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A/CN.4/2992

Summary record of the 2992nd meeting

Topic:
Draft report of the Commission on the work of its sixtieth session

Extract from the Yearbook of the International Law Commission:-
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Commentary to draft guideline 2.6.11

Paragraph (1)

48. Mr. GAJA proposed that the first sentence should be simplified by beginning it with the words “Whereas article 23, paragraph 2, ...” and amending the rest accordingly.

49. The CHAIRPERSON requested Mr. Gaja to submit his proposal in writing before the beginning of the next meeting and suggested that the consideration of paragraph (1) should be left pending.

It was so decided.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

50. Mr. NOLTE proposed that, since the distinction between the different groups of members whose positions were referred to was confusing, the text of paragraph (5) should be redrafted.

51. The CHAIRPERSON requested Mr. Nolte to submit his proposal in writing before the beginning of the next meeting and suggested that the consideration of paragraph (5) should be left pending.

It was so decided.

Draft guideline 2.6.12 (Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty)

52. Mr. PELLET (Special Rapporteur) recalled that, in the text of the draft guideline itself, it had been decided that the words “an objection made” should be replaced by the words “an objection formulated”.

The title of draft guideline 2.6.12, as amended by the Special Rapporteur, was adopted.

Commentary to draft guideline 2.6.12

Paragraph (1)

53. Mr. PELLET (Special Rapporteur) said that the comment he had just made also applied to the beginning of the first sentence, which should read: “Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question whether an objection formulated by a State or an international organization that, when formulating it, ...”, not “Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question whether an objection made by a State or an international organization that, when making it, ...”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

54. Mr. PELLET (Special Rapporteur) said that, for the sake of clarity, the word “1951” should be added

before the words “advisory opinion of the International Court of Justice”.

55. Mr. McRAE said that the word “only” should be deleted the first time it occurred because it was superfluous.

Paragraph (5), as amended, was adopted.

Paragraph (6)

56. Mr. McRAE said that he did not understand the words “traditional relations” after the words “an objection modifies”.

57. Mr. PELLET (Special Rapporteur) said that the word “traditional” was a mistranslation. The French words “*relations conventionnelles*” should be translated as “treaty relations”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to draft guideline 2.6.12, as amended, was adopted.

The meeting rose at 1 p.m.

2992nd MEETING

Tuesday, 5 August 2008, at 3 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER VI. *Reservations to treaties (continued)* (A/CN.4/L.733 and Corr.1 and Add.1–5)

C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)* (A/CN.4/L.733/Add.2–5)

2. *TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTIETH SESSION (continued)* (A/CN.4/L.733/Add.3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the text of the draft guidelines and the commentary thereto contained in document A/CN.4/L.733/Add.3.

Commentary to draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation) (*concluded*)

Paragraph (1) (*concluded*)

2. Mr. GAJA proposed that the beginning of paragraph (1) should be amended to read: “While article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions requires formal confirmation of a reservation when the reserving State or international organization expresses its consent to be bound by the treaty, objections do not need confirmation. Article 23, paragraph 2 of the Vienna Conventions provides:”. The remainder of the paragraph would remain unchanged.

Paragraph (1), as amended, was adopted.

Paragraph (5) (*concluded*)

3. Mr. NOLTE proposed that, in order to clarify its contents, paragraph (5) should be divided into two parts. The first sentence should be moved to the end of paragraph (4), while the remainder would be unchanged, except for the phrase “for the reasons given in the commentary to draft guideline 2.6.5”, which should be deleted. A general reference to draft guideline 2.6.5 should simply be included in a footnote.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 2.6.11 as a whole, as amended, was adopted.

Commentary to draft guideline 2.6.13 (Time period for formulating an objection)

Paragraph (1)

Paragraph (1) was adopted with a minor editorial amendment to the French text of the footnote.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

4. Mr. McRAE queried the use of the adjective “inhomogeneous” and asked why the phrase containing that word had been placed between dashes.

5. Mr. BROWNLIE proposed that the adjective should be replaced with the phrase “not completely homogeneous”.

6. After a brief discussion in which Mr. SABOIA, Ms. ESCARAMEIA and Mr. NOLTE took part, the CHAIRPERSON suggested that the Secretariat should be entrusted with the task of ensuring that the wording of the French and English texts was a perfect match, taking into account the proposals which had been made, especially that of Mr. Brownlie.

