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Summary record of the 2976th meeting

Topic:
Reservations to treaties

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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

to conditional interpretative declarations), the reference to the commentary to draft guideline 1.2.1 in paragraph 50 [325] of the report was useful. He shared the Special Rapporteur's doubts about using the same terminology to denote negative reactions to a conditional interpretative declaration and objections to reservations, and agreed that, for the time being, it would be better to leave the issue of terminology in abeyance until the Commission had taken a final decision on the effects of conditional interpretative declarations and on their possible assimilation to reservations. He thought that *prima facie* they could be treated as reservations. The text of the draft guideline did not call for any particular remarks.

7. He was in favour of referring all the draft guidelines proposed in the thirteenth report to the Drafting Committee.

8. Mr. McRAE said that although, as usual, he had been educated and informed by the Special Rapporteur's presentation of his report, he had not been entirely convinced by everything that had been said. As a result, while he was broadly in agreement with the report and the draft guidelines it contained, he had some comments to make, in the course of which he would respond to the specific questions regarding which the Special Rapporteur had asked for reactions.

9. As far as the categories of reactions to interpretative declarations were concerned, he tended to agree with the point made at the previous meeting by Ms. Escarameia. In paragraph 7 [282] the Special Rapporteur listed three types of reaction: positive, negative and silence. Yet when he discussed them in more detail in paragraphs 8 [283] to 41 [316] they became four categories: approval, opposition, reclassification and silence. In other words, a negative reaction was broken down into two categories, namely opposition and reclassification.

10. Opposition itself comprised two categories: rejection of the interpretation, and proposal of an alternative interpretation. Reclassification, which consisted in a State characterizing an interpretative declaration of another State as a reservation was, however, really a form of opposition. The question was why the Special Rapporteur felt the need to treat reclassification as something different to opposition.

11. He detected some ambivalence in the report. In paragraph 7 [282], the Special Rapporteur referred to what he later termed "reclassification" as expressing "opposition to its classification as an 'interpretative declaration', usually on the ground that it is in reality a reservation". Yet in paragraph 25 [300], the Special Rapporteur justified not treating reclassification as opposition on the ground that it "do[es] not refer to the actual content of the unilateral statement in question, but rather to its form and to the applicable legal regime".

12. However, it was questionable whether any of that mattered and it was, in any case, unclear what the applicable legal regime was. At that stage the Special Rapporteur was simply defining categories; he dealt with the consequences attaching to those categories later. If the

consequences of opposition through rejection of an interpretation, opposition through the proposal of an alternative interpretation, and opposition through reclassification were all the same, why could those reactions not simply be referred to as opposition?

13. He would suggest that the consequences of all three reactions must be the same. Since an objecting State could not unilaterally turn an interpretative declaration into a reservation, then all it was saying, when it called the declaration a reservation, was that it disagreed with the interpretation offered. As Mr. Gaja had already pointed out, whether an interpretative declaration was in fact a reservation depended on the intent of the State making the reservation, not on the reaction of other States to it.

14. Of course, if it subsequently transpired, through a process of interpretation, that the interpretative declaration was in fact a reservation—that it was a conditional interpretative declaration—then it would have to be treated as a reservation. However, that was not the situation at the time the objection was made. An interpretation that was opposed, or for which an alternative interpretation was suggested, could equally well turn out later to be a reservation. So again, the category of reclassification seemed not to differ from other subcategories of opposition.

15. For that reason, it was unclear why States seeking to reclassify an interpretative declaration would need to apply, or be guided by, draft guidelines 1.3 to 1.3.3, or why a State that was opposing an interpretative declaration on some other ground should take account of those draft guidelines. Therefore, he did not see why the second paragraph of draft guideline 2.9.3 was necessary.

16. His broader point was whether draft guideline 2.9.3 was needed at all as a separate guideline. If, as he had suggested, reclassification was simply another form of opposition, it could be included in draft guideline 2.9.2, along with the other subcategories of opposition, namely, rejecting an interpretation or proposing an alternative one.

17. His second comment related to silence. Like Ms. Escarameia, he had doubts about the second paragraph of draft guideline 2.9.9. The Special Rapporteur was right to conclude that consent could not be inferred from silence in the case of an interpretative declaration. Silence had implications when it occurred in the face of a duty to speak, but, as the Special Rapporteur had pointed out, there was no such duty in the case of an interpretative declaration.

18. However, the second paragraph of draft guideline 2.9.9 contradicted that assertion by saying that, in certain circumstances, silence alone could constitute acquiescence. That point had also been made by Mr. Fomba, but the justification given in the report for the second paragraph of draft guideline 2.9.9 said something slightly different: in paragraph 41 [316] the Special Rapporteur said that, in some circumstances, a State that was silent might be considered to have acquiesced by reason of its conduct. That statement was somewhat cryptic, but

to the extent that the Special Rapporteur was saying that silence might be relevant to deciding whether there had been acquiescence by conduct, it was a correct proposition. Yet the text of the second paragraph of draft guideline 2.9.9 did not say that. The text said that there could be acquiescence by silence *or* by conduct.

19. He was not, however, suggesting that the Special Rapporteur should delete the second paragraph. That paragraph was simply a caution to States; as such, it should make it clear that silence might be relevant in ascertaining whether there had been acquiescence by conduct, but that silence alone could not constitute acquiescence.

20. In response to the Special Rapporteur's question about the desirability of including draft guidelines 2.9.4 to 2.9.7, he thought that they should be included, subject to the corrections proposed at the previous meeting by Ms. Escarameia (paras. 10–11) and at the current meeting by Mr. Fomba. The Special Rapporteur should also produce parallel draft guidelines for interpretative declarations themselves.

21. Lastly, on the subject of conditional interpretative declarations, he remained unconvinced that there was any justification for them treating as anything other than reservations. While he conceded that he had not participated in the Commission's past discussions on that issue, he failed to see how such declarations could be characterized only as "infinitely closer" to reservations than simple interpretative declarations, the implication being that there was some residual difference between conditional interpretative declarations and reservations. By making its consent to the treaty conditional upon the proposed interpretation, the author of a conditional interpretative declaration was seeking to do only what a reservation could do, in other words to modify the terms of the treaty in the State's relations with the other parties to the treaty. It was thus no more than a reservation.

22. There were therefore only two categories: simple interpretative declarations and reservations, the latter being composed of true reservations and reservations put forward in the form of a conditional interpretative declaration. For that reason, he was in agreement with the spirit of draft guideline 2.9.10, namely that the rules relating to reactions to reservations also applied to reactions to conditional interpretative declarations, although he concurred with Ms. Escarameia that to make a cross-reference to such a large number of draft guidelines was not felicitous. That, however, was a matter for the Drafting Committee, to which all the draft guidelines should be referred.

23. Mr. CAFLISCH said that interpretative and conditional interpretative declarations raised such difficult issues that some had even questioned the advisability of venturing onto such slippery ground. In his view, however, there were three good reasons why the Commission should.

24. First, some multilateral agreements prohibited reservations, thereby providing States with an incentive to make declarations, which, accordingly, were of some significance. Moreover, those declarations could, after reclassification, be construed as reservations.

25. Secondly, such declarations, if they met with the approval of the other parties, could result in subsequent agreement regarding the interpretation of the treaty within the meaning of article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, so that a declaration which had been "approved" by other States that were parties came within the context, *lato sensu*, of the treaty and became an important factor in interpreting it.

26. Thirdly, attempts were frequently made to reclassify interpretative declarations, *inter alia* in international systems for the protection of human rights. If a declaration were made during the existence of a treaty and if it were subsequently reclassified as a reservation, that would raise the issue of its validity *ratione materiae* and *ratione temporis*.

27. The Special Rapporteur had therefore been right to examine the subject of declarations in depth. He had done so in a manner that made it possible to refer all the draft guidelines proposed in the thirteenth report to the Drafting Committee.

28. Mr. Caffisch agreed with the definitions given of and the distinction drawn between reservations, "simple" interpretative declarations and conditional interpretative declarations in paragraphs 3 [278] to 5 [280] of the report. He also endorsed the use of the terms "approval", "opposition" and "reclassification", and the view expressed in paragraph 5 [280] that conditional interpretative declarations came closer to being reservations than "simple" interpretative declarations.

29. With reference to individual draft guidelines, he wondered if draft guideline 2.9.1, on the approval of an interpretative declaration, should perhaps specify the effect of such approval. In paragraphs 10 [285] and 11 [286] the Special Rapporteur stated, however, that it should not be specified, referring in that connection to article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which he cited in paragraph 10 [285]. While Mr. Caffisch was prepared to accept that view, he felt that the link with that provision should be made somewhere, perhaps in the commentary.

30. The other side of the coin, namely opposition, was the subject of draft guideline 2.9.2, in which there was certainly no need to mention effects, as they were obvious: a declaration expressing opposition could bind the declaring State, and that State alone. It purported, in the words of draft guideline 1.2, "to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions".¹⁶⁵ Perhaps attention should be drawn in the commentary to the interrelationship between draft guideline 2.9.2 and draft guideline 1.2.

31. Draft guideline 2.9.3, which dealt with reclassification, defined the concept and outlined the consequences: the State that formulated a reclassification "purports to regard the [initial] declaration as a reservation and to treat it as such" (para. 28 [303] of the report). Accordingly, the declaration produced effects only for the State making the reclassification and, perhaps, for other States that might

¹⁶⁵ *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103.

subsequently “approve” it. Reclassification was obviously only a first step: the declarant would then have to deal with the question of the validity *ratione temporis* and *ratione materiae* of the original declaration or reservation; however, addressing that question would go far beyond the scope of the current exercise. The bracketed second paragraph of draft guideline 2.9.3 should be retained, and in view of the wording of draft guidelines 1.3 to 1.3.3,¹⁶⁶ referred to therein, the word “apply” would seem to be the more appropriate.

32. Draft guideline 2.9.9 was the one that raised the most difficulties. It dealt with the silence of States other than the State that had formulated an interpretative declaration: “in certain specific circumstances”, its second paragraph explained, the principle that silence was not equivalent to approval was overturned. Those circumstances were not identified, however, and in paragraphs 39 [314] and 40 [315] of his report the Special Rapporteur explained that it was impossible to do so. Doubtless that was true, but the fact remained that, as currently drafted, the second paragraph of draft guideline 2.9.9 raised more questions than it answered. Perhaps some of the doubts could be removed by citing certain specific circumstances enabling a State or an international organization to be considered in good faith to have acquiesced to an interpretative declaration. Despite the difficulties it raised, the draft guideline should not be deleted, since it would be inconsistent to speak of approval and opposition while remaining silent on silence itself. Lastly, he wondered from what point in time silence could be said to exist.

33. Mr. DUGARD said that, in his customary manner, the Special Rapporteur had anticipated every conceivable problem and his draft guidelines covered every conceivable situation. The draft guideline on reclassification might indeed, as Mr. McRae had suggested, be redundant, but it was nevertheless helpful to include that particular form of opposition to a declaration.

34. He wished to make some comments, mainly concerning the form rather than the substance, on draft guideline 2.9.9. Firstly, the phrase “acquiesced to”, in the English text, was incorrect: it should read “acquiesced in”. He agreed with Mr. Caffisch’s comments on the phrase “in certain specific circumstances”: those circumstances had to be spelled out. In practice, however, it might be extremely difficult to list all the circumstances that might give rise to an inference of consent. Accordingly, the phrase should be deleted. The emphasis should be on silence and, in particular, conduct, because it was the conduct of a State that might give rise to an inference of consent. However, such an inference could be drawn only when the State had full knowledge of the implications of the interpretative declaration and failed to take any action.

35. In paragraph 39 [314] of his report, the Special Rapporteur cited the comment of the Eritrea–Ethiopia Boundary Commission (*Decision regarding delimitation of the border between Eritrea and Ethiopia*) that in deciding whether a party to a treaty had given consent,

the court could apply principles variously described as “estoppel, preclusion, acquiescence or implied or tacit agreement” [para. 3.9]. In a recent case, with which the Special Rapporteur was intimately acquainted, the ICJ had relied on acquiescence and tacit agreement in order to infer consent.¹⁶⁷ Objections had been raised, however, to the way in which consent had been inferred when it was not clear that the State concerned had fully understood the implications of its silence. He would therefore suggest the addition to the draft guideline of a phrase indicating that consent could be inferred when a State had knowledge of the meaning and implications of the interpretative declaration and failed to object. That would reflect the comment of the Eritrea–Ethiopia Boundary Commission to the effect that, in order to infer knowledge on the part of the State, there must be an indication of a failure by that State to dissociate itself from or to reject a statement within a reasonable time. While it was difficult to prove knowledge of the meaning of an interpretative declaration subjectively, it was possible to do so objectively by examining the interpretative declaration: if it was clear in its meaning and the State did nothing, it was possible to infer consent on its part. Lastly, the phrase “as the case may be”, at the end of the second paragraph of the draft guideline, was meaningless and could be deleted.

36. With those comments, he had no hesitation in recommending that the draft guidelines be referred to the Drafting Committee.

37. Mr. PELLET (Special Rapporteur) said it was his firm conviction that the Commission must take a stand on questions of principle in plenary session. Two very different tendencies could be discerned with regard to draft guideline 2.9.9, which, he agreed, was the most problematic. Most members seemed to think the second paragraph did not add much and that the phrase “in certain specific circumstances” needed to be fleshed out. Mr. McRae, however, had proposed that, rather than specifying the circumstances, the draft guideline should state that silence was a circumstance. That was an interesting position and he would like to hear whether any other members supported it. In other words, could silence be considered as acquiescence, or as an element of acquiescence, or could the two ideas even be compatible?

38. Mr. DUGARD said it would be helpful if the Special Rapporteur could give some indication of what he meant by “specific circumstances”, perhaps by providing examples of circumstances other than silence or conduct involving silence.

39. Mr. PELLET (Special Rapporteur) cited the hypothetical case in which a State notified the depositary that if a conditional interpretative declaration it had made was contested, it would refuse to be bound by the treaty. If no States reacted to that declaration, it would be difficult to claim that their silence had no legal effects. A concrete example was the declaration of France with regard to the Treaty for the Prohibition of Nuclear Weapons in Latin America (“Treaty of Tlatelolco”).

¹⁶⁶ *Ibid.*, pp. 107–112.

¹⁶⁷ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, para. 121.

40. Mr. McRAE said that the statement in the second paragraph of draft guideline 2.9.9 that silence could constitute acquiescence contradicted the first paragraph, and that the circumstances in which it could do so had to be explained. If, on the other hand, the draft guideline stated that conduct could constitute acquiescence, then there was no need to explain the circumstances. Silence was one element of conduct constituting acquiescence. Mr. Dugard's proposal was problematic because it suggested that in certain circumstances States were under an obligation to react when an interpretative declaration was made. Many interpretative declarations were quite clear, yet States would be forced to react to them lest it might subsequently transpire that they had an obligation to react and had not done so.

41. Mr. SABOIA said that the second paragraph of draft guideline 2.9.9 was vague and seemed to contradict the first paragraph. He would prefer to see it deleted. That would not preclude silence, accompanied by other factors, from signifying acquiescence in certain circumstances, according to the general rules of interpretation. On conditional interpretative declarations, he agreed with Mr. McRae that they should be considered to be reservations and that the rules applicable to reactions to reservations should also be applicable to them.

42. Ms. ESCARAMEIA, responding to the questions posed by the Special Rapporteur, said that her proposal regarding draft guideline 2.9.9, made at the previous meeting, had in fact been more drastic, namely to delete it altogether as, if retained, it might seem to contradict draft guideline 2.9.8, which allowed no presumption of approval or opposition. Draft guideline 2.9.9, on the other hand, provided that silence or failure to react could signify acquiescence in some circumstances and opposition in others. Given that any exploration of acquiescence would be very complicated and would go beyond the scope of the topic, it would be better to delete draft guideline 2.9.9, perhaps also expanding the text of draft guideline 2.9.8 or referring to the matter in the commentary. She could understand the reasoning of those who claimed that the deletion of draft guideline 2.9.9 would leave a structural gap, implying that the Commission had failed to address the question of silence and had subsumed it under draft guideline 2.9.8. Yet the solution of retaining one paragraph of draft guideline 2.9.9 while deleting the other would convey the misleading impression that nothing could be inferred from silence, which was not the case. As for the Special Rapporteur's question whether silence was an element of conduct that led to acquiescence or itself constituted acquiescence, she tended to take Mr. McRae's view, as only a limited number of inferences could be drawn from silence.

43. Mr. NOLTE said that to remain silent on the question of acquiescence was certainly the safest way for the Commission to proceed, but was not helpful for States that were wondering what significance would be ascribed to their actions. The Special Rapporteur had drafted a nuanced and balanced proposal, and he wondered whether there was really as wide a divergence of opinion as had been suggested. Acquiescence was a version of the principles of *bona fides* and the protection of legitimate expectations, which were determined by the

context rather than by the inherent nature of the conduct or silence. There were certain types of contractual relations, such as those obtaining among a small group of States that met regularly, in which the partners might legitimately be expected to react, and others in which they had legitimate reasons for not reacting. While it was reasonable to establish a general rule whereby no presumption was to be inferred from silence, consideration must also be given to whether the specific circumstances called for a reaction. Perhaps at an earlier stage in the evolution of international law there had been greater freedom to remain silent. In the modern world, however, silence plus context, not silence as conduct, determined whether there was an obligation to react.

44. Mr. CANDIOTI said it was important to consider draft guidelines 2.9.8 and 2.9.9 in tandem. The first paragraph of draft guideline 2.9.9 was a clarification to the effect that consent must be explicit and could not be inferred from silence. While reference needed to be made to the role of silence, as was done in draft guideline 2.9.9, it was draft guideline 2.9.8 that contained the main principle. In his view, silence was a form of conduct; silence and conduct were not two different things. Silence was an expression of an attitude to an interpretative declaration. It was therefore important to indicate, either in the commentary or elsewhere, the particular circumstances in which significance was to be attached to silence. It might, for instance, have significance on the basis of the text of the interpretative declaration itself, where, for example, the other parties to the treaty were called upon to voice their opinions on the matter in question. The second paragraph of draft guideline 2.9.9 should therefore not be deleted; instead, it should be further refined and developed.

45. Mr. WISNUMURTI said that the Special Rapporteur had once again submitted a well-researched, analytical and comprehensive report. In its paragraph 3 [278], the Special Rapporteur had justifiably stressed the difference between reservations and interpretative declarations in terms of their respective legal effects on a treaty. Unlike reservations, interpretative declarations were intended merely to clarify the meaning of certain treaty provisions and did not purport to modify the treaty's legal effects. A possible exception was the case of conditional interpretative declarations, where the author made its consent to be bound by the treaty conditional on the interpretation proposed.

46. In analysing the practice of States and international organizations in response to interpretative declarations, the Special Rapporteur had convincingly presented three different types of reactions, namely positive, negative and reactions in the form of silence, on the basis of each of which draft guidelines were being proposed. The Special Rapporteur had also raised the possibility of a fourth reaction whereby an interpretative declaration was reclassified as tantamount to a reservation. In his view, such a category of reaction merited further discussion.

47. He had no problem with draft guideline 2.9.1, in that it reflected State practice as described by the Special Rapporteur in his report. He fully concurred that agreement with an interpretative declaration should not

be confused with acceptance of a reservation, given the differences between the two. However, he had some difficulty in understanding the Special Rapporteur's view that it was not necessary at the present stage of the study to specify the legal effects that the expression of such agreement might produce. The inclusion of a provision on the legal effects of approval of an interpretative declaration would strengthen draft guideline 2.9.1. That being said, he would appreciate any clarification the Special Rapporteur might be able to provide on the matter.

48. In his introduction to draft guideline 2.9.2, the Special Rapporteur had provided an extensive review of State practice, in which there were various ways of expressing rejection of the interpretation proposed in the interpretative declaration, including so-called "constructive" refusal or rejection. For the most part, he could go along with draft guideline 2.9.2. The Special Rapporteur had concluded in paragraph 22 [297] of his report that in rejecting interpretative declarations, States or international organizations sought "to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation". That conclusion had been reflected in the last part of the draft guideline, in the phrase "with a view to excluding or limiting its effect", which constituted the reason for the rejection. He was not convinced that the reason for rejection should be mentioned in draft guideline 2.9.2; rather, it should be left to the State or international organization expressing its rejection. He recalled that draft guideline 2.9.1 on approval of an interpretative declaration contained no reference to the reason for approval.

49. Like draft guideline 2.9.1, draft guideline 2.9.2 would benefit from an additional provision to address the legal effects of a rejection or opposition to an interpretative declaration. The Special Rapporteur had already referred to that question in a different context in paragraph 22 [297] of his report. The inclusion of such a provision would bring greater clarity to the regime of interpretative declarations.

50. Draft guideline 2.9.3 appeared to pose no problem and reflected State practice as described by the Special Rapporteur in his report. It was important to note that the reclassification of an interpretative declaration, by its very nature, differed from approval or opposition, as it referred to the form of the proposed interpretation in the declaration and to the applicable legal regime rather than to the content of the declaration.

51. He also favoured removing of the square brackets enclosing the second paragraph, concerning the need to take into account or apply draft guidelines 1.3 to 1.3.3. His preference was for the wording "apply".

52. Draft guidelines 2.9.8 and 2.9.9 were essential with a view to avoiding errors of judgement when dealing with situations in which the reaction to an interpretative declaration took the form of silence. He therefore had no quarrel with the two draft guidelines. It seemed to him that the essence of the second paragraph of draft guideline 2.9.9 should be retained. However, there was a need for clarification of what was meant by the "certain

specific circumstances" referred to therein, either in the body of the text or in the commentary.

53. In his view, draft guidelines 2.9.5 (Written form of approval, opposition and reclassification), 2.9.6 (Statement of reasons for approval, opposition and reclassification) and 2.9.7 (Formulation and communication of an approval, opposition or reclassification) were indeed necessary. With regard to the points made by the Special Rapporteur in paragraph 46 [321] of his report, it might be useful, subject to consensus within the Commission, for the Special Rapporteur to prepare a draft guideline on interpretative declarations themselves, based on the recommendations contained in paragraph 45 [320] of his report.

54. He had no problem with draft guideline 2.9.4, as it applied to any contracting State or international organization and also to any State or any international organization that was entitled to become a party to the treaty.

55. With regard to draft guideline 2.9.10, the Special Rapporteur had made it clear that a conditional interpretative declaration came close to being a reservation. However, he had stressed in paragraph 5 [280] that this did not mean that the regime for reactions to interpretative declarations should be identical to the one for reactions to reservations, adding that this was only a working hypothesis that should be explored. He agreed with both the Special Rapporteur's analysis and his suggestion for continued study of that issue.

56. Mr. PELLET (Special Rapporteur) said he wished to make a clarification in advance of the following day's discussion. In his interesting statement, Mr. Wisnumurti had urged him, in relation to draft guidelines 2.9.1 and 2.9.2, to add provisions on the effects of approval or rejection. He was opposed to that idea, not for reasons having to do with substance, but for reasons that related to the coherence of the text as a whole. The Guide to Practice would consist of five parts: the first part concerned definitions; the second part, which the Commission was trying at all costs to complete during the current session, was on procedure and formulation, with regard to either an objection to or an acceptance of a reservation or an interpretative declaration. That meant that there were provisions on the procedure for the formulation of interpretative declarations and of reactions to interpretative declarations. While it was difficult to refrain altogether from referring to the question of effects in the commentary or the discussion, it would make sense to take up the question of the effects produced by declarations made according to a certain procedure only in the third part of the Guide to Practice, which concerned the effects of reservations, of interpretative declarations, and of reactions to reservations and to interpretative declarations. Thus, for reasons having to do simply with the proposed structure of the draft, he could not agree to that proposal at the current stage because the Commission was concerned for the time being with procedures, not with effects.

The meeting rose at 11.30 a.m.