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**Summary record of the 2974th meeting**

Topic:  
**Reservations to treaties**

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## SUMMARY RECORDS OF THE SECOND PART OF THE SIXTIETH SESSION

*Held at Geneva from 7 July to 8 August 2008*

### 2974th MEETING

*Monday, 7 July 2008, at 3.05 p.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Brownlie, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

**Reservations to treaties (*continued*)\* (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)**

[Agenda item 2]

1. The CHAIRPERSON declared open the second part of the sixtieth session of the International Law Commission and invited members to resume their consideration of the topic “Reservations to treaties”. The Commission would first hear the report of the Drafting Committee on the topic (A/CN.4/L.739 and Corr.1). Thereafter it would turn to the consideration of the thirteenth report of the Special Rapporteur (A/CN.4/600).

REPORT OF THE DRAFTING COMMITTEE (*continued*)\*

2. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the text of draft guidelines 2.6.5, 2.6.11, 2.6.12 and 2.8 provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.739 and Corr.1, which read:

#### **2.6.5 Author**

An objection to a reservation may be formulated by:

*a)* any contracting State and any contracting international organization; and

\* Continued from the 2970th meeting.

*b)* any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

#### **2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation**

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

#### **2.6.12 Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty**

An objection formulated prior to the expression of consent to be bound by the treaty, does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

#### **2.8 Form of acceptances of reservations**

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

3. With those texts, he was presenting the fifth report of the Drafting Committee and its second on the topic of reservations to treaties. After his presentation of the Drafting Committee’s first report on that topic on 3 June 2008, at its 2970th meeting, the Commission in plenary had decided to refer back to the Committee for its reconsideration draft guidelines 2.6.5 (Author) and 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation). The Drafting Committee, meeting on 5 June 2008 under the chairpersonship of Mr. Candiotti, had been able provisionally to adopt the two draft guidelines referred back to it for reconsideration, and also draft guidelines 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty) and 2.8 (Form of acceptances of reservations).

4. Draft guideline 2.6.12 had become superfluous following the Drafting Committee’s adoption of the first version of draft guidelines 2.6.5 and 2.6.11 and had been deleted, but following the reconsideration and reformulation of the latter texts, it had had to be revisited. Draft guideline 2.8, however, was new.

