Document:-
A/CN.4/3033

Summary record of the 3033rd meeting

Topic:
Draft report of the Commission on the work of its sixty-first session

Extract from the Yearbook of the International Law Commission:-
2009, **vol. I**

Paragraphs 29 to 35

Paragraphs 29 to 35 were adopted.

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

42. Mr. HMOUD said he strongly hoped that the adoption of a chapter of the draft report not available in all working languages would not set a precedent. He could go along with it as an exception, and on the understanding that it would not happen again.

43. The CHAIRPERSON assured Mr. Hmoud that a precedent had not been set.

Chapter VIII. *Shared natural resources* (A/CN.4/L.752)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

44. Sir Michael WOOD said that in the second sentence, the words "including the existence of a practical need" should be replaced by "including whether there was a practical need".

Paragraph 6, as amended, was adopted.

Paragraph 7

45. Ms. ESCARAMEIA proposed that a second sentence should be added at the end of the paragraph, to read: "They also thought that the General Assembly had already considered that oil and gas were going to be part of the topic 'Shared natural resources'."

46. Mr. McRAE said that at the previous session, the Working Group on shared natural resources had questioned whether there was a mandate from the General Assembly for work in the area of oil and gas, and no one had been able to reply.

47. Ms. ESCARAMEIA said that the source of the mandate dated back to when the topic had first been proposed: an annex prepared by Mr. Rosenstock indicating that the subject covered groundwater, oil and gas,[297] of which the General Assembly had taken note in paragraph 8 of its resolution 55/152 of 12 December 2000. She herself had raised the question in the Working Group during the current session, but it was true that she had been the only member to do so. It would therefore be more accurate for the additional sentence she was proposing to start not with "They also thought" but with "The view was expressed".

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

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

The meeting rose at 12.30 p.m.

[297] *Yearbook … 2000*, vol. II (Part Two), annex, p. 141.

3033rd MEETING

Wednesday, 5 August 2009, at 4 p.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

Chapter V. *Reservations to treaties* (*continued*)[*] (A/CN.4/L.749 and Add.1–7)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of Chapter V of the draft report and drew attention to section B of the chapter contained in document A/CN.4/L.749/Add.1.

B. Consideration of the topic at the present session (A/CN.4/L.749/Add.1)

2. Ms. ESCARAMEIA recalled that the Commission had decided, at its 3031st meeting, that the term "*validité materielle*" and, where appropriate, the term "*validité*" in the French would be rendered as "permissibility" throughout the chapter. Paragraphs could be adopted on that understanding.

Paragraphs 1 to 16

Paragraphs 1 to 16 were adopted with editorial corrections.

Paragraph 17

3. Ms. ESCARAMEIA proposed the insertion before the last sentence in the paragraph of a new sentence reading: "Therefore, the need for guidelines addressing the issue of permissibility was questioned."

4. Mr. PELLET (Special Rapporteur) said that, in the English version of the last sentence, the words in French "*validité substantielle*" should be added in brackets after the word "permissibility", as a counterpart to the reverse clarification in the French version.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 20

Paragraphs 18 to 20 were adopted.

Paragraph 21

Paragraph 21 was adopted with an editorial correction.

[*] Resumed from the 3031st meeting.

Paragraph 22

Paragraph 22 was adopted.

Paragraph 23

5. The CHAIRPERSON called attention to the fact that, in the penultimate sentence, the words "interpretative declarations" should be preceded by the word "conditional".

6. Mr. HMOUD proposed that, at the end of the paragraph, a sentence should be added which would read: "The point was also made that, if the conditional interpretative declaration was accepted by all the contracting parties, or by an entity authorized to interpret the treaty, then that declaration should be treated as an interpretative declaration, not as a reservation, for permissibility purposes."

