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Summary record of the 2975th meeting

Topic:
Reservations to treaties

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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.¹⁶⁴ 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 for the reserving State and for the other States had the particular characteristic that they could produce their effects for the

¹⁶⁴ *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>).

other contracting parties only to the extent that those parties accepted the reservations. An objection by them, even if it did not prevent the entry into force of the treaty with the reserving State, did not signify acceptance: on the contrary, it would go beyond consent because the State formulating an objection or remaining silent would otherwise be bound to do something to which it had not consented. If that analysis was correct, there would have to be a special regime for reactions to that particular type of reservation, which was designed to modify the legal effect of some provisions by giving rise to additional obligations for the States parties to the treaty. As far as such reservations were concerned, acceptance by the other contracting States should be regarded as necessary for the reservation to produce its effects in the relations with those States.

5. Ms. ESCARAMEIA said that, since the 1969 and 1986 Vienna Conventions did not refer to interpretative declarations and there was little practice on which to rely, the Special Rapporteur had been right to proceed by analogy or by opposition in relation to reactions to reservations and to make a distinction between conditional interpretative declarations and “general” interpretative declarations. She nevertheless regretted the fact that he had not stuck closely to that methodological approach and that the distinction in question did not always appear clearly in the report. Since guidelines 1.2 (Definition of interpretative declarations) and 1.2.1 (Conditional interpretative declarations) clearly distinguished between those two types of declarations—even if she was not convinced by that approach and it seemed premature to establish such different regimes for those two types of declarations—and since the effects which the Special Rapporteur attributed to them were rightly very different, the structure of the report would have gained by being systematically based on that dichotomy.

6. With regard to interpretative declarations under the general regime, the analysis of the four possible reactions and the terms used (approval, opposition, reclassification and silence) to distinguish them from reactions to reservations were very relevant because the effect of such declarations was only to clarify the interpretation given by tribunals, treaty bodies, national courts, etc., and it had no impact on relations between the parties or on the entry into force of the treaty. The second subparagraph of paragraph 7 [282] was nevertheless confusing because it seemed to associate a negative reaction and the classification of a declaration as an “interpretative declaration”, whereas such a reaction was referred to in the last sentence of the paragraph as a possible fourth type of reaction. Perhaps the term “classification” should be avoided and reference should be made to a “proposal for another interpretation”. The distinction between reactions to reservations and to interpretative declarations was also not always very clear.

7. She endorsed draft guideline 2.9.1 (Approval of an interpretative declaration), which did not call for any comments, and draft guideline 2.9.2 (Opposition to an interpretative declaration), except for the words “with a view to excluding or limiting its effect”, which should be deleted because they were not clear and equated a reaction to an interpretative declaration and a reaction to a reservation, whereas they should continue to be clearly

distinguished. The example given in paragraph 17 [292] should also be corrected because, as the text now stood, Poland had made its consent subject to its own interpretative declaration, and that was probably a mistake. Draft guideline 2.9.3 (Reclassification of an interpretative declaration) also did not call for any particular comments, except that the words in square brackets did not serve much purpose; if they were retained, she would prefer the words “take into account” rather than the word “apply” in order to emphasize that the guideline was a recommendation. In paragraphs 29 [304] to 31 [306], which dealt with the time periods applicable to reactions to interpretative declarations, the Special Rapporteur indicated that such declarations could be “disguised” reservations and that the time period for objections to reservations should therefore apply, not the time period for reactions to interpretative declarations. In her view, that would have the result of treating such reclassifications as objections to reservations, something which might create additional problems, especially when a treaty did not allow reservations or allowed only certain reservations, even if such disguised reservations were given another name.

8. Although she agreed that silence could have various meanings and that there could be no presumption, she endorsed draft guideline 2.9.8 (Non-presumption of approval or opposition), but she would like draft guideline 2.9.9 (Silence in response to an interpretative declaration) to be deleted because it was very vague and did not state the specific circumstances in which a State or an international organization could be considered as having acquiesced to an interpretative declaration. Since such circumstances could not be listed in the draft guideline, it might be more disconcerting than enlightening. As the Special Rapporteur had said that his aim was primarily to indicate a possibility rather than to establish a practical rule, it could be considered that the indication was already given by draft guideline 2.9.8.

9. In the title of draft guideline 2.9.4 (Freedom to formulate an approval, protest or reclassification), the word “protest” should be replaced by the word “opposition”. She had no objection to the inclusion of any State or any international organization entitled to become a party to the treaty since what was involved was a unilateral declaration that had no legal effect on relations between the parties or the entry into force of the treaty. She was therefore in favour of referring draft guideline 2.9.4 and draft guidelines 2.9.5 (Written form of approval, opposition and reclassification) and 2.9.6 (Statement of reasons for approval, opposition and reclassification) to the Drafting Committee because, in reply to the question the Special Rapporteur had asked at the preceding meeting, they were entirely appropriate and provided a great deal of clarity and certainty.

10. Draft guideline 2.9.7 (Formulation and communication of an approval, opposition or reclassification) referred to several other draft guidelines, particularly draft guideline 2.1.6, which dealt with the time period for formulating an objection. In the case of an opposition, however, there should not be any time period because a time period would apply only in the case of a conditional interpretative declaration. It would therefore be better not to refer to that draft guideline in the present context.

11. With regard to draft guideline 2.9.10 (Reactions to conditional interpretative declarations), she endorsed the comments made by Mr. Gaja and agreed in principle that reactions to such declarations were similar to reactions to reservations; the text nevertheless referred to such a large number of guidelines that she had not yet been able to consider all their implications and thought that it would be useful to look more closely at the nature of conditional interpretative declarations. In conclusion, she was in favour of referring all the draft guidelines to the Drafting Committee, including draft guideline 2.9.10, which could thus be studied more thoroughly and in greater detail, and she hoped that account would be taken of her comments.

The meeting rose at 10.35 a.m.

2976th MEETING

Wednesday, 9 July 2008, at 10.10 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. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, 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. FOMBA said he had no difficulty in endorsing the reasoning behind the Special Rapporteur's erudite thirteenth report on reservations to treaties (A/CN.4/600). Addressing first the premises and postulates underpinning the report, he said that the silence of the 1969 and 1986 Vienna Conventions on the matter and the dearth of established practice were good reasons why the Commission should examine the question of interpretative declarations and reactions to them. It was important to bear in mind the distinction between reservations and interpretative declarations. Although in paragraph 4 [279] the Special Rapporteur intimated that an interpretative declaration did not, at least openly, purport to modify the treaty's legal effects with regard to the declarant, that meant, *a contrario*, that it could purport to do so. Consequently the Commission could not simply transpose the rules of the 1969 Vienna Convention on acceptance of and objections to reservations to the draft guidelines. The distinction drawn between simple and conditional interpretative

declarations had merit, as did the classification of the three types of reactions to interpretative declarations proposed in paragraph 7 [282].

2. As to the draft guidelines themselves, he concurred with the reasons given for employing the term "approval" in draft guideline 2.9.1 (Approval of an interpretative declaration), and also found the text of the draft guideline acceptable, although he wondered whether the notion of not prejudging the issue of the legal effects of such approval should perhaps be expressed there in some way. He did not, however, have any specific wording to propose at the current stage.

3. With reference to draft guideline 2.9.2 (Opposition to an interpretative declaration), he was grateful to the Special Rapporteur for drawing attention to the fact that, in practice, a variety of terms were used, and that a subtle distinction needed to be made between negative reactions to interpretative declarations and objections to reservations. The text of the draft guideline was acceptable on the whole. However, if the definition was to be based on intention and effects, he wondered whether the distinction between "opposition" and "objection" might be too tenuous, and whether there was any other valid reason for applying such a distinction.

4. He appreciated the differentiation of "approval", "opposition" and "reclassifications" made in paragraph 25 [300] with reference to draft guideline 2.9.3 (Reclassification of an interpretative declaration), the text of which was satisfactory, in that it was based on State practice. The only query which had been raised concerned the bracketed second paragraph. The Special Rapporteur explained that it was a corollary to the rules adopted with respect to the distinction between reservations and interpretative declarations and that it was justified for reasons of convenience. He agreed that, since the first paragraph provided for cases in which an interpretative declaration was reclassified as a reservation, its inclusion might be helpful.

5. Generally speaking, the texts of draft guidelines 2.9.8 (Non-presumption of approval or opposition) and 2.9.9 (Silence in response to an interpretative declaration) were acceptable, because they were based on principles drawn from State practice. There might, however, be some contradiction between the first and second paragraphs of draft guideline 2.9.9. What were the "certain specific circumstances" mentioned in the second paragraph? What was the difference between "silence" and "conduct"? Was silence not a form of conduct?

6. Draft guidelines 2.9.5, 2.9.6 and 2.9.7 constituted useful recommendations. His first reaction was that it would seem logical to draft similar provisions on interpretative declarations themselves. Although the text of draft guideline 2.9.4 (Freedom to formulate an approval, protest or reclassification) was acceptable on the whole, it would be necessary to harmonize the terminology of the title, which used the term "protest", with the body of the text, which spoke of "opposition". In his view, States and international organizations which were not parties to the treaty were entitled to react to interpretative declarations. In the context of draft guideline 2.9.10 (Reactions