Document:-
A/CN.4/3073

Summary record of the 3073rd meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-second session

Extract from the Yearbook of the International Law Commission:-
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Paragraph 9

59. Mr. GAJA said that, having consulted the Special Rapporteur on the subject, he thought that, in the third sentence, it would be wise not to give the impression that the Commission was passing judgment over bilateral agreements which might or might not have been concluded. He therefore proposed that the words "had been adequately addressed" with "may have been adequately addressed".

60. Mr. CANDIOTI proposed that, in the same sentence, the words "and confusion" should be deleted.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

61. Mr. NOLTE said that, in the last sentence of the paragraph, it would be advisable to indicate why the Working Group had taken the decision in question, if only by referring back to the previous paragraphs. He therefore proposed that the words "On the whole" should be replaced with "In light of the foregoing".

Paragraph 11, as amended, was adopted.

Chapter XII of the draft report, as a whole, as amended, was adopted.

The meeting rose at 6.10 p.m.

3073rd MEETING

Tuesday, 3 August 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-second session (*continued*)

Chapter IV. *Reservations to treaties* (A/CN.4/L.764 and Add.1–10)

1. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report beginning with the portion of the chapter contained in document A/CN.4/L.764.

A. Introduction (A/CN.4/L.764)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.764 and Add.1)

Paragraphs 5 to 12

Paragraphs 5 to 12 were adopted.

1. Introduction by the Special Rapporteur of the second addendum to his fourteenth report and his fifteenth report

Paragraphs 13 to 30

Paragraphs 13 to 30 were adopted.

2. Introduction by the Special Rapporteur of his sixteenth report

Paragraphs 31 to 55

Paragraphs 31 to 55 were adopted.

3. Content of the final report on the topic

Paragraph 56

Paragraph 56 was adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.764/Add.2–10)

2. Text of the draft guidelines with commentaries thereto provisionally adopted by the Commission at its sixty-second session (A/CN.4/L.764/Add.3–10)

2. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter IV contained in document A/CN.4/L.764/Add.3.

Commentary to guideline 2.6.3 (Freedom to formulate objections)

Paragraph (1)

3. Mr. NOLTE questioned the wording of the second sentence of paragraph (1) which read: "Nevertheless, although that freedom is quite extensive, it is not unlimited, and it therefore seems preferable to speak of a 'freedom' rather than a 'right'." As he recalled, the Drafting Committee and the Commission had been prompted to use the term "freedom" and not "right", because it had been held that the word "freedom" would allow States greater latitude, whereas rights might tend to be limited. He therefore proposed that the sentence be recast to read: "As this entitlement flows from the general freedom of States to conclude treaties, it seems preferable to speak of a freedom rather than a right." He clearly remembered that the discussion had turned on terminology drawn from English or American legal theory. The philosopher Wesley Newcomb Hohfeld had been mentioned as someone who had distinguished between rights and freedoms and who had contended that freedoms were less specific than rights and that they flowed from general entitlements.[375] That was why the term "freedom" had been chosen rather than "right". The debate had reached the conclusion that the possibility of formulating an objection should not be limited but enhanced.

4. Mr. PELLET (Special Rapporteur) said, in response to Mr. Nolte, that he was unsure whether the philosophy

[375] W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, W. Cook (ed.), New Haven, Yale University Press, 1919.

of rights and freedoms had really inspired the Commission when it had discussed paragraph (1). The Drafting Committee, after careful consideration, had decided to retain the term "freedom" [in French "*faculté*"], which had appeared in the text originally proposed by the Special Rapporteur and referred to the Drafting Committee, because, as its report had noted, the term "right" might not be appropriate in that context, since a right could be regarded as implying the existence of a correlative obligation and, possibly, of a remedy in the event of its violation. Although the reason for choosing the term "freedom" was not therefore that suggested by Mr. Nolte, he did not have any objection to the wording that Mr. Nolte had proposed.