7. The CHAIRPERSON drew attention to the fact that "contracting parties" should read "contracting States".

8. Sir Michael WOOD said that the reference to "an entity authorized to interpret the treaty" was rather vague and could cover entities authorized to interpret a bilateral treaty between two States, or to interpret the treaty in a non-binding fashion as part of their supervisory or monitoring role. He asked Mr. Hmoud why, in those cases, the declaration should be treated for all purposes as an interpretative declaration. In short, he wondered if the sentence would be just as good without the reference to "an entity authorized to interpret the treaty".

9. Mr. HMOUD said that the argument presented in the Special Rapporteur's fourteenth report was basically that if there was a judicial or arbitration body that was authorized to give a binding interpretation in respect of a certain treaty, then it should be deemed to give the correct interpretation. If that body overruled a State's conditional interpretative declaration, the latter became a reservation and the State did not become a party to the treaty. If that body accepted the interpretative declaration, the interpretation contained in it then became the accepted interpretation.

10. Mr. VASCIANNIE said that a Government was authorized to interpret a treaty, but its interpretation was not necessarily authoritative. He therefore suggested as an alternative wording "an entity empowered to give an authoritative interpretation of the treaty".

11. Mr. KOLODKIN asked whether the Commission was considering the substance of the matter, or whether it was trying to ascertain if what had been said during the debate on the topic was faithfully reported or needed to be recast. In his opinion, that paragraph merely reflected the Commission's discussions. In that case, if Mr. Hmoud wanted to include what he had said, that should be done. The Commission should not try to improve on the terminology he had used.

12. Ms. ESCARAMEIA said that she did not understand why the term "contracting parties" should be replaced by "contracting States", since the latter expression would exclude international organizations. It would therefore be better to refer to "parties".

13. Ms. JACOBSSON said that Mr. Kolodkin had made a valid point. The report should reflect what Mr. Hmoud had said. Otherwise the Commission ran the risk of reopening the debate on the topic.

14. The CHAIRPERSON, speaking as a member of the Commission, said that he was worried by the tendency to include everything that had been said in the debate in the report. He was personally not in favour of that trend and considered that the Commission's report should inform the General Assembly and other readers only of the main thrust of the debate.

15. Sir Michael WOOD agreed with the Chairperson that it was inadvisable to include individual viewpoints in the report. He therefore drew attention to the importance of placing the summary records of debates on the Commission's website at the earliest opportunity, so that it would be possible to see what positions had been expressed. He had no problem with the inclusion of the sentence proposed by Mr. Hmoud, but wondered if it should not be prefaced with the phrase "the view was expressed" in order to indicate that it was an individual view and not the Commission's opinion.

16. Mr. HMOUD said that the sentence he had suggested reflected an opposing view to that expressed earlier in the paragraph and was intended to enlighten readers about the circumstances in which a conditional interpretative declaration should not be treated as a reservation.

17. Mr. GAJA said that, as the sentence which Mr. Hmoud wished to incorporate conveyed an opinion contrary to that set out in the second sentence, it would be better to place it immediately after the second sentence, as it would be helpful for the reader to be able to contrast the two viewpoints.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 27

Paragraphs 24 to 27 were adopted.

Section B, as reproduced in document A/CN.4/L.749/Add.1, as a whole, as amended, was adopted.

18. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter V contained in document A/CN.4/L.749/Add.5.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*)*

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-first session (A/CN.4/L.749/Add.5)

Commentary to guideline 2.9.1 (Approval of an interpretative declaration)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

19. Mr. KOLODKIN noted that the commentary contained the text of a declaration made by the Government of Norway, which it interpreted as implying acceptance of a declaration by France[298] to the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973. He was, however, unsure that the interpretation tallied with the actual contents of the declaration. He did not, of course, exclude the possibility that the Government of Norway might concur with that interpretation, but it had formulated its declaration in neutral terms: "the Government of Norway has taken due note of ... a declaration on the part of the Government of France". Moreover, he was not sure that the commentary should offer any interpretation at all and he therefore suggested that it should be deleted.