It was so decided.

On that understanding, paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

7. Mr. PELLET (Special Rapporteur) said that the word “*récemment*” should be deleted from the seventh sentence of the French text and from any of the other language versions in which it appeared.

Paragraph (6), as amended, was adopted.

Paragraph (7)

8. Mr. GAJA said that the words “this wording in” should be inserted after the words “to retain” in the first sentence.

9. Mr. NOLTE challenged the statement in the first sentence that all the provisions of the 1969 and 1986 Vienna Conventions were of a residuary, voluntary nature and applied only if the treaty did not otherwise provide. The provisions concerning, *jus cogens*, for example, were not residuary or voluntary. He proposed that the statement should be reworded to read: “given that, in general, the provisions of the Vienna Conventions are of a residuary and voluntary nature”.

10. Mr. PELLET (Special Rapporteur) said that the Commission should exercise caution before accepting Mr. Nolte’s proposal. He was not certain that the rules pertaining to *jus cogens* were not residuary and voluntary. It would therefore be inadvisable to take such a rigid position. Accordingly, he proposed that the first part of the sentence should read: “For the same reason, while the expression ‘[u]nless the treaty otherwise provides’ is self-evident, since all the rules concerning reservations set forth in the Vienna Conventions are of a residuary, voluntary nature ...”. After all, the only aspect of the Conventions that was of interest to the Commission in that context was the provisions concerning reservations. However, he did not agree with being made to say, by means of a drafting amendment, that some provisions of the Vienna Conventions might not be of a residuary, voluntary nature.

11. Mr. NOLTE said that while the Special Rapporteur’s proposal constituted an important qualification of the sentence, he nevertheless wondered whether a reservation that ran counter to the object and purpose of a treaty could be considered acceptable if the treaty so provided. While that was, of course, a hypothetical situation, he was not certain that it was possible to make a categorical statement about all the rules concerning reservations to treaties. He would therefore be wary about making such a general statement regarding the residual nature of the provisions of the Vienna Conventions.

12. Mr. KOLODKIN questioned the need for the phrase regarding the residuary, voluntary nature of the provisions of the Vienna Conventions and proposed its deletion.

13. Mr. PELLET (Special Rapporteur) said that he was not in favour of Mr. Nolte’s proposal because he thought that the provisions of the Vienna Conventions concerning reservations were in fact of a residuary, voluntary nature, since States could always agree to formulate reservations to provisions of a treaty even if the reservations were contrary to what some law professors

considered to be the object and purpose of that treaty. He was not very keen on Mr. Kolodkin's proposal either, as it would deprive readers of the explanation of the Commission's decision. At least it should be indicated that, since the Guide to Practice was not binding, the Commission had felt that draft guideline 2.6.13 would be useful. Mr. Kolodkin's proposal would be tantamount to saying that the Commission had reached a decision, but would not say why it had done so. That would not be a wise course of action; a brief statement of the rationale ought to be given because the Commission always had a reason for its findings.

14. The CHAIRPERSON suggested that since the text of paragraph (7) was important and obviously required further careful thought, Mr. Nolte, Mr. Kolodkin and the Special Rapporteur should confer with a view to proposing satisfactory wording.

15. Mr. NOLTE said that, following consultations, he, Mr. Kolodkin and the Special Rapporteur had agreed that, in the first sentence, the word "all" should be deleted and the word "relevant" should be inserted before "provisions".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

16. Mr. BROWNLIE said that, for the sake of consistency, either the title "Sir" should be inserted before the names of Hersch Lauterpacht and Gerald Fitzmaurice, or all the persons mentioned in that paragraph should be referred to simply by their initials and surnames.

17. After a brief discussion in which Mr. PELLET (Special Rapporteur), Mr. BROWNLIE and Mr. CAFLISCH took part, the CHAIRPERSON suggested that the Commission should delete the title "Sir" before Humphrey Waldock's name and refer to all persons mentioned in that paragraph by their initials and surnames.

It was so decided.

18. Mr. HASSOUNA asked what was "curious" about the Commission's decision not to take up the solution of drawing a distinction between contracting States and those that had not yet acquired that status *vis-à-vis* the treaty.

19. Mr. PELLET (Special Rapporteur) said that the distinction seemed to be so self-evident that it was strange that neither the three eminent gentlemen mentioned in that paragraph nor the Commission had considered it necessary to retain it. That was why he had used the word "curiously".

