decision whose limitations Mr. Nolte had referred to. In another advisory opinion, on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [para. 66], the Court had pointed out that "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts". Reference could also be made in that connection to the mechanism for compensation for death, injury or illness of United Nations staff or

²⁷⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

²⁷⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28(a).

²⁷⁹ See footnote 276 above.

experts attributable to the performance of official duties on behalf of the Organization.

65. Interpreting Article 17, paragraph 2, of the Charter of the United Nations in its advisory opinion on *Certain Expenses of the United Nations*, the Court had noted that:

The obligation is one thing; the way in which the obligation is met—that is from what source the funds are secured—is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to the ordinary scale of assessment; it may apportion the cost according to some special scale of assessment; it may utilize funds which are voluntarily contributed to the Organization; or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard established sections of the “regular” budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under Article 17, paragraph 2, the General Assembly therefore has authority to apportion it. [pp. 169–170]

66. The final form the draft articles on responsibility of international organizations would take was still uncertain. The inclusion of a text like the one proposed by Mr. Pellet could give rise to misinterpretations in that, in the absence of such a text, the Member States of the United Nations would not be bound, under Article 17, paragraph 2, of the Charter of the United Nations, to bear the expenses incumbent on the Organization in the form of compensation for an internationally wrongful act by the Organization.

67. The obligation to pay compensation to the party injured by the internationally wrongful act of an organization was incumbent solely upon the latter, even in the case of insolvency, and not upon its members. The payment of such compensation was an expense of the organization which its members had committed themselves to financing *ab initio*. Thus, to ensure that the injured party received compensation, it would probably be more useful from a legal standpoint to elaborate a draft article expressly imposing on the international organization the obligation to adopt, in its rules, the mechanisms needed to ensure effective compliance by its members with their obligation to bear all the organization’s expenses.

68. Mr. McRAE said that the idea put forward by Mr. Pellet in his proposed additional draft article did not pose any problem for him, and he accepted the logic behind it. On the other hand, to enunciate such a legal obligation in a draft article was more problematic: its existence in general international law had yet to be demonstrated. In that connection, he agreed with the view expressed by Mr. Nolte and suggested replacing the words “shall provide the organization” with the phrase “should provide the organization”, although personally he would prefer to see the question addressed in the commentary, as the Special Rapporteur himself had suggested.

69. Mr. DUGARD said that Mr. Pellet’s proposal raised a question of policy in respect of responsibility of international organizations. A cautious approach would be to refuse to expand the responsibility of international organizations by expanding the responsibility of the organization’s member States. That approach had been reflected in draft article 29, which had already been adopted on first reading. Another approach, the one followed by Mr. Pellet, would be to make

international organizations more responsible by clearly specifying that their member States were under an obligation to provide the organization with the means to fulfil its obligations. It must be recognized that if no such obligation were imposed upon member States, it would be impossible for the responsibility of an international organization to be effectively carried out. In a word, the question was whether the Commission ought to approach the matter from the broader perspective of the interests of the international community or from the narrower viewpoint of sovereign States. The Commission must also decide whether it should confine itself to a strict codification of international law or whether it should also engage in its progressive development. In the case at hand, he thought that the Commission should give preference to progressive development. He therefore supported Mr. Pellet’s proposal, while endorsing the drafting change suggested by Mr. McRae.

70. Mr. PELLET said that the debate showed just how divided the Commission was. All the members agreed that his proposed draft article reflected a real problem, but the solution he suggested remained highly controversial.

71. Mr. GAJA (Special Rapporteur) apologized for the delay with which the debate had taken place, which had been due to his absence from Geneva.

72. The draft articles on responsibility of member States for the internationally wrongful acts of international organizations had already been provisionally adopted in 2006, and it would be inappropriate to revise them. The outcome had been a middle course, and the responsibility of member States had been admitted in three types of circumstances. Draft article 29 covered the case in which a State member of an international organization was responsible for an internationally wrongful act of the organization when the member State had accepted that it could be held responsible for that act or had led the injured party to rely on its responsibility. Draft article 28 contemplated a situation in which member States attempted to circumvent one of their obligations by transferring certain functions to an international organization which had no such obligation.