20. Mr. PELLET (Special Rapporteur) said that he did not see why the Commission should not interpret the declaration of the Government of Norway. He agreed that his interpretation might be open to debate, although it was hard to see how the declaration could be interpreted otherwise. The French version was more cautious than the English version, which said "It appears that this statement can be interpreted" whereas the French expression "*Il semble que l'on puisse*" was less categorical. He therefore suggested that the English should read "It appears that this statement might be interpreted". He did not agree that the Commission should forgo an interpretation. He would be loath not to quote that example because, unfortunately, examples of declarations which could be interpreted as approvals of interpretative declarations were extremely rare.

21. Mr. KOLODKIN said that he was in favour of demonstrating much greater caution, but if the other members of the Commission considered that it was right to retain that text with a slight modification of the English, he would not demur.

22. Mr. CAFLISCH suggested that one way out of the dilemma would be to word the English version "It appears that this statement could be interpreted", which, he hoped, was sufficiently guarded to satisfy Mr. Kolodkin, but which still allowed for the possibility of the interpretation given in paragraph (4).

23. Sir Michael WOOD said that a direct translation of the French would be "It seems that this statement could be interpreted", which introduced a double note of hesitation.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (6)

Paragraphs (5) to (6) were adopted.

The commentary to guideline 2.9.1, as a whole, as amended, was adopted.

Commentary to guideline 2.9.2 (Opposition to an interpretative declaration)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

[298] United Nations, *Treaty Series*, vol. 1341, No. 22484, pp. 330 and 323, respectively.

Paragraph (4)

24. Mr. GAJA said that paragraph (3) of the commentary cited a statement by Italy, but the first sentence of paragraph (4), "Examples can also be found in the practice of States members of the Council of Europe", gave the impression that Italy was not a member of the Council of Europe. He accordingly proposed that the phrase "of State members of the Council of Europe" should be replaced by "relating to conventions adopted within the Council of Europe".

Paragraph (4), as amended, was adopted.

Paragraph (5)

25. Mr. GAJA said the final sentence referred to "an interpretative declaration comparable to that of Italy", whereas in fact Italy had made a statement in reaction to an interpretative declaration. That inaccuracy should be rectified.

Paragraph (5) was adopted on the understanding that the text would be adjusted to correspond to the factual situation regarding the statement by Italy.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

26. Mr. McRAE queried the term "Western", before the word "States", in the first sentence, and suggested that it be deleted.

27. The CHAIRPERSON, speaking as a member of the Commission, said that he, too, found the term to be out of place and supported the proposal to delete it.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (15)

Paragraphs (8) to (15) were adopted.

The commentary to guideline 2.9.2, as a whole, as amended, was adopted.

Commentary to guideline 2.9.3 (Recharacterization of an interpretative declaration)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

28. Mr. GAJA said that the second sentence contained the words "recharacterization seeks to change the legal status of the unilateral statement", but that was not the case. He proposed that the word "change the" should be replaced by the phrase "identify the appropriate".

Paragraph (5), as amended, was adopted.

Paragraph (6)

29. Mr. GAJA said that the phrase "does not in and of itself change the status of the declaration in question"

posed the same problem as had arisen in paragraph (5). He proposed that the word "change" should be replaced by the word "affect".

30. Mr. PELLET (Special Rapporteur) said that he could not agree with that proposal, because with the neutral term "affect" the idea underlying the sentence was lost. It was important to point out that an attempt by a State to characterize as a reservation a unilateral statement submitted by another State brought about no change in the statement's status.

31. Mr. GAJA said that the phrase "does not in and of itself change" implied that if other elements were present, recharacterization would indeed change the status, and that was not the case. The purpose of recharacterization was to identify the correct status.

32. Mr. McRAE proposed that the word "change" should be replaced by "determine", which would be consistent with the amendment made to the previous paragraph.

33. Sir Michael WOOD said that for further consistency, the word "declaration" should be replaced by "unilateral statement".

Paragraph (6), with the amendments proposed by Mr. McRae and Sir Michael Wood, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to guideline 2.9.3, as a whole, as amended, was adopted.

Commentary to guideline 2.9.4 (Freedom to formulate approval, opposition or recharacterization)

Paragraphs (1) to (2)

Paragraphs (1) to (2) were adopted.

Paragraph (3)

34. Mr. GAJA drew attention to the final sentence, which stated that it was "perfectly logical that the Secretary-General should have accepted" the opposition by Ethiopia to an interpretative declaration formulated by Yemen. What the Secretary-General in fact did, however, was to accept a document transmitting the position communicated by Ethiopia. The word "accepted" gave the idea that his role involved more than just receiving and communicating the document outlining the position of Ethiopia. He proposed that the word "accepted" should be replaced by the phrase "communicated" to avoid any possible confusion.

35. Mr. PELLET (Special Rapporteur) said the French text, "*ait accepté la communication de l'opposition de l'Éthiopie*", was much clearer: the English should be aligned with the French.

Paragraph (3), as amended, was adopted.

The commentary to guideline 2.9.4, as a whole, as amended, was adopted.

Commentary to guideline 2.9.5 (Written form of approval, opposition and recharacterization)

36. Mr. PELLET (Special Rapporteur) said that, without wishing to reopen debate on the guideline itself, he had an overriding problem with it. In many guidelines, examples being 2.9.6, 2.1.9 and 2.6.10, the words "to the extent possible" were used, but curiously, guideline 2.9.5 employed the word "preferably". When jurists read guidelines 2.9.5 and 2.9.6 one after the other, they would surely be at a loss to understand the change in language. He himself did not see any distinction between the two guidelines that might justify using different phrases. A paragraph should be added to the commentary to explain the different wordings, but he himself was at a loss to draft it and he appealed to his colleagues to help him.

37. Mr. McRAE said that he, too, was at a loss to explain the distinction and had been in favour of replacing the phrase "to the extent possible" with "preferably" throughout the text, not just in guideline 2.9.5. Perhaps the problem could be resolved by reverting to the phrase "to the extent possible" in that guideline.

38. Ms. ESCARAMEIA said that the word "preferably" referred to one of two options, the written form of approval, as opposed to the only possible other form, oral acceptance. "To the extent possible", on the other hand, meant that the fullest possible explanation should be given in support of a position. She saw no need to harmonize the wording of the two guidelines.

39. Mr. PELLET (Special Rapporteur) said that he still did not see the distinction and thought that the use of the conditional "should" in guideline 2.9.5, obviated the need for the word "preferably", since it conveyed the notion of preference.

40. Sir Michael WOOD said the difference had been very well explained by Ms. Escarameia. It would be very odd to say that approval of an interpretative declaration should "to the extent possible" be formulated in writing. It was either possible or impossible to do something in writing. However, the explanation of reasons for approval could be affected by many factors, such as confidentiality. There was thus a factual difference between the situations described in the two guidelines that made the word "preferably" more appropriate in the first.

41. Mr. CAFLISCH said that the question was whether the text should state an obligation, in which case "to the extent possible" should be used, or a wish, which would be better expressed by "preferably". There was indeed a difference between the two wordings, and he preferred the latter.

42. Mr. PELLET (Special Rapporteur) said that, though he remained unconvinced by the arguments for keeping the two separate wordings in the text, he was willing to go along with the majority that favoured their retention. The problem remained, however, that some explanation needed to be provided in the commentary.

43. Ms. ESCARAMEIA, supported by Mr. SABOIA, said there was no need for a paragraph explaining the

obvious. The two guidelines were not at all similar, one addressing the form to be used in making interpretative declarations, the other, whether or not reasons were to be given for making interpretative declarations. There was no need for the wording to be parallel.

44. Mr. PELLET (Special Rapporteur) proposed the following text, to become paragraph (7 *bis*): "A majority of the members of the Commission were of the view that the word 'preferably' was more appropriate than the expression 'to the extent possible' used in the text of guidelines 2.1.9 (Statement of reasons [for reservations]), 2.6.10 (Statement of reasons [for objections]) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), because in the context of guideline 2.9.5, States were not faced with alternatives."

45. Mr. GAJA said that the most logical place for the Special Rapporteur's proposed additional text was immediately following paragraph (6), which explained that the decision of whether to formulate in writing a reaction to an interpretative declaration was a matter of preference for States or international organizations. However, the last phrase of that text was incorrect: States faced the choice of using the written form or the oral form.

46. Mr. VALENCIA-OSPINA said that it would be better to place the Special Rapporteur's new text in paragraph (5) because that paragraph referred to the option that States and international organizations had to formulate their reaction in writing or orally, whereas paragraph (6) dealt with the issue of whether to formulate an interpretative declaration as such.

47. Sir Michael WOOD suggested that the concluding phrase might be "because these provisions addressed different situations", although, in fact, he felt that no explanation was necessary.

48. Mr. VASCIANNIE said that the Special Rapporteur was operating on the false premise that there was a need to explain the difference between the term "preferably", used in one context, and the phrase "to the extent possible", used in another. He agreed entirely with Ms. Escarameia that the two were not parallel provisions and that, consequently, there was no need to provide an explanation in the commentary.

49. Mr. PELLET (Special Rapporteur) said that the reason the two provisions did not appear to be parallel was precisely because their wording had been changed so that they were now different. To his mind, they were parallel provisions, and it was therefore necessary to explain why their wording was not consistent. He wished to amend the last clause of his proposed new text in order to indicate that "States were faced with an alternative, which was not the case in the situations described in the other guideline". He remained unconvinced by that explanation, but at least it represented an attempt to justify the difference in wording between the various provisions, and he agreed that the text could be placed after paragraph (5). It was not the normal practice to indicate in the commentary that the Special Rapporteur had been opposed to a particular point, and he was not asking for his position necessarily to be reflected.

50. Sir Michael WOOD said that a State or an international organization could formulate its reaction either in writing or orally: there was no middle ground, as one could not formulate something in writing to a certain extent. In the other guidelines in which the expression "to the extent possible" was used, the choice was not between two alternatives but rather between a range of possibilities. The Commission could simply say that it had not used the term "to the extent possible" in guideline 2.9.5 because it did not make sense in that context.

51. Mr. McRAE said that he had always seen both guideline 2.9.5 and guideline 2.9.6 as involving a choice: in the case of the former, one could choose to make one's statement in writing or not, and in the case of the latter, one could choose to state one's reasons or not. The simple meaning of guideline 2.9.5 was that a reaction to an interpretative declaration should, where possible, be formulated in writing, and the meaning of guideline 2.9.6 was that such a reaction should, where possible, include a statement of reasons. In guideline 2.9.6, the use of the expression "to the extent possible" had created confusion by suggesting that it referred to the extent of the reasons, rather than to the option of whether or not to state one's reasons.

52. Mr. GAJA pointed out that paragraph (6) was actually a continuation of paragraph (5) and that the Commission would be ill-advised to break the flow between the two by inserting new text there. He reiterated that it would be better to place any new text, particularly if it reflected the view of the majority but not of the Commission as a whole, after paragraph (6).

53. Mr. FOMBA said that paragraph (5) described the reason for offering States and international organizations the choice between two alternatives and indicated why it was preferential for their reactions to interpretative declarations to be formulated in writing. Those arguments seemed to constitute sufficient explanation and he would be hard-pressed to come up with any others.

54. Mr. MELESCANU said that, since both the text of guideline 2.9.5 and that of guideline 2.9.6, with their differences in language, had been adopted by the Drafting Committee, it was inappropriate to change the text of guideline 2.9.5 at the current stage. He suggested that perhaps on second reading the Commission could take up the issue of harmonizing the relevant guidelines or explaining why it had not used parallel wording in them.

55. Mr. PELLET (Special Rapporteur) said that he was not advocating an amendment to the text of the guideline and agreed with Mr. Melescanu that the matter could be dealt with on second reading. His point was that the difference in wording between the two guidelines should be explained in the commentary, which was what the commentary was for. The Commission had come close to reaching a consensus with Sir Michael Wood's explanation that the term "preferably" implied a choice between two alternatives, whereas the phrase "to the extent possible" implied a range of choices. His own position, and that of Mr. McRae, was that both guidelines involved a choice between two alternatives and that the difference in their wording was not justified. However, if the majority

of the members felt that the reason for the difference in language between them was that something to be provided preferably in writing implied a choice between two alternatives, whereas indicating one's reasons to the extent possible implied that such reasons could be provided to a varying extent, then that was what should be reflected in the commentary. He volunteered to draft a text in both French and English that would summarize the views presented, and he would submit it to the Commission at its next meeting.

56. Mr. VALENCIA-OSPINA warned that he was not ready to agree to the placement of the Special Rapporteur's text in the commentary until he had read it.

The adoption of the commentary to guideline 2.9.5 was deferred.

57. Ms. ESCARAMEIA said that, with respect to the title of guideline 2.9.5 itself, the Commission's past practice had been to include the word "written" in the title only when a written form of a submission was required. She therefore proposed that, for the sake of consistency, in the title of guideline 2.9.5, the Commission should delete the word "written".

58. Mr. PELLET (Special Rapporteur) said that that particular matter had been discussed in the Drafting Committee, which he thought had accepted Ms. Escarameia's point. However, the change did not appear in any of the documents. In any case, he agreed with the proposal to delete the word "written" from the title for the reason given by Ms. Escarameia.

59. The CHAIRPERSON suggested that, since the Drafting Committee had apparently already agreed on the title as it currently stood, the Commission should defer a decision on amending it until the second reading.

60. Sir Michael WOOD said that, irrespective of whatever agreement had been reached in the Drafting Committee, if there was now a general consensus among members of the Commission that the title should be amended, the word "written" should be deleted from the title of guideline 2.9.5.

It was so decided.

Commentary to guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

61. Mr. PELLET (Special Rapporteur) suggested that, in the second sentence, the phrase "the equivalent for interpretative declarations of the 'reservations dialogue'" should be deleted, as it was an unnecessary repetition of the last sentence of paragraph (2).

Paragraph (4), as amended, was adopted.

The commentary to guideline 2.9.6, as a whole, as amended, was adopted.

Commentary to guideline 2.9.7 (Formulation and communication of an approval, opposition or recharacterization)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

62. Mr. PELLET (Special Rapporteur) said that in the French version the word "*il*" in the first sentence should be replaced by "*elle*", since the pronoun referred to the feminine noun "*diffusion*".

63. Mr. VALENCIA-OSPINA asked whether, in the English version, the plural noun "interests" was correctly used, or whether that noun should be in the singular.

64. Mr. HASSOUNA said that, although English was not his native tongue, he thought the singular was the correct form.

65. Mr. McRAE said that the word "interests" should remain in the plural since it referred to the different interests of a number of parties, namely, both the authors of a reaction to a unilateral declaration and all the entities concerned.

Paragraph (2), as corrected in the French version, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to guideline 2.9.7, as a whole, as corrected was adopted.

Commentary to guideline 2.9.8 (Non-presumption of approval or opposition)

The commentary to guideline 2.9.8 was adopted.

Commentary to guideline 2.9.9 (Silence with respect to an interpretative declaration)

Paragraphs (1) to (3)

The commentary to paragraphs (1) to (3) was adopted.

Paragraph (4)

66. Mr. McRAE said that, according to the commentary, "the silent State may be considered as having acquiesced to the declaration by reason of its conduct or lack of conduct in relation to the interpretative declaration", whereas draft guideline 2.9.9 itself referred only to conduct, not to lack of conduct. The point being made in the draft guideline was that silence could have an effect as part of conduct. The reference to "lack of conduct" in the commentary, however, reinstated a position that the guidelines had sought to avoid, namely, that silence on its own could have an effect. He therefore suggested either the deletion of the phrase "or lack of conduct" or the insertion, after "lack of conduct", of the phrase "in circumstances where conduct is required".

67. Mr. PELLET (Special Rapporteur) said that, of the two options, he preferred the second.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 2.9.9, as a whole, as amended, was adopted.

Commentary to guideline [2.9.10 (Reactions to conditional interpretative declarations)*]*

Paragraph (1)

68. Mr. VARGAS CARREÑO said that he did not propose any change to the commentary, but he wished to draw the Special Rapporteur's attention to aspects of the involvement of France in Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean ("Treaty of Tlatelolco"),[299] when he came to provide a definitive version of the commentary on second reading. In common with the other declared nuclear-weapon States—the United States of America, the Russian Federation, China and the United Kingdom—France was a party to Additional Protocol II, under which it undertook to respect the denuclearized zone in Latin America and the Caribbean covered by the Treaty and not to install or use nuclear weapons in the region. France had made an interpretative declaration, one element of which was that, in the event of any armed attack on French possessions in the area, such as Guadeloupe, French Guiana or Martinique, France would no longer feel bound by the Protocol. In other words, it would feel free to use nuclear weapons. In the view of the members of the body set up to monitor the Treaty, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL), that position was contrary to international customary law, which stated that legitimate defence must be proportionate: nuclear weapons should not be used to repel an attack involving conventional weapons.

69. That interpretation had been communicated to France, orally at first, by a number of South American ambassadors, including those of Brazil, Cuba and Mexico, who had asked France to withdraw its interpretation. An exchange of correspondence had ensued, but France had maintained its position, even though its interpretation dated back to the time when the French were conducting nuclear tests in the area. France nonetheless expressed a desire to continue to be a party to the Protocol and to cooperate with OPANAL. The Special Rapporteur might care to bear the situation in mind for his future work.

70. Ms. ESCARAMEIA said that, if guideline 2.9.10 was in square brackets, the commentary ought also to be in square brackets.

71. Mr. PELLET (Special Rapporteur) confirmed that, until a final decision had been reached on the treatment of conditional interpretative declarations, both the guideline and the commentary should be in square brackets. As for the statement by Mr. Vargas Carreño, he would be most interested to be given access to the exchange of letters between France and OPANAL, since very little material existed on reactions to interpretative declarations.

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraphs (4) and (5)

72. Ms. ESCARAMEIA said that, after the statement in paragraph (4) that the procedure for conditional interpretative declarations was the same as for reservations, paragraph (5) added that there might be doubts about the 12-month time period set out in article 20 of the 1969 and 1986 Vienna Conventions and quoted an explanation by Sir Humphrey Waldock of why that period had been chosen, rather than a shorter one.[300] In her view, however, there should be no time limit for reactions to conditional interpretative declarations. Whereas the parties to a treaty, when notified of a reservation, knew that they had 12 months in which to object, the same was not true when they were notified of a conditional interpretative declaration. Some parties might think that it was really a reservation, others that it was merely an interpretative declaration. The effect was that they were not fully aware that it was something they should react to within 12 months.

73. The text of paragraph (4) gave the impression that the Commission as a whole was in agreement that the procedure for conditional interpretative declarations should be identical to that for reservations. However, she disagreed. She therefore suggested the addition of the following sentence at the end of paragraph (4): "There was a view, however, that the time period for reaction to reservations should not be applicable to conditional interpretative declarations." The first sentence of paragraph (5) should then begin: "There may be doubts about the length of the 12-month time period set out in article 20".

74. Mr. PELLET (Special Rapporteur) said that he had no objection, provided that it was clear that it was the expression of one person's view.

75. Mr. VALENCIA-OSPINA said that there was a difference between the commentary and the summary of the debate. The point of the commentary was to explain the Commission's view of the meaning of the text. He did not object to the addition proposed by Ms. Escarameia, however, since the commentary was still provisional and appeared in square brackets. Otherwise, the addition would be more problematic.

76. Mr. MELESCANU seconded that view. The commentary was not the place to express individual points of view, but, since the text was in square brackets, the proposed addition was acceptable.

77. Ms. ESCARAMEIA said that, according to her understanding, there was a significant difference between the commentaries on first reading and on second reading. On first reading, the commentary gave guidance to States on their options. That being so, it was important for States to know that different views had been expressed. Only with the second reading did the commentary express the Commission's final conclusions.

[299] *Ibid.*, vol. 936, No. 9068, annex A (ratification by France of Additional Protocol II), p. 419.

[300] First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, commentary on article 18, para. (16), p. 67.

78. Mr. GAJA said that, as a general rule, the commentary should follow a single line. If every individual view was reflected, the commentary would become incomprehensible. Where, however, there was dissent on a particularly important point, it was permissible—so long as great restraint was shown—to add a sentence to that effect. He noted that it was not the Commission's custom to provide a detailed account of its debate in the report. Perhaps that practice should be reviewed.

79. Sir Michael WOOD, after agreeing with Mr. Gaja's suggestion, which could be taken up by the Planning Group at the next session, proposed that, in paragraph (5), the clause "which is probably not reflective of customary international law" should be deleted. The statement might be true, but it would not be wise for the Commission to draw attention to the fact, particularly when it was itself proposing a guideline setting a 12-month time limit. Even if the provision was not customary international law, it ought to develop into such law. It was hard to see why States that were parties to the 1969 Vienna Convention should have a different rule from those that were not. Secondly, in the interests of clarity, he suggested that the words "this solution" in the second sentence should be replaced by the words "12 months", since the length of the time period was the point at issue in that paragraph.

80. Mr. PELLET (Special Rapporteur) said that he found Sir Michael's position surprising: the point of ratifying a treaty was acceptance of the rules of that treaty. The application of general rules remained unchanged in any case. Footnote 74 referred the reader to the lengthy debate on the topic. Since the phrase that Sir Michael wished to delete was not of great importance, however, he would make no objection. He could also accept the other proposed amendment.

81. Ms. JACOBSSON (Rapporteur) said that the name of Sir Humphrey Waldock should be spelled out in full. In that context, she noted an inconsistency throughout the document in the use of personal names: names were given in full in footnotes 6 and 47, for example, while elsewhere, such as footnote 65, only the initial was given with the surname.

Paragraphs (4) and (5), as amended, were adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

82. The CHAIRPERSON said he took it that the commentary to draft guideline 2.9.10 should be placed in square brackets.

It was so decided.

The commentary to draft guideline 2.9.10, as a whole, as amended, was adopted.

The commentary to the draft guidelines reproduced in document A/CN.4/L.749/Add.5, as a whole, as amended, was adopted, with the exception of the commentary to draft guideline 2.9.5.

The meeting rose at 6.05 p.m.

3034th MEETING

Thursday, 6 August 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

Chapter V. *Reservations to treaties* (*concluded*) (A/CN.4/L.749 and Add.1–7)

1. The CHAIRPERSON invited the members of the Commission to continue its consideration of section C of chapter V of the draft report and to start by taking up document A/CN.4/L.749/Add.6.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*concluded*)

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-first session (A/CN.4/L.749/Add.6)

Commentary to guideline 3.2 (Assessment of the validity of reservations)

Paragraph (1)

2. Sir Michael WOOD said that the term used in the title of the draft guideline, "to assess", should be replicated in the English text of the second sentence: the phrase "for verifying" should therefore be replaced by "for assessing".

3. Mr. GAJA said that the phrase "common law", used in the English text of the final sentence, was a mistranslation of the French phrase "*de droit commun*": it should be replaced by the words "generally applicable".

With those amendments to the English text, paragraph (1) was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

4. Sir Michael WOOD said that the final part of the fifth indent was far too emotive—a more factual text was needed. He proposed that a semi-colon should be inserted after the word "accept" and that the remainder of the text should be amended to read: "some States have denied that the bodies in question have any jurisdiction in the matter".

5. Ms. ESCARAMEIA said that she could not accept the second part of Sir Michael's proposal. The current wording underlined the fact that the States in question