20. The CHAIRPERSON suggested that the word "curiously" should be deleted.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to draft guideline 2.6.13 as a whole, as amended, was adopted.

Commentary to draft guideline 2.6.14 (Conditional objections)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

21. Mr. GALICKI asked whether the reservations in question had been formulated to the 1961 Vienna Convention on Diplomatic Relations or to the 1963 Vienna Convention on Consular Relations, as the date and instrument given in paragraph (3) did not match.

22. Mr. PELLET (Special Rapporteur) said that the correct reference should be to the 1961 Vienna Convention on Diplomatic Relations.

Paragraph (3), as amended, was adopted.

Paragraph (4)

23. Mr. PELLET (Special Rapporteur) said that the word "made" in the fourth sentence should be amended to "formulated".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

24. Mr. GAJA said that there was some inconsistency between paragraphs (6) and (8), which dealt with pre-emptive objections in a case where the objection had been made before the reservation, but the reservation which the pre-emptive objection was supposed to address had then come into being. It was unclear whether it was then necessary to confirm the objection. Paragraph (6) gave the reader the impression that in such cases a pre-emptive objection automatically became a real objection, yet paragraph (8) seemed to say the opposite. The Commission should take one position or the other, or else say plainly that it did not wish to deal with the issue.

25. Mr. PELLET (Special Rapporteur) said that he saw no incompatibility or inconsistency between the two paragraphs.

26. The CHAIRPERSON requested Mr. Gaja to propose an alternative text.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Commentary to draft guideline 2.6.15 (Late objections)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

27. Mr. GALICKI said that the last sentence referred first to categories of treaties and then to the titles of two specific conventions, which seemed stylistically inconsistent. He therefore proposed that the two halves of the sentence should be linked by a phrase such as “or some particular conventions like ...”.

28. Mr. HMOUD said that the reference in footnote 154 [388]³⁰⁶ to a reservation by Jordan was incorrect; Jordan had made a declaration on the 1999 International Convention for the Suppression of the Financing of Terrorism.

Paragraph (2), as amended, was adopted.

Paragraph (3)

29. Mr. NOLTE proposed that in the final sentence, the words “or contribute to” should be inserted between “may lead to” and “a reservations dialogue”. Late objections did not usually initiate a dialogue but were part of an ongoing one, and his proposal would make that clear.

Paragraph (3), as amended, was adopted.

Paragraph (4)

30. Mr. GAJA said he had serious problems with the final two sentences of the paragraph, which read: “The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, not as objections but as ‘communications.’” That was not true: footnote 158 [391] gave some indications to the contrary, as did his own recent research, particularly in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The two sentences should therefore be deleted.

31. Mr. PELLET (Special Rapporteur) said that it was important for the Commission to note that the Secretary-General communicated late objections not as objections but as communications. However, it was true that the footnote indicated that certain late objections were indeed listed as objections in the compendium of treaties deposited with the Secretary-General (*Multilateral Treaties Deposited with the Secretary-General*). He therefore suggested that in the second sentence referred to by Mr. Gaja, the words “not as objections but as ‘communications’” should be deleted.

32. Mr. NOLTE said that the issue had been debated intensively: it was not a small matter. It was true that the footnote did not confirm that the Secretary-General had the practice of calling late objections “communications”, but that information was important and must appear in the report. The commentary could still state the view that late objections were objections according to the definition preferred by the Special Rapporteur and the majority

of members of the Commission. However, not mentioning the fact that the Secretary-General called them communications might influence a future debate in the Sixth Committee when the draft guidelines were considered on second reading.

33. Mr. PETRIČ endorsed that viewpoint: the explanation given concerning the practice of the Secretary-General on a fairly complicated issue was particularly important for countries that did not have large legal departments. The substance of the second sentence should therefore be retained, either in a footnote or in the text itself.

34. Mr. PELLET (Special Rapporteur) acknowledged that there was some lack of coherence in the text, as Mr. Gaja had pointed out, but Mr. Nolte and Mr. Petrič were right in not wanting the information to be deleted altogether, as it was important. The text in question might be better placed before the final sentence of paragraph 3, which argued that the late formulation of objections was in some ways useful for determining the validity of the reservation. The text might then read: “Moreover, it is the practice of the Secretary-General, as the depositary of multilateral treaties, when he receives late objections to communicate them to the other States and organizations concerned.” In the corresponding footnote it could be stated that the information was generally transmitted in the form of a communication, although in some cases it was called an objection, and in that connection the examples of the objections to the reservations by Bahrain and Qatar could be given.