5. For its consideration of draft guideline 2.6.5, the Drafting Committee had had before it the original version of the draft guideline and a new version prepared by the Special Rapporteur after the debate in plenary, in which he had addressed the concerns of those members who had been of the view that States or international organizations that were not parties to a treaty were not entitled to make objections, properly speaking, but that they could make declarations that became objections once they became parties to the treaty. The Special Rapporteur's new proposal contained two subparagraphs, the first on contracting States and contracting international organizations, and the second on States and international organizations entitled to become parties to a treaty. At the end of the second subparagraph, the Special Rapporteur had added the phrase "in which case the objection produces its legal effects only at the time the State or the international organization expresses its consent to be bound by the treaty". The Drafting Committee had wondered whether that phrase, addressing the question of effects, which would be covered in another section of the Guide to Practice, had its place in that draft guideline. It had been acknowledged that, although that was the general rule, in the present case, exceptionally, the mention of effects was justified in order to bridge the divergent positions prevailing in the Committee. It had been pointed out that, in that additional phrase, the word "objection" should be replaced by the more neutral word "declaration", since it did not yet constitute an objection, according to the adherents of the "contracting parties only" theory. The Committee had also considered using the term "becomes operative" or "becomes effective", as it had done in draft guideline 2.7.7. It had been pointed out, however, that the term "does not produce any legal effect" was much clearer; in addition, it had been used in the past in several draft guidelines.
6. The Committee had finally decided to keep most of the wording originally proposed by the Special Rapporteur but to make some changes to the additional phrase. It had replaced the word "objection" by the neutral word "declaration" and had changed the positive mode of the phrase ("produces its legal effects") into a negative one ("does not produce any legal effect"), which confirmed more categorically the absence of legal effects of such declarations. The commentary would explain the complicated history of the draft guideline, whose title, "Author", remained unchanged.
7. Following the Drafting Committee's adoption of draft guideline 2.6.5 in its modified form, it had been led to reconsider draft guideline 2.6.11. After a very short debate, it had decided that the original version proposed by the Special Rapporteur was the most appropriate. The title, "Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation", remained the same, but the draft guideline was now much shorter and simpler, stating that an objection made prior to confirmation of the reservation in accordance with draft guideline 2.2.1 did not itself require confirmation. It basically repeated article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions. With regard to the use of the word "made" instead of the more accurate "formulate", it had been pointed out that the word "made" was used in the Vienna Conventions and therefore should not be changed. The commentary would also address that issue.
8. After the adoption of the new versions of draft guidelines 2.6.5 and 2.6.11, the Committee had felt that draft guideline 2.6.12 should be reconsidered. It had still been entitled "Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty", and the new version proposed by the Special Rapporteur had consisted of two options, one more detailed and the other more concise and simpler. The Committee had focused on the simpler one. The guideline stated that, if an objection was formulated prior to consent to be bound by the treaty by a signatory State or international organization, it did not need to be reconfirmed when that State or organization expressed its consent to be bound by the treaty. However, it needed to be reconfirmed if the State or organization had not signed the treaty when making the objection. The Committee had had a useful debate on the guideline and had been informed of the current depositary practice, especially that of the Secretary-General of the United Nations, which, however, had not been conclusive. The Committee had been of the view that if a State or organization had formulated an objection before even signing a treaty and expressed its consent to be bound by it after a long period of time, the security and certainty of treaty relations required that such an objection be reconfirmed at the time of expression of the consent to be bound. If, however, the State or organization had already signed the treaty when formulating the objection, such confirmation was not necessary. The title of the draft guideline had been changed to reflect that distinction. It now read "Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty".
9. Draft guideline 2.8 constituted the first in a series of guidelines dealing with the acceptance of reservations. The original draft as proposed by the Special Rapporteur had stated that the acceptance of a reservation arose from the absence of objections, which itself could arise either from a unilateral statement (express acceptance) or from the silence kept by a contracting State or organization (tacit acceptance). Such tacit acceptance should, however, be distinguished from implicit acceptance, which constituted a presumption of acceptance and could be reversed. During the debate, the Drafting Committee had been of the view that the first paragraph in the original version of the guideline was redundant, since the second paragraph repeated practically the same principle. It had decided, however, that some elements of the first paragraph could be usefully inserted into the second paragraph, in which case the two paragraphs could be merged into one.
10. The Drafting Committee had also thought that the bracketed terms "(express acceptance)" and "(tacit acceptance)" should be deleted. The final wording was much more concise and clear. The title of the guideline now read "Form of acceptances of reservations", since it had been felt that the express and tacit methods of acceptance pertained to the form of such an action rather than to its formulation.
11. If time allowed, the Drafting Committee would meet again during the second part of the session in order to complete its examination of the draft guidelines included in section 2.8 of the Guide to Practice.

12. With those remarks, he recommended to the plenary the adoption of the four draft guidelines.

13. The CHAIRPERSON invited the Commission to adopt the texts of draft guidelines 2.6.5, 2.6.11, 2.6.12 and 2.8.

Draft guideline 2.6.5

14. Mr. VASCIANNIE pointed out an inconsistency in the verbs used in connection with objections to reservations: in the *chapeau* of draft guideline 2.6.5, the verb was “formulated”, while in the titles of draft guidelines 2.6.11 and 2.6.12, *inter alia*, it was “made”. It had been explained that the latter was the term used in the 1969 Vienna Convention. For the sake of consistency, perhaps the verb “made” should also be used in the *chapeau* of draft guideline 2.6.5.

15. Mr. PELLET (Special Rapporteur) said that while he personally would welcome such a change, he feared vociferous opposition from a minority of members who construed subparagraph (b) of the draft guideline to mean that an objection was considered “made” only once a State or international organization had expressed its consent to be bound by the treaty.

*Draft guideline 2.6.5 was adopted.*

Draft guideline 2.6.11

16. Mr. HASSOUNA suggested the replacement of the first word in the French text of the title, “*Inutilité*”, by “*Non-exigence*”, which corresponded more closely to the English term (“Non-requirement”) and was more consistent with the French term used in draft guideline 2.6.12 (“*Exigence*”).

17. Mr. PELLET (Special Rapporteur) said the point was a valid one, particularly as the expression “*non-exigence*” had been used earlier, in draft guideline 2.4.4, for example.