5. Mr. NOLTE said that the Special Rapporteur's answer had confirmed his own argument that it was precisely the correlation between rights and duties which had prompted the Commission to use the expression "freedom". Paragraph (1) did not reflect that thinking.

6. Sir Michael WOOD said that Mr. Nolte was right to hold that the current language was not entirely accurate. He suggested that the Commission try to echo some of the language from the Drafting Committee's report. He therefore proposed that the sentence should read, "That freedom is quite extensive but it is not unlimited. It seems preferable to speak of a freedom rather than a right", and then continue with the language of the Drafting Committee.

7. Mr. NOLTE said that the choice of the word "freedom" or "right" had nothing to do with any limitation of the entitlement to formulate objections. It rested on different considerations.

8. Mr. GAJA said that the English text of the last footnote to paragraph (1) sounded rather strange, because it said that an objection could not be made before the treaty had come into force. What the footnote should say was "To be specific, there are two cases in which an objection may be formulated, but does not produce its effects, the first being…".

The footnote would be amended in that vein.

9. Mr. NOLTE said that, he proposed deleting the word "nevertheless" at the beginning of the second sentence of paragraph (1). The sentence would then be amended to read: "Although that freedom is quite extensive, it is not unlimited. It seems preferable to speak of a 'freedom' rather than a 'right' because this entitlement flows from the general freedom of States to conclude treaties." The third sentence would remain unchanged.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were adopted.

Paragraph (9)

10. Mr. GAJA, supported by Mr. NOLTE and Mr. McRAE, said that, in the English text, the last sentence should read: "In practice, this would render the mechanism of acceptances and objections meaningless."

11. Mr. McRAE said that to say in the first sentence that a State was never bound by treaty obligations that were not in its interests sounded strange. It was quite possible that a State might discover that a treaty was no longer in its interests. What the sentence should say was that a State could never be bound by treaty obligations against its will.

12. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. McRae, because "in its interests" did not accurately translate the French expression "*qui ne lui conviennent pas*".

13. Mr. VASCIANNIE said that "against its will" captured what was intended.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

14. Mr. NOLTE said that the second sentence, which referred to an objection that might be incompatible with the object and purpose of the treaty, was too narrowly worded. It should state that it was scarcely possible to envisage a situation in which an objection might be incompatible with the treaty.

15. Mr. PELLET (Special Rapporteur) suggested that the sentence should read "… incompatible with the treaty, in particular with its object and purpose".

16. Sir Michael WOOD said that the wording proposed by the Special Rapporteur did not reflect the conclusions of the Commission's debate, which had specifically concentrated on objections incompatible with the object and purpose of a treaty. If the wording was broadened to encompass the treaty as a whole, it would be difficult to see what was meant by saying that an objection was contrary to a treaty, unless it meant objections prohibited by the treaty, which would be most unusual.

17. Mr. PELLET (Special Rapporteur) said that it was precisely that unusual situation which he had had in mind. Although he had never encountered a situation where a treaty expressly permitted reservations but not objections to reservations, the possible existence of such a situation could not be ruled out.

18. Sir Michael WOOD said that such a situation might not be impossible, but it would be ridiculous and the Commission should not anticipate the ridiculous.

19. Mr. PELLET (Special Rapporteur) said that the situation was less ridiculous than suggested by Sir Michael. If a treaty expressly authorized negotiated reservations, in other words a reservation whose text was provided for in the treaty itself, an objection would be implicitly prohibited.

20. Mr. NOLTE said that he could accept the wording suggested by the Special Rapporteur. There were other means of interpretation besides the text of the treaty and its object and purpose that might make the situation envisaged seem more likely.

21. Mr. PELLET (Special Rapporteur) said that the passage would read "Although it is scarcely possible to envisage a situation in which an objection might be incompatible with the treaty, in particular with its object and purpose, it goes without saying…" [*Alors qu'il n'est guère envisageable qu'une objection soit incompatible avec le traité, en particulier avec son but et son objet, il va de soi…*].

22. Sir Michael WOOD said that if the situation was indeed quite common, it was inconsistent to say that it could scarcely be envisaged.