35. Mr. GAJA said that he could accept most of that proposal, except for the description of the practice of the Secretary-General. He had recently done research on that very subject and did not entirely agree with the way that practice was portrayed. There might be cases in which the Secretary-General had used the word “communications”, but on the whole, late objections were treated in the same way as all other objections.

36. Mr. PELLET (Special Rapporteur) said that the instrument of communication, as he understood it, was in fact called a communication; it was the object of the communication that was called an objection.

37. THE CHAIRPERSON invited Commission members to consult briefly on the wording of paragraph (4).

38. Mr. GAJA said that, following consultations, agreement had been reached on moving the last two sentences of paragraph (4) to paragraph (3). Doing so would require some slight editorial adjustments, which might best be left to the Special Rapporteur. The problem lay with the last sentence. He admitted that, not being very familiar with the practice of the Secretary-General, he was somewhat at a loss as to how to deal with it. It might be possible to say that the Secretary-General sometimes renamed late objections “communications”. However, he was not actually aware of any instances in which that had been done and therefore hesitated to say that. What he did know was that the Secretary-General did what was expected of a depositary and did not rename what was submitted to him, regardless of whether it was a reservation, a declaration or an objection. He simply transmitted what he received

³⁰⁶ The number in square brackets refer to the number of the footnote in the final version of the draft commentary as adopted in the report of the Commission on the work of its sixtieth session, *Yearbook ... 2008*, vol. II (Part Two), document A/63/10.

and did not pass judgement on it. If, on the basis of his research, the Special Rapporteur had learned of a different practice, perhaps the last sentence might be reformulated to read: “Sometimes the Secretary-General, when receiving late objections, communicates them to the other States and organizations concerned as ‘communications’.”

39. Mr. PELLET (Special Rapporteur) said that, short of spending an inordinate amount of time studying the practice of the Secretary-General, he would rely on what was stated in paragraph 213 of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*,³⁰⁷ which read: “... the Secretary-General, when thus receiving an objection after the expiry of this time lapse, calls it a ‘communication’ when informing the parties concerned of the deposit of the objection”. In his own opinion, the contents of the footnote should be retained and should reproduce that quotation in its entirety. Given that the Secretary-General’s practice was not the absolute last word on the subject, the footnote could then go on to list the examples of late objections that were referred to as such which currently appeared in the footnote.

40. He wished to point out that the principle reflected in the last sentence of paragraph (4), to which the footnote corresponded, was nevertheless accurate: the Secretary-General was in fact cautious and preferred not to state his position with respect to the nature of objections and referred to them as “communications”. There were, however, instances in which the Secretary-General did refer explicitly to such communications as objections. Thus, to recapitulate, his proposal was to move the last two sentences of paragraph (4) to the end of paragraph (3), generally retaining the current wording of the last sentence, and to include the quotation from paragraph 213 of the *Summary of Practice* in the footnote to the last sentence, while also listing the examples of late objections as they currently appeared in footnote 158 [391].

Paragraph (4), as amended was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

41. Mr. PETRIČ proposed that the word “important”, used to describe the word “element”, should be deleted, as it exaggerated the weight of a late objection in determining the validity of a reservation and did not accurately reflect the Commission’s discussions on the subject.

Paragraph (7), as amended, was adopted.

Paragraph (8)

42. Mr. NOLTE suggested the inclusion, in the second sentence, of a reference to the term “objecting communication”, which he had proposed and which had been extensively discussed.

Paragraph (8), as amended, was adopted.

³⁰⁷ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, United Nations publication (Sales. No. E.94.V.15), document ST/LEG/7/Rev.1.

Paragraph (9)

43. Mr. NOLTE said that the final phrase (“it spells out in the clearest of terms that they do not produce the effects that their authors generally expect them to”) was imprecise and could lend itself to numerous interpretations. He suggested that it should be replaced by “it spells out explicitly that they do not produce the legal effects of an objection”.

44. Mr. GAJA objected to that proposal, as it was not consistent with the wording of the draft guideline. To solve the problem, the words “made within that time period” should be appended at the end of the phrase proposed by Mr. Nolte.

Paragraph (9), as amended by Mr. Nolte and Mr. Gaja, was adopted.