73. The issue which the Commission was currently discussing arose when member States were not held responsible for an internationally wrongful act and the international organization which was responsible for it did not have the means to provide compensation. That was not, then, a subsidiary responsibility of member States. In practice, however, the difference for the member States concerned between a subsidiary responsibility and an obligation to compensate or to provide the organization with the means to compensate was somewhat questionable. In other words, was there a difference for the member States between their money going to the organization, and thus indirectly to the victims, or to its going directly to the victims? Mr. Pellet was certain that there was. In Mr. Pellet’s view, the many States which had spoken against establishing an obligation had done so because the question posed by the Commission had not specified that the money would be paid to the organization for the purpose of compensating the victims.

74. Having looked again at the comments made by States in the Sixth Committee which were mentioned

in the fifth report (para. 29), he had been able to detect only one which had argued the existence of an obligation for member States that was not based on the rules of the organization. It was a comment by the Russian Federation, which had contended that States establishing an international organization were required to “give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party”.²⁸⁰ In the view of several other States, an obligation existed for the member States only if provided for in the constituent instrument or the rules of the organization. In practice, when member States did in fact provide an organization with the necessary means to make compensation, they did so expressly on the basis of the rules of the organization or else *ex gratia*, through voluntary contributions. That practice certainly did not confirm the existence of an obligation in general international law for member States to provide an organization with the means to compensate.

75. Mr. Pellet’s proposal was ambiguous because it did not make it clear that the basis of the obligation was a rule of general international law, which was necessarily implicit if the proposed draft article was added. If an additional draft article on the subject was necessary, as several members of the Commission had suggested, reference would have to be made to the rules of the organization, rules which would enunciate, either expressly or implicitly, the existence of an obligation for member States to cooperate with the organization. He therefore proposed the following draft article: “In accordance with the rules of the responsible international organization, its members are required to take all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.” He also suggested that the members of the Commission should hold consultations to see whether they could agree on a compromise solution. If that was not possible, perhaps the Commission could either take a vote or establish a working group.

76. The CHAIRPERSON endorsed the idea that the members of the Commission should hold consultations. If the consultations were not successful, Mr. Pellet’s proposal would be put to a vote.

77. Mr. PELLET said that he withdrew his proposal, since Mr. Gaja’s was perfectly acceptable. He suggested that, if there was no objection, Mr. Gaja’s proposal might be referred to the Drafting Committee; there was no need for consultations.

78. After an exchange of views on the question in which Mr. BROWNLIE, Mr. CANDIOTI, Mr. GAJA, Mr. NOLTE and Mr. PELLET took part, the CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer the additional draft article proposed by the Special Rapporteur to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2939th MEETING

Thursday, 19 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA said that the work of the Special Rapporteur on reservations to treaties was always remarkable, even when he became mired in matters of detail, or when the multiplicity of cross-references to other parts of the Guide to Practice made for difficult reading, the depth of his research and ability to organize material had to be acknowledged. He regretted having been unable to attend all the meetings on the agenda item, especially the one at which the Special Rapporteur had made his presentation.

2. In his view, the question of the formulation of acceptances of reservations was best approached by considering first the admittedly rare case in which acceptance was not simply an absence of objections to the reservation in question, as indicated in draft guideline 2.8, but instead an act through which a State or organization expressed its consent to the formulation of a reservation.

3. He was not of the opinion that the 1969 Vienna Convention allowed for such express acceptance only when the State or organization expressed its consent to be bound by the treaty. As with a reservation or objection, article 23 of the Convention did not seem to exclude the possibility of formulating an acceptance prior to the expression of consent to be bound by the treaty. Nor did article 20, paragraph 5 exclude that possibility, contrary to the assertion in paragraph 59 [239] of the report. It was clear, however, that where acceptance preceded the expression of consent, it would produce effects only when bilateral relations as between the reserving State and the accepting State were established on the basis of the treaty.

4. The Commission should place next to express acceptance, not tacit acceptance, but presumption of acceptance. Although the report used the two terms interchangeably, as in paragraph 36 [216], it was important to distinguish between them. If a State publicly criticized a reservation but omitted to formulate an objection in accordance with the procedure laid down in the 1969 Vienna Convention,

²⁸⁰ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, summary record of the 18th meeting (A/C.6/61/SR.18), para. 68.*