23. Mr. PELLET (Special Rapporteur) suggested that the clause "Although it is scarcely possible to envisage a situation in which an objection might be incompatible with the object and purpose of the treaty" be deleted. In that way no position would be taken on whether it was possible to envisage such a situation. The reference to the Guide to Practice amply covered all aspects connected with the permissibility of objections.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

The commentary to guideline 2.6.3, as amended, was adopted.

Commentary to guideline 2.6.4 (Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

24. Mr. GAJA said that States often indicated that their objection should not prevent the entry into force of the treaty. There was nothing strange about such action on the part of States if the reservation in question was not deemed to be valid. At the end of the first sentence, it would therefore be advisable to add "with regard to an objection to a permissible reservation" after the phrase "that would automatically be the case". The addition of the words that he had proposed would not alter the substance of the commentary, but might clarify matters with regard to State practice.

25. Mr. PELLET (Special Rapporteur) agreed with the wording proposed by Mr. Gaja. It would be advisable to add a footnote worded, "With regard to invalid reservations, see guideline…".

Paragraph (7), as amended and supplemented by the additional footnote, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to guideline 2.6.4, as amended and supplemented with a footnote, was adopted.

26. The CHAIRPERSON invited the members of the Commission to continue the adoption of section C.2 of chapter IV by considering document A/CN.4/L.764/Add.4.

General commentary to section 3.4 (Permissibility of reactions to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary to section 3.4, was adopted.

Commentary to guideline 3.4.1 (Permissibility of the acceptance of a reservation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

27. Mr. GAJA said that the wording of the second sentence seemed to imply that the time period provided in article 20, paragraph 5, of the Vienna Convention on the Law of Treaties was applicable in the case of impermissible reservations. He therefore proposed ending the sentence with the words "tacit acceptances", deleting the article "the" before "tacit".

Paragraph (5), as amended, was adopted.

The commentary to guideline 3.4.1, as amended, was adopted.

Commentary to guideline 3.4.2 (Permissibility of an objection to a reservation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

28. Mr. GAJA proposed amending the opening phrase of the English version of the penultimate footnote to read: "The United Kingdom objected with maximum effect, in due and proper form, to the reservations…".

Paragraph (2), with the amendment to the penultimate footnote in the English version, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

29. Mr. NOLTE, referring to the phrase "it makes little sense to apply a treaty with no object or purpose", asked whether it was the treaty itself or its application that was deemed to have no object or purpose.

30. Mr. PELLET (Special Rapporteur) proposed amending the phrase to read: "it makes little sense to apply a treaty that has been deprived of its object and purpose".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

31. Mr. GAJA proposed replacing "other provisions of Part 5" in the second sentence with "certain provisions of Part 5".

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (15)

Paragraphs (10) to (15) were adopted.

Paragraph (16)

32. Mr. NOLTE, referring to the last sentence of the paragraph, said that at least one member of the Commission did in fact think that it was conceivable that an "objection" might violate a peremptory norm. He therefore proposed adding the following sentence: "According to one point of view, it was conceivable that a minus could produce an *aliud*."

33. Mr. PELLET (Special Rapporteur) said that he was unfamiliar with the Latin term used in the proposed amendment. Perhaps Mr. Nolte could rephrase it so that the language was more accessible.

34. Mr. NOLTE proposed the following alternative wording: "According to another view, however, it was conceivable that a 'deregulation' of one obligation could lead to a modification of related obligations."

35. Mr. PELLET (Special Rapporteur) said that the new wording was acceptable. However, he wondered whether the "related obligations" referred to customary or treaty-based rules.

36. Mr. GAJA proposed adding the words "under the treaty" at the end the sentence.

37. Mr. NOLTE agreed to the proposed addition.

38. Mr. McRAE said that the meaning of the term "deregulatory" in the sentence "The effect is simply 'deregulatory' " should be clarified. He suggested either inserting a footnote indicating the source, which he assumed was Frank Horn,[376] or clarifying that "deregulation" entailed the applicability of rules of customary international law rather than treaty obligations.