The commentary to draft guideline 2.6.15 as a whole, as amended, was adopted.

45. The CHAIRPERSON invited the Commission to continue the consideration of the text of the draft guidelines and commentaries thereto contained in document A/CN.4/L.733/Add.4.

Commentary to draft guideline 2.7 (Withdrawal and modification of objections to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

46. Mr. NOLTE said that the description of the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions as being “succinct” on the withdrawal of objections did not convey the idea that they contained very little information on the withdrawal of objections, which he believed was the intended meaning of the first sentence. He suggested that alternative wording should be found.

47. Mr. BROWNLIE proposed that the word “succinct” should be replaced by “inconclusive”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

48. The CHAIRPERSON noted that the incorrect numbering in the English version of paragraph (6) as paragraph (9) would be corrected by the Secretariat.

49. Mr. GAJA said that in the penultimate sentence the phrase “the life of the treaty” seemed unduly dramatic: it should be replaced by “treaty relations”.

50. Mr. SABOIA said that the word “revive” in the third sentence was a bit strong and proposed that it should be replaced by the word “reinforce”.

51. Mr. PELLET (Special Rapporteur) proposed that the French translation of the word proposed by Mr. Saboia should be “*mettre en oeuvre*”.

Paragraph (6), as amended by Mr. Gaja and Mr. Saboia, was adopted, subject to editorial corrections to be made by the Secretariat.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft guideline 2.7 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.1 (Withdrawal of objections to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft guideline 2.7.1, as a whole, was adopted.

Commentary to draft guideline 2.7.2 (Form of withdrawal)

Paragraph (1)

52. Mr. NOLTE suggested that, in the second sentence, the word “absolute” should be deleted and the word “rule” should be replaced by “theory”.

53. Mr. PETRIČ said that while he endorsed Mr. Nolte’s idea, it sounded rather awkward to state that the theory was not a principle.

54. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Petrič, but also with the substance of Mr. Nolte’s comment. Perhaps the easiest solution would be to include a phrase along the lines of “while the theory of parallel forms is not established in international law”. That would avoid having to specify whether it was a principle or a rule and would perhaps address the concerns expressed.

55. Mr. CANDIOTI suggested that, given the proliferation of theories in international law, the theory referred to in the second sentence and the one referred to in paragraph (6) of the commentary to draft guideline 2.7 should be worded identically.

56. Mr. McRAE said that there was indeed an inconsistency between the third sentence of paragraph (6) of the commentary to draft guideline 2.7, which referred to “the theory of parallelism of forms”, and the second sentence of paragraph (1) of the commentary to draft guideline 2.7.2, which referred to the “rule of parallel forms”. He agreed that the two references to parallelism of forms should be brought into line.

57. Mr. PELLET (Special Rapporteur) said that he saw no contradiction between the two. Personally, he did not think that parallelism of forms existed. It was not an absolute rule of international law, though it was true that in drafting texts on reservations and objections, some formalism was necessary. The only difference between

paragraph (6) of the commentary to draft guideline 2.7 and paragraph (1) of the commentary to draft guideline 2.7.2 was that the latter simply referred to “rules”, while the former spoke of a “theory”. Perhaps the word “principle” could be used in both instances.

58. Mr. NOLTE said it was true that there was no rule in international law about parallelism of forms, although there was, perhaps, a theory. Similarly, one could not speak of such a rule or theory as being “absolute”. He therefore proposed that in paragraph (1) of the commentary to draft guideline 2.7.2 the phrase “while the rule of parallel forms is not an absolute principle in international law” should be replaced by “while the theory of parallel forms is not a principle of international law”. That would establish consistency with the formulation in the commentary to draft guideline 2.7 and avoid making any assertions about a rule of international law on parallelism of forms.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The commentary to draft guideline 2.7.2 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.3 (Formulation and communication of the withdrawal of objections to reservations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

59. Mr. GAJA drew attention to the third sentence and suggested that, in order to make the text more readable, the phrase “by merely replacing the word ‘reservation’ with the word ‘objection’ in the text” should be moved to the beginning of the sentence and inserted after the word “reproduce”, where it would be set off by commas.

Paragraph (2), as amended, was adopted.

The commentary to draft guideline 2.7.3 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.4 (Effect on reservation of withdrawal of an objection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

60. Mr. PELLET (Special Rapporteur) apologized for raising a question of form but said that it was important for the Commission to be as coherent as possible. In order to make the reader’s life easier, whenever he had referred the reader in a footnote to a publication that had been cited previously, he had taken the trouble to include the number of the footnote in which the publication had been cited the first time. To his dismay, those footnote numbers had not been reproduced in the English translation.

The use of the formula “*op. cit.*” was not as practical because it sometimes left the reader leafing through voluminous reports while trying desperately to find the original citation. He thus requested that, if the Commission agreed, the Secretariat should reinstate the references to the footnote numbers in question.

Paragraph (3), as amended, was adopted.

Paragraph (4)

61. Mr. GAJA suggested that, in the last sentence, the words “are felt” should be replaced by “occur”, which would be closer to the meaning intended by the Commission. In addition, he questioned whether, in the penultimate sentence, the French word “*consistance*” had been correctly translated in the English version as “consistency”. In any case, he did not think “consistency” was the right word and requested the French-speaking members of the Commission to help find a better translation.

Paragraph (4), as amended, was adopted, subject to editorial changes.

The commentary to draft guideline 2.7.4 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.5 (Effective date of withdrawal of an objection)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

62. Mr. PELLET (Special Rapporteur) drew attention to the footnote, which related to paragraph (2), and said that the page numbers of the document cited had been omitted in the French version.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to draft guideline 2.7.5 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft guideline 2.7.6 as a whole was adopted.

Commentary to draft guideline 2.7.7 (Partial withdrawal of an objection)

Paragraph (1)

63. Mr. GAJA, drew attention first of all to the phrase “will produce the effects foreseen in article 23, paragraph 3” and said that the correct reference should be to

article 21. Secondly, in the footnote that related to paragraph (1), the words “be associated” should be replaced by “enter into treaty relations”. Lastly, he had a problem with the inclusion of the bracketed phrase “or even ‘super-maximum’”. Aside from the fact that he disliked the expression “super-maximum”, its inclusion gave rise to a whole host of problems, which had not yet been addressed by the Commission. Those problems were related to the fact that when downgrading an objection with super-maximum effect to one with maximum effect, the end result, as explained—not very clearly, he might add—in a later footnote, was that the treaty was no longer in force between the States or international organizations concerned. He therefore suggested the deletion of the bracketed text in question, so that the amended text would refer exclusively to downgrades from objections with maximum effect or intermediate effect to those with normal or simple effect. He would also recommend including a footnote with a general proviso explaining that there were particular problems relating to objections with super-maximum effect which the Commission planned to consider at its sixty-first session, and that it was for that reason that they had not been included in the current text.

64. Mr. PELLET (Special Rapporteur) said that he would prefer *a priori* to retain the bracketed phrase “or even ‘super-maximum’” since it had been the subject of much discussion within the Drafting Committee and had constituted one of the justifications for addressing the issue of the partial withdrawal of an objection. Given that background, he would be interested to learn the position of other members. However, if Mr. Gaja would be satisfied with the inclusion of an explanation of an objection with super-maximum effect in a long footnote, he would not be averse to that modification.

65. Ms. ESCARAMEIA (Rapporteur) said that she had no problem with the text as it currently stood.

66. Mr. GAJA said that he would attempt to rephrase his proposal concerning the issue of objections with super-maximum effect. The problem was that when an objection was downgraded from maximum to intermediate or from intermediate to normal, the effect of the objection was reduced. The point of the guideline was to provide for that possibility at any time, while preventing a situation in which a State or international organization was subjected to the interruption of treaty relations on the part of another State or international organization. While it could be argued that, by definition, a super-maximum objection did not have the effect of interrupting treaty relations, it could also be argued that, when downgrading from super-maximum to maximum, the treaty relations that existed as a result of an objection with super-maximum effect no longer existed as a result of one with maximum effect. If the point of the draft guideline was to allow for the possibility of reducing the effect of an objection and not of increasing its effect, then there should be no reference to the objection with super-maximum effect in the commentary because it raised more complicated questions that might better be addressed in a footnote.

67. Mr. McRAE said that he would be inclined to support Mr. Gaja, since the placement of the text in question after the phrase “an objection with ‘maximum’ effect” suggested

that the consequences of moving down the scale from an objection with maximum or super-maximum effect to one with simple effect were similar, whereas they were not. He agreed with Mr. Gaja that the language gave rise to some confusion and that an explanation was needed to reflect the different nature of objections with super-maximum effect.