18. Mr. CAFLISCH said he would prefer the wording “*Absence d’exigence*”.

19. Mr. PELLET (Special Rapporteur) said that while formulation proposed by Mr. Caflich was certainly more elegant, the primary consideration was consistency. Since the term “*non-exigence*” had already been used elsewhere in the text, he would prefer the formulation proposed by Mr. Hassouna.

*With that editorial amendment to the French text, draft guideline 2.6.11 was adopted.*

Draft guideline 2.6.12

20. The CHAIRPERSON drew attention to a corrigendum reproduced in document A/CN.4/L.739/Corr.1, issued in French and English only, which read:

Draft guideline 2.6.12

First line:

*Replace the word formulated with made.”*

21. Mr. PELLET (Special Rapporteur) said that the corrigendum must be the result of a misunderstanding, because it seemed to him that the converse should apply. Given the correlation between draft guideline 2.6.12 and draft guideline 2.6.5 (b), and also as a concession to his intellectual adversaries, it would be more logical to speak of an objection “formulated” prior to the expression of consent to be bound by a treaty, rather than of one “made”, both in the body of the text and also in the title. The title should be amended accordingly.

22. The CHAIRPERSON said that the text contained in the corrigendum had apparently been proposed by the Drafting Committee.

23. Ms. ESCARAMEIA, speaking as a member of the Drafting Committee, said she had no recollection of the Drafting Committee having proposed a corrigendum changing the word “formulated” to “made”. She suggested that the corrigendum should be disregarded and the wording contained in document A/CN.4/L.739 retained.

*It was so decided.*

24. Mr. VASCIANNIE and Mr. VÁZQUEZ-BERMÚDEZ supported Mr. Pellet’s proposed amendment to the title.

*Draft guideline 2.6.12, as amended, was adopted.*

Draft guideline 2.8

25. Mr. McRAE said that, in the title, the plural form “acceptances” should be replaced by the singular form “acceptance”.

26. Mr. CANDIOTI said that, in the Spanish version, the plural form “*las reservas*” should be replaced with the singular “*la reserva*”.

27. Mr. McRAE said that, in that case, in the English version, the word “reservations” should be replaced with the singular “a reservation”.

28. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that, since draft guideline 2.8 was a guideline introducing a series of others, more than one form of acceptance was to be taken into account. It might therefore be more appropriate, in the title, to replace the singular “form” by the plural “forms”. The title would then read: “Forms of acceptance of a reservation”.

29. Mr. PELLET (Special Rapporteur) said he supported the idea of replacing the word “form” by “forms” in the title. However, he was unsure whether the words “acceptance” and “reservation” should also be pluralized, and doubted that the matter was of any consequence.

30. The CHAIRPERSON suggested that an appropriate formulation for the title might be “Forms of acceptance of reservations”.

*Draft guideline 2.8, as amended, was adopted.*

*The draft guidelines contained in document A/CN.4/L.739, as a whole, as amended, were adopted.*

## THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR

31. The CHAIRPERSON invited the Special Rapporteur to present his thirteenth report on reservations to treaties, contained in document A/CN.4/600.

32. Mr. PELLET (Special Rapporteur) said that, although the Commission had already discussed the topic of reservations to treaties at considerable length during the current session, it had still not managed to eliminate the accumulated backlog of work on the topic. The slowness of his working methods, for which he had often been criticized, was a deliberate choice based on the very form of the Guide to Practice as endorsed by the Commission. In his view, it was better to have a carefully pondered and extensively debated draft than one that was rushed through and consequently botched, as regrettably had sometimes been the case in the recent past. He wished to point out that, despite his admittedly slow pace, the Commission was nevertheless having difficulty in keeping up with him. At the current session, more than 40 draft guidelines had been languishing, if not on death row, at least in the Drafting Committee, which, furthermore, sometimes condemned his draft guidelines to death, thereby going well beyond what its subordinate status permitted. Although an effort had been made during the first part of the session, some 10 draft guidelines that had already been referred to the Drafting Committee had still to be given their final form. He hoped that the time that had been generously allocated to discussion of the topic in plenary would be put to good use and that any unused time would be set aside in order to enable the Drafting Committee at least to complete its consideration of the series of draft guidelines comprising section 2.8 of the Guide to Practice. It was now his turn to be eager for the Commission to complete its work regarding the procedure for formulation of reservations, and with it the second part of the Guide to Practice, although it was perhaps too much to hope that the Commission could also find the time to consider the draft guidelines he was about to introduce concerning reactions to interpretative declarations by the end of the present session.