39. Mr. PELLET (Special Rapporteur) confirmed that the term had been used by Frank Horn. He suggested the following amendment: "The effect is 'deregulatory' and the customary norm applies."

40. Mr. McRAE said that the proposed amendment was acceptable.

Paragraph (16), as amended, was adopted.

[376] F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, 1988, p. 121.

Paragraphs (17) to (19)

Paragraphs (17) to (19) were adopted.

The commentary to guideline 3.4.2, as amended, was adopted.

Commentary to guideline 3.5 (Permissibility of an interpretative declaration)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

41. Mr. GAJA pointed out that the words "other grounds" in the English version of the paragraph should be amended to read "another ground", since only one other ground was mentioned.

Paragraph (9), as amended in the English version, was adopted.

Paragraphs (10) to (18)

Paragraphs (10) to (18) were adopted.

Paragraph (19)

42. Mr. NOLTE said that the German quotation was perhaps somewhat misleading, particularly the clauses "International law knows no limits to the formulation of a simply interpretative declaration" and "restrictions on the admissibility of simply interpretative declarations may only derive from the treaty itself". Paragraphs (9) and (10) mentioned possible exceptions, for instance where an interpretative declaration was contrary to a peremptory norm of general international law. He therefore considered that the paragraph should be deleted.

43. Mr. PELLET (Special Rapporteur) said that he agreed to the proposed deletion.

Paragraph (19) was deleted.

Paragraph (20)

Paragraph (20) was adopted and renumbered.

The commentary to guideline 3.5, as amended, was adopted.

Commentary to guideline 3.5.1 (Permissibility of an interpretive declaration which is in fact a reservation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

44. Mr. CAFLISCH pointed out that "the *Mer d'Iroise* case" was a term used in the popular press to designate the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* [*English Channel* case].

45. Sir Michael WOOD expressed strong support for the use of the correct title of the case.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to guideline 3.5.1, as amended, was adopted.

Commentary to guideline [*3.5.2* (Conditions for the permissibility of a conditional interpretative declaration)]

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

46. Mr. VARGAS CARREÑO said that, although guideline 3.5.2 and the commentary thereto was in brackets, he wished to make a statement for the record. Paragraph (5) cited as "a particularly clear example of a conditional interpretative declaration" the declaration that France attached to its expression of consent to be bound Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean ("Treaty of Tlatelolco"). According to the declaration,[377] if France was attacked, it would not apply the rules laid down in Additional Protocol II and hence would be free to use nuclear weapons. Even if the attack was not made with nuclear weapons, if, for instance, it took the form of an invasion of Martinique by sea, France would be entitled to respond with nuclear weapons. All the Latin American States had objected to the interpretative declaration on the ground that it was incompatible with the principle of proportionality, as recognized by the ICJ in a number of advisory opinions and by the Commission in its draft articles on State responsibility for internationally wrongful acts.[378] The change in nuclear weapons policy of France since 1974 was clearly demonstrated by the fact that France considered itself bound by Additional Protocol II despite the objections. He merely wished to place that fact on record.

Paragraph (5) was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

47. Mr. NOLTE proposed amending the words "remains in a legal vacuum" in the third sentence to read "remains in a twilight realm".

48. Mr. PELLET (Special Rapporteur) said he agreed that the reference to a legal vacuum was indeed misleading. However, he would prefer the alternative wording "remains undetermined".

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

The commentary to guideline 3.5.2, as amended, was adopted.

Commentary to guideline [*3.5.3* (Competence to assess the permissibility of a conditional interpretative declaration)]

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

49. Mr. HMOUD asked whether the time had come to remove the square brackets around the text of the guideline and then to delete paragraph (2) explaining the brackets.

50. Mr. PELLET (Special Rapporteur) said that it had been agreed to keep the guideline in square brackets until the Commission assessed whether conditional interpretative declarations came under the reservations regime. As it had now been established that they did, all the guidelines concerning such declarations would eventually be removed from the Guide to Practice and replaced by a single guideline to the effect that conditional interpretative declarations were subject to the legal regime applicable to reservations. If the Commission so wished, guideline 3.5.3 could already be deleted. However, he would prefer to keep it in square brackets for the time being and explain the situation in a footnote.