68. Mr. PELLET (Special Rapporteur) said that he nevertheless wished to point out that great care had gone into drafting that text. The term “*voire*” in French conveyed the idea that one was not giving one’s opinion on the matter in question. Moreover, footnote 45 [441] was perfectly consistent with what Mr. Gaja had stated. If that did not satisfy members, he would propose, in the first indented subparagraph, to delete the phrase “(or even ‘super-maximum’)” as well as the reference to that term in footnote 42. On the other hand, in order to help the reader, who might not be as adept at interpreting the effects of different types of objections as Mr. Gaja and Mr. McRae, he would propose retaining the current wording of footnote 45 [441] but adding at the end of it the current text of footnote 42, which explained what was meant by an objection with “super-maximum” effect.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

The commentary to draft guideline 2.7.7 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.8 (Effect of a partial withdrawal of an objection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

69. Mr. GAJA said that the first sentence seemed to suggest that States were not allowed to react to the partial withdrawal of an objection, which was not the case. He therefore proposed that the sentence should be deleted.

Paragraph (3), as amended, was adopted.

The commentary to draft guideline 2.7.8, as amended, was adopted.

Draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation)

70. Mr. PETRIČ drew attention to a discrepancy between the English and French versions of the title of the draft guideline.

71. Mr. PELLET said that the English text should be aligned with the French original, which now read “*Aggravation d’une objection à une réserve*”. Thus, in the English text, the words “prohibition against the” should be deleted.

The title of the draft guideline was thus amended.

Commentary to draft guideline 2.7.9 (Widening of the scope of an objection to a reservation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

72. Mr. NOLTE drew attention to discrepancies between the English and the French versions of the second sentence.

73. Ms. ESCARAMEIA (Rapporteur) proposed that the second sentence of the English text should be aligned with the French to read: “The Commission considered that the widening of the scope of an objection cannot call into question the very existence of treaty relations between the author of the reservation and the author of the objection.”

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft guideline 2.7.9 as a whole, as amended, was adopted.

74. The CHAIRPERSON drew attention to the portion of chapter VI contained in document A/CN.4/L.733/Add.5.

Draft guideline 2.8 (Form of acceptances of reservation)

75. Mr. McRAE drew attention to a discrepancy between the English and French versions of the title of the draft guideline.

76. Mr. PELLET (Special Rapporteur) said that the English text should be aligned with the original French, which had been amended in the Drafting Committee to read “Forms of acceptance of reservations”.

The title of the draft guideline was thus amended.

Commentary to draft guideline 2.8 (Forms of acceptance of reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

77. Mr. PELLET (Special Rapporteur) said that the first sentence of the English text should be aligned with the original French to read: “Guideline 2.8, which opens the section of the Guide to Practice dealing with the procedure and forms of acceptance of reservations, presents two distinct forms of acceptance: ...”.

Paragraph 3, as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

78. Mr. PELLET (Special Rapporteur) proposed the deletion of the words “*et celles*” in the second sentence of the French text.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

The commentary to draft guideline 2.8 as a whole, as amended, was adopted.

Section C as a whole, as amended, was adopted.

CHAPTER VII. Responsibility of international organizations (A/CN.4/L.734/Rev.1 and Add.1–2)

79. The CHAIRPERSON invited the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.734/Rev.1.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

80. Mr. VALENCIA-OSPINA said that it was customary to include the names of the chairpersons of working groups established during the session, and proposed that Mr. Candiotti's name should be inserted in the second sentence.

81. The CHAIRPERSON suggested that the words "and appointed Mr. Candiotti as its Chairperson" should be inserted after the phrase "the Commission established a Working Group".

Paragraph 4, as amended, was adopted.

Paragraphs 5 to 10

Paragraphs 5 to 10 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPporteur OF HIS SIXTH REPORT

Paragraphs 11 to 20

Paragraphs 11 to 20 were adopted.

2. SUMMARY OF THE DEBATE

Paragraph 21

82. Mr. PELLET proposed the addition of the phrase "since the second reading of the draft articles provided an opportunity for taking due consideration of the positions of States" at the end of the paragraph.

83. Mr. VALENCIA-OSPINA wondered whether the words "and international organizations" should also be added to the text proposed by Mr. Pellet, for the sake of consistency with the first part of the paragraph.

84. Mr. PELLET said that, first, it was not a foregone conclusion that the Commission would seek the views of international organizations. What he had had in mind, and wished to have reflected in the text of the summary, was the Commission's established procedure of undertaking a first reading, which was followed by its own research and then a second reading, at which time it usually took account of the views of States. Moreover, the Commission intended to invite the legal advisers of international organizations to its sixty-first session, at which juncture it would presumably take their views into account.

Paragraph 21, as amended by Mr. Pellet, was adopted.

Paragraph 22

Paragraph 22 was adopted.

85. Mr. PELLET proposed that the following text should be added to the commentary as paragraph 22 *bis*: "It was highly unfortunate that the question of the implementation of State responsibility by injured organizations was not dealt with in the draft articles presented by the Special Rapporteur, which left a regrettable lacuna in the international law of responsibility as codified by the Commission." That had been the *leitmotif* of his statements and a point with he had argued at some length during the debate. Although it had not been followed up on, he still wished it to be reflected in the summary.

86. Mr. GAJA (Special Rapporteur) said that all members should be allowed to have their views reflected in the report. Nevertheless, he would like to hear Mr. Pellet's proposal again, in case some minor amendment was necessary. The question raised was a delicate one, since the implication was that the Commission might have to review various provisions of the draft articles on State responsibility for internationally wrongful acts.³⁰⁸

87. The CHAIRPERSON suggested that consideration of the new paragraph should be deferred until the next meeting so as to give Mr. Pellet time to draft a suitable text.

It was so decided.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

88. Mr. PELLET said that he was perplexed by the statement in the last sentence, in particular the reference to "contractual obligations", which seemed out of place. The point he had made, which he wished to be reflected in the summary, was that countermeasures were a means of ensuring that organizations were held responsible for internationally wrongful acts. If the sentence was intended to reflect his views, it should be redrafted along those lines, although perhaps it reflected someone else's views. If that was not the case, it should be deleted.

³⁰⁸ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

89. Mr. GAJA (Special Rapporteur) said that he could not recall whose views the sentence was intended to reflect. If Mr. Pellet considered that his views had not been adequately reflected, he had only to submit an appropriate text.

90. Mr. McRAE said that the reference to contractual obligations might be attributed to him. He had advocated a cautious approach to countermeasures and had suggested that, as a point of departure, the Commission might wish to consider countermeasures in the context of contractual relations, where there was a stronger argument in favour of such measures than in other areas. If necessary, he could redraft the sentence to reflect his views more clearly for the next meeting.

91. The CHAIRPERSON suggested that, given the importance of the issues at stake, further discussion of the paragraph should be deferred until the next meeting.

It was so decided.

The meeting rose at 6 p.m.

2993rd MEETING

Wednesday, 6 August 2008, at 10.20 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (continued)

CHAPTER VI. Reservations to treaties (concluded) (A/CN.4/L.733 and Corr.1 and Add.1–5)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of chapter VI of the Commission's draft report.

B. Consideration of the topic at the present session (A/CN.4/L.733/Add.1)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

2. Mr. PELLET (Special Rapporteur) proposed replacing the word “*désapprobation*” in the French version with the word “*opposition*”.

Paragraph 11, as amended in the French version, was adopted.

Paragraph 12

3. Mr. PELLET (Special Rapporteur) proposed replacing the words “the reserving and the accepting State” in the second sentence with “the author of the reservation and the author of the acceptance”.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

4. Mr. PELLET (Special Rapporteur) proposed replacing “the nexus” at the end of the first sentence with “the establishment”.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 24

Paragraphs 15 to 24 were adopted.

Paragraph 25

5. Mr. GAJA proposed replacing the word “emphasized” in the last sentence with “noted” and inserting the words “also conditional interpretative” before the word “declarations”. The sentence, thus amended, should be moved to the end of paragraph 37.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 31

Paragraphs 26 to 31 were adopted.

Paragraph 32

6. Mr. McRAE proposed replacing “betoken” in the second sentence with “constitute”.

7. Mr. PERERA proposed replacing “far-ranging” in the first sentence with “wide-ranging”.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

8. Mr. McRAE proposed replacing “betokened” in the first sentence with “amounted to” and “betoken” in the third sentence with “constitute”.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 38

Paragraphs 35 to 38 were adopted.

Paragraph 39

9. Mr. PELLET (Special Rapporteur) proposed replacing the words “*ne visant*” in the French version of the third