33. The draft guidelines in question would thus be missing from the part of the Guide to Practice dealing with the formulation of reservations and interpretative declarations, but if those could at least be referred to the Drafting Committee at the end of the discussion on the topic, as he hoped would be the case, the Commission would finally be able, at its next session, to conclude its consideration of all the problems relating to formulation. It was for that reason that, even though he realized that the Commission would not be able to examine all 10 draft guidelines proposed in document A/CN.4/600, he had resigned himself to submitting his so-called thirteenth report, which, as was indicated in the first footnote to the cover page, was merely the follow-up to the twelfth report (A/CN.4/584),<sup>158</sup> that dealt with the formulation of reactions to reservations, in other words, objections and comments made following reservations and interpretative declarations. That was why the numbering of the paragraphs and footnotes did not begin afresh but followed on from the previous year's report.<sup>159</sup>

34. Any line of reasoning concerning interpretative declarations stemmed from two observations: the first was that the 1969 and 1986 Vienna Conventions were totally silent on the question of interpretative declarations, which had been mentioned only rarely during the *travaux préparatoires*; the second was that interpretative declarations served a different function from that of reservations. In that connection, he referred members to draft guidelines 1.2 and 1.2.1 on the definition of interpretative declarations and on conditional interpretative declarations, respectively.<sup>160</sup> Since the function of interpretative declarations differed from that of reservations, one could not simply transpose the rules applicable to reservations to cover cases of interpretative declarations, even though there was nothing to prevent one from drawing inspiration from them. Indeed, it was essential to do so, for, in addition to the lack of any reference to them in the legal texts, there was also a dearth of practice relating to them. As the Commission had prepared a fairly complete set of guidelines on reactions to reservations, the most logical approach would be to take those reactions as a starting point, while bearing in mind the different functions served by reservations and interpretative declarations.

35. As was indicated in paragraph 7 [282]<sup>161</sup> of the report, four possible attitudes could be adopted towards an interpretative declaration: agreement, disagreement, silence and reclassification, the latter being the observation or claim that what the author was presenting as an interpretative declaration was in fact a reservation.

36. A few isolated examples of explicit approval were mentioned in paragraphs 8 [283] and 9 [284] of the report and did not raise any particular problems. The declaration/approval pairing could be linked with article 31, paragraph 3, of the 1969 and 1986 Vienna Conventions, which provided that any agreement between the parties regarding the interpretation of a treaty was an element that must be taken into account for its interpretation. The fact remained that analogies with the acceptance of a reservation could not be pressed too far, for, while acceptance of a reservation might alter the effects of the treaty itself as between the reserving State and the accepting State, and acceptance could even result in the applicability of the treaty to the reserving State or its entry into force, agreement with an interpretative declaration constituted agreement with the interpretation of the treaty, but had no effect on the nexus of treaty relations. That was the reasoning behind the very cautious wording of draft guideline 2.9.1, to be found in paragraph 12 [287] of the report, which read:

#### 2.9.1 Approval of an interpretative declaration

“Approval” of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

37. There was, however, another very important difference between the pairing interpretative declarations/reactions to them, on the one hand, and the system of acceptance of reservations, on the other. One of the key

<sup>158</sup> *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584.

<sup>159</sup> The paragraphs were renumbered when the report was published in *Yearbook ... 2008*, vol. II (Part One).

<sup>160</sup> *Yearbook ... 1999*, vol. II (Part Two), pp. 97–106.

<sup>161</sup> The number between square brackets refers to the corresponding article in the thirteenth report of the Special Rapporteur (A/CN.4/600).

elements of the Vienna regime was the presumption of acceptance resulting from the silence on the part of the other States concerned. In the case of interpretative declarations, it seemed wholly inconceivable to apply the dictum whereby silence constituted consent. That was true only if the State or international organization that failed to respond did so because it was legally bound to respond but instead chose to remain silent. Yet no practice or *opinio juris* established such an obligation in respect of interpretative declarations. States were entitled to respond but were certainly not required to do so.

38. That was the rationale behind draft guideline 2.9.8, to be found in paragraph 41 [316], which read:

#### 2.9.8 *Non-presumption of approval or opposition*

Neither approval of nor opposition to an interpretative declaration shall be presumed.

39. That absence of presumption did not mean that approval of the interpretative declaration could not result from the silence of the other States or international organizations concerned when circumstances so permitted—in other words, if the circumstances in a particular case were such that a State could legitimately be expected to express its opposition to the interpretation put forward in the declaration.

40. That was the basis for draft guideline 2.9.9, also to be found in paragraph 41 [316], which read:

#### 2.9.9 *Silence in response to an interpretative declaration*

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

41. While he was aware that the wording he proposed was not very specific, he did not think the Commission could reasonably go much further. If it wanted to do so, it would have to include in the Guide to Practice the entire set of rules concerning acquiescence in international law, something which was scarcely feasible. Moreover, given the extent of the problems that had arisen in relation to the topic of unilateral acts of States,<sup>162</sup> he feared that the Commission might find itself dealing with the matter for decades to come. As a result, draft guideline 2.9.9 was more of a signal to users of the Guide than a rule that was directly and individually applicable. While he did not think the Commission could go any further than that, it would be wise to point out to States and international organizations that they should be vigilant in weighing the risks of reacting or not reacting to an interpretative declaration.

42. Negative reactions whereby a State or an international organization expressed disagreement with an interpretative declaration were more frequent than expressions

of approval, just as objections to reservations were more frequent than cases of express acceptance. A number of examples had been provided in paragraphs 13 [288] to 16 [291] of the report; they concerned outright opposition to an interpretative declaration and corresponded to the first part of the definition of opposition to an interpretative declaration set out in draft guideline 2.9.2, which read:

#### 2.9.2 *Opposition to an interpretative declaration*

“Opposition” to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.

43. That was quite clear, but it left the reader hungry for more. According to the first part of the draft guideline, a State could reject a declaration, which was therefore not opposable to it—if he might be allowed to stray a little into the question of effects, even though that question was not on the Commission’s agenda—but that was all; it could not propose any counter-interpretation. Thus, although it was clear which interpretation it did not accept, there was no way of knowing what interpretation it considered to be the correct one. Yet it could, and often did, happen that a State went so far as to interpret the provision on which the initial interpretative declaration was based, by providing an interpretation that diverged in whole or in part from that interpretative declaration and that seemed to it to be the only one in line with the letter and spirit of the treaty in question. Paragraphs 17 [292] to 20 [295] of the report provided examples of reactions which he had tried to reflect at the end of draft guideline 2.9.2 by explaining that “opposition” to an interpretative declaration could also mean a unilateral statement whereby a State or international organization proposed an interpretation other than that contained in the declaration with a view to excluding or limiting its effect. In any event, whether the reactions in question amounted to a counter-interpretation or simply constituted opposition to an interpretation, their effects obviously differed from those produced by an objection to a reservation, if only because negative reactions to an interpretation could not have any consequences for the entry into force of the treaty, or for the nexus of treaty relations between the declaring and the reacting State or international organization. As he explained in paragraphs 11 [286] and 23 [298], it would be unwise to use identical terminology to denote reactions to interpretative declarations and reactions to reservations. Instead of “acceptance” and “objection”, the terms he had employed with reference to reservations, he had preferred “approval” and “opposition” in respect of interpretative declarations, in order to avoid confusion.

44. There was, however, one type of reaction to interpretative declarations, namely reclassification, which had no equivalent in the context of reservations. He had defined that reaction in draft guideline 2.9.3, which read:

#### 2.9.3 *Reclassification of an interpretative declaration*

“Reclassification” means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or

<sup>162</sup> For the text of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations with the commentaries thereto adopted by the Commission, see *Yearbook ... 2006*, vol. II (Part Two), pp. 161–166, para. 177.

organization purports to regard the declaration as a reservation and to treat it as such.

[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]

45. States and treaty-monitoring bodies in fact frequently engaged in that practice. Paragraph 26 [301] supplied numerous examples of inter-State reactions of that kind.

46. Such counter-declarations, often accompanied by a very detailed statement of reasons, were generally based on the usual criteria for distinguishing between reservations and interpretative declarations, which had been summarized in draft guidelines 1.3 to 1.3.3,<sup>163</sup> to be found in footnote 52 [509] of the thirteenth report, which, incidentally, had been co-authored by Daniel Müller, whom he wished to thank publicly.

47. The second paragraph of draft guideline 2.9.3 tried to encapsulate that frequent practice by making an express reference to the draft guidelines he had just mentioned. While he realized that the paragraph was neither in line with the general logic of the Guide to Practice nor indispensable, it was nonetheless useful so that the Drafting Committee would have to decide whether to say that, when States or international organizations reclassified an interpretative declaration, they must apply the guidelines in section 1.3 of the Guide to Practice, or that they must simply take them into account. Even if that was a problem which the Drafting Committee could resolve, it would be useful if speakers in the debate were to indicate their preference in order to provide guidance to the Drafting Committee on a point on which he was neutral.

48. Although reactions to interpretative declarations could not be treated in the same way as acceptances of or objections to reservations, they were nonetheless intended to produce legal effects. As the International Court of Justice had found in its advisory opinion of 11 July 1950 on the *International Status of South-West Africa*, “[i]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument” [pp. 135–136].

49. It was therefore important that other States or international organizations that were, or might become, parties to the treaty were aware of those interpretations, and it was therefore wise to make an interpretative declaration in writing and to communicate it to other States or international organizations that were entitled to become parties to the treaty. But, as the Commission had already accepted, that was not a legal obligation. It was therefore hard to see why reactions to interpretative declarations should be made subject to stricter formal and procedural requirements than interpretative declarations themselves.

50. However, as he had indicated in paragraph 45 [320], if the author of an opposition, approval or reclassification of an interpretative declaration seriously intended its reaction to be taken into account and to have legal effects in

the event of problems arising, it was in its interests to state the reasons for its reaction, and certainly to formulate it in writing so that it might be communicated in accordance with the formal requirements applicable to all unilateral declarations relating to the treaty, thereby ensuring that its position was known to all the States which had, or might have, something to say about it.

51. Two problems arose in that connection. The first, though not very serious, difficulty was that any provisions the Commission might decide to include on the formulation of and statement of reasons for interpretative declarations could be only in the nature of recommendations, since it was not possible to require that reactions to interpretative declarations be formulated in writing, when the interpretative declarations to which they related did not themselves necessarily have to be made in writing. The recommendatory form of those forthcoming draft guidelines was not a major problem because the Commission was not in the process of drafting a treaty, but was drawing up a guide to practice which, by definition, would never be binding. Moreover, it would not be the first time that the Commission had made recommendations. That was the method it had chosen in the first part of the session in adopting draft guidelines 2.1.9 and 2.6.10 on statement of reasons for reservations and objections (see the 2970th meeting above, paragraphs 66 and 93, respectively). It was quite reasonable to urge States to observe certain formalities if they wanted their reactions to interpretative declarations to have any chance of producing an effect.

52. The second, more complicated question was whether it was necessary to devote some draft guidelines to the form of, reasons for, and communication of, reactions to interpretative declarations when, at least for the moment, no equivalent provisions existed with regard to interpretative declarations themselves. There were three solutions to that dilemma. The first and simplest solution would be to say something in the commentaries about the form in which reactions to interpretative declarations should be communicated, rather than adopting draft guidelines on the matter. The second solution, which he favoured, would be to include the relevant provisions in the Guide to Practice so as to make it more “user-friendly”. If that were done, it would be necessary to correct the dissymmetry between interpretative declarations and the reactions thereto during the second reading. The third solution would be to instruct the Special Rapporteur to present, either by the end of the current session or at the beginning of the next session, equivalent provisions on interpretative declarations themselves.

53. The three draft guidelines he was tentatively proposing read as follows:

#### **2.9.5 Written form of approval, opposition and reclassification**

An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.

#### **2.9.6 Statement of reasons for approval, opposition and reclassification**

Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.

<sup>163</sup> *Yearbook ... 1999*, vol. II (Part Two), pp. 107–112.

### 2.9.7 *Formulation and communication of an approval, opposition or reclassification*

An approval, opposition or reclassification in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

54. Once again, the guidelines could be no more than recommendations. He very much hoped that speakers in the debate would express an opinion on the desirability of referring them to the Drafting Committee—the step he advocated—and on the advisability or otherwise of incorporating equivalent provisions on interpretative declarations themselves in the Guide to Practice. That was a question of principle on which the Commission should state its position in plenary; it was not for the Drafting Committee to take the decision.

55. Draft guideline 2.9.4 read as follows:

#### 2.9.4 *Freedom to formulate an approval, protest or reclassification*

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

56. It was imperative to refer that text to the Drafting Committee, as something must be said in the Guide to Practice about the time at which it was possible to react to an interpretative declaration, and who could react to it. As to the first of those questions, the draft guideline stated that approval, opposition or reclassification could be formulated at any time. He had not adopted that position merely out of a concern for symmetry with interpretative declarations themselves, which could be formulated at any time, as specified in draft guideline 2.4.3, but also because, as there was no obligation to formulate interpretative declarations in writing or to communicate them to the other States, depositaries or international organizations concerned, those other States or international organizations might learn of the interpretative declaration by chance and only after some considerable time had elapsed. They must therefore be able to respond at any time once they had become aware of the interpretative declaration.

57. He sincerely hoped that the Commission would not spend as much time discussing the issue of who could react to an interpretative declaration as it had in discussing the question of who could formulate an objection to a reservation. For the same reasons as those he had adduced on that question, which the majority of members had ultimately accepted, that possibility must be open to any State which was entitled to become a party. Admittedly, as far as objections were concerned, draft guideline 2.6.5, in the form in which it had just been adopted (paras. 13–15 above), established that objections from a State or an international organization that was not a party to the treaty did not produce their effects until that State or international organization had expressed its consent to be bound thereby. He was uncertain whether it was necessary to transpose that restriction to the case of reactions to interpretative declarations. Whereas an objection had effects on the treaty relations between the author of the reservation and the author of the objection and the objection might even lead to the entry into force of the treaty

or prevent it, the same was not true of interpretative declarations or of reactions to them. A simple interpretative declaration never had any effect on treaty relations themselves. Consequently, it could not be contended that the principle contained in the second subparagraph of draft guideline 2.6.5 likewise applied to interpretative declarations. Since interpretative declarations and reactions to them were no more than indications for interpreters, he saw no point in specifying that it was necessary to wait until a State had become a party before its reaction, or counter-interpretation, could produce effects. The interpreter, for example, a court, might or might not be inclined to accept the interpretation of a State or an international organization that was not a party, but it could hardly disregard that view as a matter of principle. What a State had to say about the interpretation of a treaty was always interesting. That was a second problem on which the plenary Commission, which had the authority to decide, must give clear instructions to the Drafting Committee, which had no authority to adopt a position on issues of principle, since its mandate was simply to give shape to decisions taken by the Commission in plenary.

58. He was proposing only one draft guideline on conditional interpretative declarations, namely draft guideline 2.9.10, which was worded:

#### 2.9.10 *Reactions to conditional interpretative declarations*

Guidelines 2.6 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.

59. The draft guidelines in sections 2.6, 2.7 and 2.8 of the Guide to Practice, which had not yet been adopted but all of which had been referred to the Drafting Committee, concerned reactions, in the form of acceptances or objections, to reservations. The wording he was proposing for draft guideline 2.9.10 was in line with what had consistently been found with respect to conditional interpretative declarations: they were certainly interpretative declarations as far as their purpose was concerned but, unlike simple interpretative declarations, they might produce effects, and were intended to produce effects, on treaty relations between the State making the interpretative declaration and any State that might oppose it. For that reason, once a contracting State or international organization opposed the interpretation proposed by the author of the conditional interpretative declaration, the negative reaction of another contracting State should prevent the application of the treaty, in part or in its entirety, in relations between the author of the conditional interpretative declaration and the author of the negative reaction, which was more like an objection to a reservation than an opposition to an interpretative declaration. He set out his terminological scruples in paragraph 54 [329] of the report.

60. Accordingly, the wording of draft guideline 2.9.10 had the merit of not taking a position on that terminological nicety, which was after all of secondary importance. It spoke of “reactions of States and international organizations”, rather than “objections”, “opposition”, “acceptance” or “approval”. In any event, draft guideline 2.9.10, like all those concerning conditional interpretative declarations, was being presented only as an interim solution,

since the Commission had agreed provisionally that it would adopt a set of guidelines on conditional interpretative declarations, but that no final decision would be taken on the advisability of retaining those draft guidelines until it was absolutely sure that conditional interpretative declarations behaved like reservations and had the same effects. There was a widely held conviction, which he shared, that this was the case.

61. He would be grateful if, at the end of the debate, the Commission were to refer to the Drafting Committee draft guidelines 2.9.1, 2.9.2, 2.9.3, 2.9.4, 2.9.8, 2.9.9 and 2.9.10, and also possibly draft guidelines 2.9.5, 2.9.6 and 2.9.7. It was, however, important that the plenary Commission and not the Drafting Committee decide on the advisability of including similar provisions on interpretative declarations themselves. Likewise, the plenary must give firm and clear instructions to the Drafting Committee as to whether States and international organizations that were not parties to a treaty could react to interpretative declarations, as he firmly believed they could and, if so, in what circumstances.

*The meeting rose at 4.35 p.m.*

## 2975th MEETING

*Tuesday, 8 July 2008, at 10 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

#### THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA said he regretted that he had been unable to be present when Mr. Pellet had introduced his report, which was very detailed and contained a wealth of analysis and information based on practice. He was not entirely convinced that the question of reactions to interpretative declarations had to be dealt with in a guide to reservations, but, even if the Commission had little choice in the matter, it would be a shame if it did not follow up on the Special Rapporteur's proposals. In reply to the Special Rapporteur's question at the preceding meeting whether draft guidelines 2.9.5 to 2.9.7 should be maintained, he himself did not think that they were necessary,

and perhaps other texts were unnecessary as well. Most of the comments and proposals contained in the report were nonetheless generally convincing.

2. The impression should not be given that it was for a State other than the State making a declaration to determine the nature of the reclassification of a declaration, a phenomenon of which the report provided relevant examples. The State reclassifying a declaration gave its interpretation, which might be wrong, of the nature of that declaration. It would not be consistent if, after stating that a declaration was, in its view, a reservation, it did not treat it as such. However, if the declaration was in fact an interpretative declaration—in which case, the State was wrong—the regime applicable to reactions to that declaration continued to be the regime governing reactions to interpretative declarations. Even if the proposed draft guidelines did not necessarily arrive at another conclusion, the commentary seemed to indicate that the reclassifying State occupied a more important position than the declaring State. Obviously, if the question was put to an arbitrator or a court, they would provide their interpretation, but, to the extent that a practice of States was being considered, the declaring State must be given precedence.

3. He continued to have problems with the category of conditional interpretative declarations. If a State declared that it accepted a text only if it was interpreted in a certain way, its purpose was to modify the legal effect of a provision by agreeing to only one of the possible interpretations and subjecting its acceptance of the treaty thereto; the treaty was thus modified to some extent even if the interpretation of it was correct. Since the Special Rapporteur had promised in the past that he would reconsider the existence of the category of conditional interpretative declarations that had appeared in the draft 10 years previously, he hoped that the Special Rapporteur would in future agree to include such declarations in the category of reservations by amending accordingly the wording of certain draft guidelines, which, as he had said, were perhaps not suited to conditional interpretative declarations.

4. In paragraph 18 [293], the Special Rapporteur referred to a declaration by Egypt designed “to broaden the scope of the [International Convention for the Suppression of Terrorist Bombings]” and noted that this “exclude[d] assigning the status of ‘reservation’”, which seemed to be too restrictive an interpretation of a reservation. For example, when the Union of Soviet Socialist Republics and other socialist countries had formulated a reservation to the 1958 Convention on the High Seas to extend the immunity of Government ships to all ships belonging to the State, they had made declarations which they had called reservations and which had been treated as such by the other contracting States.<sup>164</sup> When a reservation was designed to modify the legal effect of some provisions of the treaty, its purpose was not necessarily to restrict the scope of those provisions. Reservations that modified the scope and therefore added obligations to the reserving State and for the other States had the particular characteristic that they could produce their effects for the

<sup>164</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006*, vol. II (United Nations publication, Sales No. E.07.V.3), p. 321 (chap. XXI.2) (available at <http://treaties.un.org/pages/ParticipationStatus.aspx>).