51. Mr. HMOUD said that Mr. Pellet's proposal was acceptable.

Paragraph (2) was adopted.

The commentary to guideline 3.5.3 was adopted.

Commentary to guideline 3.6 (Permissibility of reactions to interpretative declarations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

52. Mr. GAJA, referring to the last sentence of the first footnote to the paragraph, proposed amending the phrase "that the author State or organization must accordingly treat the recharacterized reservation as a reservation" to read: "that this State should accordingly treat the recharacterized reservation as a reservation". He had replaced "must" with "should" to reflect the wording of draft guideline 2.9.3.

53. Sir Michael WOOD proposed replacing "recharacterized reservation" with "recharacterized declaration".

Paragraph (3), with the amendment to the first footnote in the second sentence, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

The commentary to guideline 3.6, as amended, was adopted.

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[377] United Nations, *Treaty Series*, vol. 936, Annex A, No. 9068, p. 419.

[378] See footnote 217 above.

Commentary to guideline 3.6.1 (Permissibility of approvals of interpretative declarations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 3.6.1, was adopted.

Commentary to guideline 3.6.2 (Permissibility of oppositions to interpretative declarations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 3.6.2, as a whole, was adopted.

54. The CHAIRPERSON drew attention to the portion of section C.2 of chapter IV of the draft report contained in document A/CN.4/L.764/Add.5.

General commentary to Part 4 (Legal effects of reservations and interpretative declarations)

Paragraphs (1) to (16)

Paragraphs (1) to (16) were adopted.

Paragraph (17)

55. Mr. GAJA asked whether, in the second sentence, the phrase "objections with maximum effect" should be replaced by "objections with minimum effect", as that was what was most likely intended by the reference contained in that sentence to article 21, paragraph 3, of the Vienna Convention.

56. Mr. PELLET (Special Rapporteur) said that the use of the term "maximum" was indeed an error and should be corrected.

Paragraph (17), as amended, was adopted.

Paragraphs (18) to (21)

Paragraphs (18) to (21) were adopted.

The general commentary to Part 4, as amended, was adopted.

Commentary to guideline 4.1 (Establishment of a reservation with regard to another State or organization)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

57. Mr. NOLTE pointed out that, in the English version of the first sentence, the word "established" was used twice in close succession with two different meanings, which made for awkward reading. He proposed that the second occurrence of the term should be replaced by "presupposed" or "spelled out".

58. Mr. PELLET (Special Rapporteur) said that the second use of the word "established" in the English version was the translation of the word "*consacré*" in the French version.

59. Mr. HASSOUNA proposed, alternatively, that "established" could be replaced by "contained" or "included".

60. The CHAIRPERSON further suggested as options the terms "stipulated" or "embodied".

61. Mr. PELLET (Special Rapporteur) said that the term "*consacré*" had a more complex meaning than any of the terms just proposed: it implied that the concept in question was not only included in the article but was based on a pre-existing rule. Of the suggested alternatives, the term "embodied" came the closest to translating the French adequately.

62. Mr. McRAE said that the first sentence seemed to imply that the term "established reservation" was to be found in the Convention but was simply not defined in it. His recollection of the Commission's debate was that there had been disagreement over whether the concept of an "established reservation" was contained in the Convention; however, it had ultimately been agreed that the concept could be found in article 21, paragraph 1, of the Vienna Conventions. He therefore proposed that, in the first sentence, the phrase "had failed to define clearly what was meant by" should be replaced by "had not defined" and that the term "established" should be replaced by "nevertheless found".

63. Mr. CANDIOTI said that the discovery of the concept of an "established reservation" in article 21, paragraph 1, of the Vienna Conventions posed problems in Spanish. That was because that article in the official Spanish version of the 1969 and 1986 Vienna Conventions did not employ the Spanish cognate "*establecida*" where the English version used "established" and the French version used "*établie*", but rather the word "*efectiva*", which corresponded to "effective" in English. If, in keeping with its usage in article 21, paragraph 1, of the Vienna Conventions, the word "*efectiva*" was retained in the guidelines as a translation of "established" in English, many of the guidelines would be confusing in that they would refer to the equivalent in Spanish of such constructions as "the effectiveness of an effective reservation" and "the effects of an effective reservation".

64. After discussing the problem, the Spanish-speaking members of the Commission had concluded that the concept of an "established reservation" could best be incorporated in the Spanish version of the Guide to Practice if the translation of the term "established" departed from the official language of the Vienna Conventions and used the term "*establecido*" instead of "*efectivo*" where the English used the term "established". That would require modifying the Spanish version of the guidelines provisionally adopted by the Drafting Committee, replacing the term "*efectivo(a)*" by "*establecido(a)*" and "*efectividad*" by "*establecimiento*". He proposed that a footnote to paragraph (3) in the Spanish version of the draft report should be included to clarify that situation.

65. Mr. PELLET (Special Rapporteur) said that the proposal conveyed by Mr. Candioti was important and should be implemented. He suggested that the footnote should state that the Commission, in making those changes, was

aware of the fact that, regrettably, it was departing from the official text of the Vienna Conventions.

66. Mr. HASSOUNA said that, if it was the only change to the sentence, the term "found" proposed by Mr. McRae did not adequately convey the meaning of "*consacré*", which implied some form of confirmation. For that reason, he could accept the term "found" only if other changes were also made to the first sentence.

67. Sir Michael WOOD agreed with Mr. McRae's proposal but added that the sentence was too complicated and could benefit from being split in two. The word "because" seemed odd, given that, in his view, it was not "because" the Vienna Conventions had not defined an established reservation that the Commission had considered that the concept was found in article 21, paragraph 1; rather it was in spite of it, which could be conveyed by replacing the word "because" with "although".

68. Mr. McRAE said that he could agree to split the first sentence in two, provided that the comma after "reservations" was deleted and that his proposed clause "because the Vienna Conventions had not defined an 'established reservation'" was linked to the first part of the sentence and not to the second.

69. Sir Michael WOOD said that the first sentence could easily be reformulated along the lines proposed by Mr. McRae to read: "Some of the members of the Commission expressed hesitation regarding the chosen terminology, which in their view could introduce an element of confusion by unnecessarily and artificially creating a new category of reservations because the Vienna Conventions had not defined 'an established reservation'. Nevertheless, the Commission considered that the concept was found in article 21, paragraph 1, of the Vienna Conventions…".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

Paragraph (11)

70. Mr. GAJA said that the paragraph referred only to the criterion of compatibility with the object and purpose of the American Convention on Human Rights: "Pact of San José, Costa Rica", but, as was mentioned later in the commentary, the Inter-American Court of Human Rights had also found that the Convention implied acceptance of all reservations that were not incompatible with its object and purpose. That meant that the element of consent was considered to be implied in the Convention. He proposed adding the following sentence to the end of paragraph (11): "The Court also found that the Convention implied the acceptance of all reservations that were not incompatible with its object and purpose." That sentence would explain the position taken by the Inter-American Court of Human Rights and would link paragraph (11) to paragraph (12).

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (17)

Paragraphs (12) to (17) were adopted.

The commentary to guideline 4.1, as amended, was adopted.

Commentary to guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty)

Paragraphs (1) to (15)

Paragraphs (1) to (15) were adopted.

The commentary to guideline 4.1.1 was adopted.

Commentary to guideline 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to guideline 4.1.2 was adopted.

Commentary to guideline 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 4.1.3 was adopted.

71. The CHAIRPERSON drew attention to the portion of section C.2 of chapter IV of the draft report contained in document A/CN.4/L.764/Add.6.

General commentary to section 4.2 (Effects of an established reservation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary to section 4.2 was adopted.

Commentary to guideline 4.2.1 (Status of the author of an established reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

72. Mr. GAJA proposed that, in the first sentence, the phrase "it is, in fact, impossible to determine"—in reference to whether the author of the reservation became a party to the treaty in the sense of article 2, paragraph 1 (*g*), of the 1969 Vienna Convention—should be amended to read: "it may, in fact, be impossible to determine". While he agreed that, in most cases, it was impossible to make such a determination, there were cases in which it might be possible.

73. Mr. PELLET (Special Rapporteur) said that, in that same spirit, he would prefer the expression "it is frequently impossible" because it most closely described the reality of the situation.

74. Mr. GAJA suggested that the word "often" might be preferable to "frequently". The proposed expression would then read: "it is often impossible".

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (10)

Paragraphs (5) to (10) were adopted.

Paragraph (11)

75. Mr. NOLTE said that, as currently worded, the paragraph implied that the Commission's position (regarding article 20, paragraph 4 (*c*), of the Vienna Conventions) was contrary to the predominant practice of depositaries, which was not consistent with the softer position expressed in draft guideline 4.2.2, paragraph 2. He proposed that new text should be inserted in paragraph (11) after the second sentence. It should read: "By reaffirming article 20, paragraph 4 (*c*), of the Vienna Conventions, the Commission does not wish to imply, however, that the practice by depositaries in a particular case is necessarily incompatible with that provision. This issue is dealt with more specifically in draft guideline 4.2.2, paragraph 2."

76. Mr. PELLET (Special Rapporteur) agreed that some reference should be made in paragraph (11) to paragraph (3) of the commentary to draft guideline 4.2.2, where the Commission's position was clarified. However, he would prefer more neutral wording than that proposed by Mr. Nolte, since he would not wish to imply that the Commission regarded such practice of depositaries as good practice.

77. Mr. GAJA agreed that, if a reference was made in paragraph (11) to draft guideline 4.2.2, the Commission should be careful not to imply that it endorsed the practice of the Secretary-General and certain other depositaries, which not only disregarded the rule contained in article 20, paragraph 4 (*c*), and the time limit laid down in article 20, paragraph 5, of the Vienna Conventions, but, more importantly, ignored the distinction between permissible and impermissible reservations.

78. Mr. NOLTE said that draft guidelines 4.2.1 and 4.2.2 were closely interrelated and persons reading the commentaries should be aware of that fact. While he had no wish to alter what the Commission had already decided, he did not consider that a simple cross reference to draft guideline 4.2.2 would suffice.

79. Mr. PELLET (Special Rapporteur) said that the simplest way to meet Mr. Nolte's concern would be to start paragraph (11) with the phrase "without intending to give its opinion on the correctness of this practice", adding at that point a footnote that would say, "See guideline 4.2.2 and its commentary, in particular paragraph (3) below." Mr. Gaja's concern would be better dealt with in paragraph (3) of the commentary to draft guideline 4.2.2.

80. Mr. NOLTE said that the Special Rapporteur's proposal adequately addressed his concern.

81. Sir Michael WOOD suggested the deletion of the words "in particular paragraph (3)," from the new footnote, since paragraphs (4) and (5) of the commentary to draft guideline 4.2.2 were also relevant.

Paragraph (11), as amended and supplemented by an additional footnote, was adopted.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

The commentary to guideline 4.2.1 as amended, was adopted.

Commentary to guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

82. Mr. PELLET (Special Rapporteur), in order to meet the concerns expressed by Mr. Gaja earlier regarding the practice of certain depositaries, proposed that the last part of the paragraph should be reworded to read "which is to consider the author of the reservation to be a contracting State or contracting organization, on the one hand, as soon as the instrument expressing its consent to be bound has been deposited, and, on the other hand, without considering the permissibility or impermissibility of the reservation".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to guideline 4.2.2, as amended, was adopted.

Commentary to guideline 4.2.3 (Effect of the establishment of a reservation on the status of the author as a party to the treaty)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 4.2.3 was adopted.

Commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations)

Paragraphs (1) to (19)

Paragraphs (1) to (19) were adopted.

Paragraph (20)

83. Mr. GAJA proposed, for the sake of clarity, that the phrase "without affecting the rights and obligations" should read "without affecting the content of the rights and obligations".

Paragraph (20), as amended, was adopted.

Paragraphs (21) to (23)

Paragraphs (21) to (23) were adopted.

Paragraph (24)

84. Mr. GAJA proposed, for the sake of consistency with paragraph (20), that the phrase "the rights and obligations" should read "the content of the rights and obligations".

He also had some concerns about the last sentence, in particular the reference to the exceptions cited in guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), which he would address in connection with that guideline.

Paragraph (24), as amended, was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

85. Mr. NOLTE wondered whether the principle of reciprocity was correctly described in the paragraph, which spoke of the right to require the fulfilment of an obligation. A similar statement about the loss of the right to invoke an obligation appeared in the third sentence of paragraph (7) of the commentary to draft guideline 4.2.5. There, in a context of human rights treaties, which dealt with obligations for the benefit of the individual, the concept of invocation of an obligation was appropriate, but in the context of guideline 4.2.4, where inter-State relations were concerned, the parties were released from the obligation itself. He therefore proposed that paragraph (26) be redrafted as follows:

> "It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation, but also that the State or international organization with regard to which the reservation is established is released from the obligation to which the reservation relates with regard to the author of the reservation."

86. Mr. GAJA said that, although he shared Mr. Nolte's concerns, he was not entirely satisfied with the wording of his proposal. The Commission needed more time to consider how to explain in the commentaries the distinction between guidelines 4.2.4 and 4.2.5, in other words, the fact that, in certain cases, the content of the obligation changed and the State or international organization was released from the obligation, whereas, in other cases (guideline 4.2.5), the obligation still existed, but only towards States other than the author of the reservation. That distinction seemed fairly clear in the guidelines, less so in the commentary.

87. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (26) at the next plenary meeting.

The meeting rose at 1 p.m.

3074th MEETING

Tuesday, 3 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-second session (*continued*)

Chapter IV. *Reservations to treaties* (*continued*) (A/CN.4/L.764 and Add.1–10)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.764/Add.2–10)

2. Text of the draft guidelines with commentaries thereto provisionally adopted by the Commission at its sixty-second session (*continued*) (A/CN.4/L.764/Add.3–10)

1. The CHAIRPERSON invited the members of the Commission to continue with the adoption of section C.2 of chapter IV by considering document A/CN.4/L.764/Add.6 paragraph by paragraph.

Commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations) (*concluded*)

Paragraph (26)

2. Mr. NOLTE said that paragraph (26) defined in general terms the principle of reciprocal application, which meant that one party was released from compliance with a treaty obligation and another party could not invoke that obligation. Paragraph (7) of the commentary to 4.2.5 specified that a State or international organization that had made a reservation could not invoke the obligation excluded or modified by that reservation. He proposed to simplify paragraph (26) by not raising the issue of invocation and merely to refer to the reciprocal application of the obligation. The text would then read:

> "It follows that not only the author of the reservation is released from compliance with the treaty obligations which are the subject of the reservation, but that the same is true for the State or international organization with regard to which the reservation is established."

3. Mr. PELLET (Special Rapporteur) said that the point made by Mr. Nolte was correct, but insofar as a non-reciprocal obligation was concerned, the reserving State also lost the right to require other States to apply it. He did not see how paragraph (7) of the commentary to draft guideline 4.2.5 supported Mr. Nolte's position.

4. Mr. GAJA said that he had no objection to the initial text of paragraph (26), but had a problem with Mr. Nolte's proposal: the State or international organization with regard to which the reservation was established was released from its treaty obligations towards the reserving State, but there might be a parallel obligation towards other States or international organizations. That aspect should be included.

5. Sir Michael WOOD proposed to retain the current text of paragraph (26) and to add the following sentence to take Mr. Nolte's concern into account: