

Document:-  
**A/CN.4/3034**

**Summary record of the 3034th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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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. Vascianie, 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

had adopted an extreme position, whereas Sir Michael's proposal made that position seem perfectly acceptable. She did not, however, oppose the deletion of the words "particularly violently".

6. Sir Michael WOOD proposed that the new phrase should read "some States have even denied ...".

7. Ms. ESCARAMEIA said that with that change, the proposal was acceptable. In the final indent, the word "hypersensitivity" was too subjective: it should be replaced by the word "reactions".

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

8. Sir Michael WOOD said that in the second sentence of the English text, the words "to rule" should be replaced by "to assess". He also proposed that the words "of course", in the same sentence, should be deleted because they were superfluous.

9. Ms. ESCARAMEIA proposed that in the penultimate sentence, the words in parentheses, "or dispute settlement bodies", should be deleted. Some dispute settlement bodies, such as the European Court of Human Rights, could substitute their own judgement for the State's consent: the Court had done precisely that in the *Belilos* case.

10. Mr. PELLET (Special Rapporteur) said that the paragraph referred to all the bodies that might be called upon to assess the permissibility of reservations. Some had the power to make binding decisions, while others did not. No body, however, irrespective of whether it had such powers, could tell a State that it knew better than that State did whether it wished to be bound, despite the reservation. Contrary to what Ms. Escarameia seemed to believe, in the *Belilos* case, the European Court of Human Rights had not substituted its own judgement for the consent of the State concerned to be bound: it had taken great pain to say it was certain that Switzerland wished to be bound, despite its reservation. The amendment proposed by Ms. Escarameia therefore did not seem acceptable.

*Paragraph (6), as amended by Sir Michael Wood, was adopted.*

Paragraph (7)

11. Sir Michael WOOD said that the final phrase in paragraph (7), after the words "including" with reference to what national courts could do under domestic law, seemed superfluous. He proposed that it should be deleted and that the paragraph should end with the words "before them".

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

12. Ms. ESCARAMEIA said that in the first sentence, the phrase "within the limits of their competence" should

be made to apply to domestic courts, which could not rule on the permissibility of a reservation. She accordingly proposed that the phrase should be transposed to follow the word "States".

*Paragraph (9), as amended, was adopted.*

Paragraphs (10) and (11)

*Paragraphs (10) and (11) were adopted.*

Paragraph (12)

13. Sir Michael WOOD said that in the English text, the words "determining", "rule on" and "determine" should be replaced by "assessing", "assess" and "assess", respectively.

14. Ms. ESCARAMEIA said that in the second indent, the word "now", which appeared to contradict the second sentence in paragraph (6), should be deleted.

15. Mr. PELLET (Special Rapporteur) pointed out that the treaty bodies had long maintained that they had no competence to assess the permissibility of reservations, and he had stated as much in the commentary. Now, those bodies were demanding to have such competence, in a departure from their usual position. Nevertheless, he had no objection to the amendment proposed by Ms. Escarameia.

16. Mr. GAJA said that the first indent had apparently been drafted at a time when the Special Rapporteur had been of a different view than he was now as to the role of article 20 with regard to the permissibility of reservations. He proposed that the reference to article 20 should be deleted and that the phrase should read "provided for by the Vienna Conventions".

*Paragraph (12), as amended by Sir Michael Wood, Ms. Escarameia and Mr. Gaja, was adopted.*

Paragraph (13)

17. Sir Michael WOOD said that in the English text, the word "verification" should be replaced by "assessment".

*With that correction to the English text, paragraph (13) was adopted.*

Paragraph (14)

18. Mr. GAJA said that his comment on paragraph (12) applied to paragraph (14) as well. The second sentence seemed to imply that article 20, paragraph 5, of the Vienna Conventions resolved the question of whether a reservation was permissible. He therefore proposed that the sentence should be amended to begin "In the case of the 'Vienna regime', article 20, paragraph 5, of the Convention, insofar as it is applicable, sets a time limit of 12 months ...".

19. Mr. PELLET (Special Rapporteur) said that before agreeing to Mr. Gaja's amendment, he would like to know its purpose and that of his amendment to paragraph (12).

He had thought Mr. Gaja agreed with him that reservations either were or were not permissible, and that it was article 20 of the 1969 Vienna Convention that set up the system for assessing such permissibility.

20. Mr. GAJA replied that the idea was to leave open the question of whether it was article 20, paragraph 5, of the Vienna Convention or article 20 *in toto* that applied to the assessment of the permissibility of reservations, or whether, where reservations were incompatible with the object and purpose of a treaty, other rules should apply.

21. Sir Michael WOOD said that the final part of the penultimate sentence, beginning with the words “which is designed”, was a strange way of describing the actions of monitoring bodies. He proposed that it should be deleted.

22. Ms. ESCARAMEIA said that the reference to the object and purpose of the treaty should be retained but that, to take into account the comment made by Sir Michael, the end of the sentence should read: “which is designed to ensure compliance with the treaty by parties, including the preservation of the object and purpose of the treaty”.

*Paragraph (14), as amended, was adopted.*

Paragraphs (15) and (16)

*Paragraphs (15) and (16) were adopted.*

Paragraph (17)

23. Sir Michael WOOD said that the end of the first sentence, after the footnote, was obscure.

24. Mr. PELLET (Special Rapporteur) said that the text in French was perfectly clear.

25. Sir Michael WOOD pointed out that the translation into English did not correspond to the original French text.

26. The CHAIRPERSON said that the Secretariat would have the translation aligned on the original French.

*Paragraph (17) was adopted on the understanding that a correction would be made to the English language version.*

*The commentary to guideline 3.2, as amended, was adopted.*

*Commentary to guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the validity of reservations)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

27. Mr. HMOUD said that in the English text of the beginning of the paragraph, the words “to rule on” should be replaced by “to assess”.

*With that amendment to the English language version, paragraph (2) was adopted.*

Paragraph (3)

28. Sir Michael WOOD queried what was meant, in the English text, by the words “the meaning of the last phrase”.

29. Mr. PELLET (Special Rapporteur) said that the words “the last phrase” must be replaced by “this last phrase”.

*With that amendment to the English text, paragraph (3) was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

*The commentary to guideline 3.2.1, as amended, was adopted.*

*Commentary to guideline 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the validity of reservations)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

30. Sir Michael WOOD said that, in the English text, the words “it would be appropriate” should be replaced by “it could be appropriate”.

*With that amendment to the English text, paragraph (4) was adopted.*

Paragraph (5)

31. Sir Michael WOOD queried what was meant, in the English text, by the phrase “flexible law”.

32. Mr. PELLET (Special Rapporteur) said that the phrase could be replaced by the words “soft law”.

*With that amendment to the English text, paragraph (5) was adopted.*

*The commentary to guideline 3.2.2, as amended, was adopted.*

*Commentary to guideline 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

33. Sir Michael WOOD said that in the English text of the first indent, the words “their findings” should be replaced by “their assessments”.

*With that amendment to the English text, paragraph (2) was adopted.*

Paragraph (3)

34. Ms. ESCARAMEIA asked what was meant by the phrase “treaty monitoring bodies”. A distinction was

made between monitoring bodies, which had no decision-making power, and dispute settlement bodies, in which such powers were vested, but paragraph (3) went on to suggest that monitoring bodies could have decision-making powers. She wondered whether the European Court of Human Rights ought to be seen as a monitoring body, and thus be covered by draft guideline 3.2.3, or as a dispute settlement body, covered by draft guideline 3.2.5.

35. Mr. GAJA said that he failed to see how regional human rights courts could be said to take, in respect of reservations, decisions that were legally binding upon States in general terms. For the sake of precision, he proposed the addition, at the end of the second paragraph, of the phrase “and even then only to the extent that the decision on the permissibility of reservations binds the parties”. He also thought a new paragraph should be drafted to indicate what was meant by the phrase “should give full consideration to” in draft guideline 3.2.3 itself. Lastly, he suggested that, perhaps in draft guideline 3.2.5, the extent to which States were bound by the decisions of the bodies in question should be made clear.

36. Sir Michael WOOD said that the wording of the second sentence of paragraph (3) left something to be desired. He proposed that it should be replaced by the following text: “Of course, if these bodies have been vested with decision-making power, which is currently only the case of the regional human rights courts, the parties must respect their decisions.”

37. Ms. ESCARAMEIA said she simply could not see how such courts could be covered by draft guideline 3.2.3. When States were involved in a case, they must not simply “cooperate” with the courts and “give full consideration” to their assessment: they must also respect their decisions. The regional human rights courts should be covered by draft guideline 3.2.5.

38. Mr. McRAE pointed out that the text drafted by Sir Michael partly solved the problem raised and that the first footnote to paragraph (3) addressed Ms. Escarameia’s concerns.

39. Mr. PELLET (Special Rapporteur) fully endorsed that remark.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

40. Mr. GAJA said he failed to see which “principle” was cited at the start of the paragraph.

41. Mr. PELLET (Special Rapporteur) said Mr. Gaja’s confusion was understandable: a sentence at the beginning of the paragraph, referring to a future guideline 3.2.6, was missing. He accordingly proposed that the paragraph should begin with the following sentence: “Equally, treaty monitoring bodies should take into account the positions expressed by States and international organizations with respect to the reservation.”

*Paragraph (4), as amended, was adopted.*

*The commentary to guideline 3.2.3, as amended, was adopted.*

*Commentary to guideline 3.2.4* (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body)

*The commentary to guideline 3.2.4 was adopted.*

*Commentary to guideline 3.2.5* (Competence of dispute settlement bodies to assess the validity of reservations)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

42. Mr. GAJA said that, as currently drafted, the paragraph did not indicate the extent to which the decisions of dispute settlement bodies or other legal institutions were binding upon States. He accordingly proposed the addition, at the end of paragraph (3), of the following phrase: “and only to the extent that it is so provided”. One could not work on the basis of the principle that when a judicial institution ruled on the permissibility of a reservation in a given case, that necessarily had a binding effect as a general rule for the States concerned. A distinction must be drawn between the relevance of what a dispute settlement body might say on the permissibility of a reservation and the binding nature of the decision it would hand down.

43. Sir Michael WOOD said that the translation into English of the phrase “*l’autorité relative de la chose jugée*” was not very clear. Accordingly, he proposed that that text, “is binding solely on the parties to the dispute in question” should be replaced by the words “is binding solely in respect of the dispute in question”.

44. Mr. PELLET (Special Rapporteur) said he felt somewhat at a loss, since he had assumed that *res judicata* was a general principle of the law that could be expressed in all languages. As to Mr. Gaja’s comment, he agreed that a distinction ought to be made between the general situation when a decision related directly to the issue of permissibility, and a situation when the decision related only in part to the permissibility of a reservation and was therefore not binding. Some decisions nevertheless had binding force if their grounds constituted the necessary basis for the ruling. He was not sure that the phrase Mr. Gaja had proposed to add, “and only to the extent that it is so provided”, expressed that concept very well: it was too elliptical. It would be better to say “to the extent that the position of that body on the permissibility of the reservation is of a binding nature in those circumstances”.

45. Sir Michael WOOD said that the translation into English of paragraph (3) did not fully correspond to the French text. He accordingly proposed that the English text should read: “It goes without saying that, in any event, the decision of the dispute settlement body has only the force of *res judicata* for the parties to the dispute in question.”

46. Mr. McRAE said that the very meaning of *res judicata* was that a matter was always adjudicated with reference to the parties to a dispute. That was clear from the paragraph as currently drafted, and he saw no reason to amend it.

47. Mr. GAJA said that the reference to a decision that was binding solely on the parties to the dispute in question gave the reader, including national courts, the idea that pronouncements by a legal body were generally always binding on the parties. The reader must be alerted to the fact that when a given body, even the European Court of Human Rights, ruled on the permissibility of a reservation, its assessment could not be deemed to be binding.

48. Mr. McRAE proposed that the sentence in paragraph (3) should be supplemented by the addition of the following phrase: “and only to the extent of the authority of the dispute settlement body to make such a decision”.

*Paragraph (3), as amended, was adopted.*

*The commentary to guideline 3.2.5, as amended, was adopted.*

*Commentary to guideline 3.3* (Consequences of the non-validity of a reservation)

*The commentary to guideline 3.3 was adopted.*

*Commentary to guideline 3.3.1* (Non-validity of reservations and international responsibility)

Paragraph (1)

49. Mr. PELLET (Special Rapporteur) said that the words “or an international organization” should be inserted after “a State”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

50. Mr. PELLET (Special Rapporteur) proposed that in the first sentence, the words “the reserving State” should be replaced by “the author of the reservation” and that in the second sentence, the words “are other States prevented” should be replaced by “are other parties prevented”.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (7)

*Paragraphs (3) to (7) were adopted.*

*The commentary to guideline 3.3.1, as amended, was adopted.*

*The commentary to the guidelines reproduced in document A/CN.4/L.749/Add.6, as a whole, as amended, was adopted.*

51. The CHAIRPERSON invited the members of the Commission to take up document A/CN.4/L.749/Add.7.

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.7)

*Commentary to guideline 2.8.9* (Modalities of the acceptance of a reservation to a constituent instrument)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

52. Mr. PELLET (Special Rapporteur) said that the text of the first footnote should be expanded, since it referred to the “footnote above”, but there was no previous footnote in the document.

*Paragraph (2) was adopted on the understanding that the Secretariat would make the appropriate correction to the first footnote.*

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

Paragraph (7)

53. Mr. PELLET (Special Rapporteur) said that in the French text of the penultimate sentence, the words “*ceux-ci*” should be replaced by “*les États ou organisations internationales contractants*”.

*Paragraph (7), as amended, was adopted.*

*The commentary to guideline 2.8.9, as amended, was adopted.*

*Commentary to guideline 2.8.10* (Acceptance of a reservation to a constituent instrument that has not yet entered into force)

*The commentary to guideline 2.8.10 was adopted.*

*Commentary to guideline 2.8.11* (Reaction by a member of an international organization to a reservation to its constituent instrument)

*The commentary to guideline 2.8.11 was adopted.*

*Commentary to guideline 2.8.12* (Final nature of acceptance of a reservation)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

54. Mr. PELLET (Special Rapporteur) said that in the French text of the final sentence, the word “*et*”, before “*bien que*”, should be deleted.

*With that correction to the French text, paragraph (4) was adopted.*

*The commentary to guideline 2.8.12, as amended, was adopted.*

*The commentary to the guidelines reproduced in document A/CN.4/L.749/Add.7, as a whole, as amended, was adopted.*

55. The CHAIRPERSON said it remained for the Commission to adopt paragraph (5) of the commentary to draft guideline 2.9.5 (Written form of approval, opposition and recharacterization reproduced in document A/CN.4/L.749/Add.5, which had been left in abeyance at the previous meeting pending a written proposal by the Special Rapporteur.

*Commentary to guideline 2.9.5* (Form of approval, opposition and recharacterization) (*concluded*)

Paragraph (5)

56. Mr. PELLET (Special Rapporteur) said that he had simply written down wording proposed by Mr. Valencia-Ospina and supplemented by Mr. Gaja, which in no way reflected his own position. The following text should be added at the end of paragraph (5) of the commentary to draft guideline 2.9.5:

“(5) ... The alternative whether to use the written form or not does not leave room for any intermediate solutions. Accordingly, a majority of the members of the Commission was 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), which could convey the idea of the existence of such intermediate solutions.”

57. Paragraph (6) would then begin:

“(6) ... The Commission adopted guideline 2.9.5 ...”.

*Paragraph (5) of the commentary to draft guideline 2.9.5, as amended, was adopted.*

*The commentary to guideline 2.9.5, as a whole, as amended, was adopted.*

58. The CHAIRPERSON proposed that the Commission should adopt document A/CN.4/L.749/Add.2, containing the texts of all the draft guidelines on reservations to treaties adopted so far.

1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.749/Add.2)

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

*Chapter V of the draft report of the Commission, as a whole, as amended, was adopted.*

**CHAPTER IX. *The obligation to extradite or prosecute (aut dedere aut judicare)* (A/CN.4/L.753)**

59. The CHAIRPERSON invited the Commission to consider chapter IX of its draft report, on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/L.753).

*Chapter IX, as a whole, was adopted.*

**CHAPTER XI. *The most-favoured-nation clause* (A/CN.4/L.755)**

60. The CHAIRPERSON invited the Commission to consider chapter XI of its draft report, on the most-favoured-nation clause (A/CN.4/L.755).

**A. Introduction**

Paragraph 1

*Paragraph 1 was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 2 to 4

*Paragraphs 2 to 4 were adopted.*

Paragraph 5

61. Sir Michael WOOD said that the word “possibly”, at the end of the first sentence, should be deleted.

*Paragraph 5, as amended, was adopted.*

Paragraph 6

62. Mr. McRAE (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that there was some text missing. It should follow paragraph 6, have a heading like that of paragraph 5, “Roadmap of future work”, and read:

“A preliminary assessment of the 1978 draft articles<sup>301</sup>”

“1. During the discussion, the Co-Chairperson of the Study Group, Mr. McRae highlighted the specific articles of the 1978 draft articles which remained important to the areas of relevance to the Study Group. These included articles 1 (Scope of the present articles), 5 (Most-favoured-nation treatment), 7 (Legal basis of most-favoured-nation treatment), 8 (The source and scope of most-favoured-nation treatment), 9 (Scope of rights under a most-favoured-nation clause), 10 (Acquisition of rights under a most-favoured-nation clause), 16 (Irrelevance of limitations agreed between the granting State and a third State), 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences), 24 (The most-favoured-nation clause in relation to arrangements between developing States), 25 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic) and 26 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State). In particular, it was considered that draft articles 9 and 10, which focused on the scope of most-favoured nation, were of contemporary relevance, and in the context of investment would be the basic points of departure and the primary focus of the Study Group.

“2. In the ensuing discussions in the Study Group, comments were made regarding the status of the 1978 draft articles and their relationship with the current work of the Study Group. It was felt necessary to clarify in advance and reach an understanding about that earlier work and its status in order to ensure that there was a clear delineation between that work and the current exercise, without the earlier achievements being undermined or affecting adversely work and developments in other forums. It was hoped that the papers to be prepared will further reflect upon these aspects and flesh out the issues that ought to be addressed.”

63. Following a discussion in which Mr. VALENCIA-OSPINA, Mr. GAJA, Mr. McRAE (Co-Chairperson of

<sup>301</sup> *Yearbook ... 1978*, vol. II (Part Two), p. 16, para. 74.

the Study Group on the most-favoured-nation clause) and Ms. JACOBSSON (Rapporteur) participated, it was proposed that the heading "Roadmap of future work" should be transposed to precede paragraph 6 and to follow the part entitled "A preliminary assessment of the 1978 draft articles". In addition, it was proposed that the name of Mr. McRae, in parentheses, should be inserted at the end of the text, in subparagraph viii.

*It was so decided.*

*Chapter IX, as a whole, as amended, was adopted.*

**CHAPTER XII. Treaties over time (A/CN.4/L.756)**

64. The CHAIRPERSON invited the Commission to consider chapter XII of its draft report, on the evolution of treaties over time (A/CN.4/L.756).

**A. Introduction**

*Section A was adopted.*

Paragraph 1

*Paragraph 1 was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 2 to 8

*Paragraphs 2 to 8 were adopted.*

Paragraph 9

65. Sir Michael WOOD proposed that the second sentence, which was unclear for anyone who was not a member of the Commission, should be deleted.

*Paragraph 9, as amended, was adopted.*

Paragraphs 10 and 11

*Paragraphs 10 and 11 were adopted.*

*Section B, as amended, was adopted.*

*Chapter XII, as a whole, as amended, was adopted.*

**CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.747 and Add.1)**

**A. Responsibility of international organizations (A/CN.4/L.747)**

Paragraphs 1 and 2

66. Mr. GAJA said that section A had wrongly been broken into two paragraphs, although the document submitted to the Secretariat had comprised only one. The points raised in the second sentence of the current paragraph 1 were not questions to States; the Commission was not expecting a response from States, but simply wanted to make them aware of certain gaps. The sole question addressed to States was in the current paragraph 2. Breaking section A into two paragraphs thus caused confusion: it gave the impression, for example, that States were invited to answer the question of when an international organization was entitled to invoke the responsibility of a State. The question to which the Commission was

awaiting a response was about how it should deal with the issues concerning international responsibility between States and international organizations that had not yet been covered. He therefore proposed that the two paragraphs be merged.

67. Mr. VALENCIA-OSPINA said that the Commission might do well to refer to the timetable for its future work on responsibility of international organizations. The current wording of paragraph 2 might give the impression that it would only continue its work on the issues mentioned in paragraph 1 if States specifically asked it to do so. States should instead be requested to indicate not only in what form the Commission should deal with issues not expressly covered either in the articles on the responsibility of States for internationally wrongful acts<sup>302</sup> or in the draft articles on the responsibility of international organizations, but also, in what time frame it should do so.

68. Mr. GAJA said that he thought it would be best to leave it to States to decide on that. Everything would depend on what they wished to do with the articles on the responsibility of States. The Commission should be prepared for the unlikely event of having to propose "amendments" to the articles, with a view to a conference on the subject.

69. Mr. HASSOUNA pointed out that in section B (Shared natural resources), the Commission said that it would welcome more responses from Governments: it could include similar wording in section A.

70. Mr. GAJA said that a sentence beginning "The Commission would welcome observations on the following points" could be inserted at the start of chapter III.

71. The CHAIRPERSON said he took it that the Commission endorsed Mr. Gaja's proposals.

*It was so decided.*

*Section A, as amended, was adopted.*

**B. Shared natural resources**

Paragraph 3

72. Mr. GAJA proposed that, in the first sentence, the word "most", which departed from the traditional formulation, should be deleted. In the second sentence, the words "more responses from Governments are required" were a bit too strong. Instead, one might say: "In order to assist the Commission to make a full assessment of the practice, it would welcome further responses from Governments, particularly from those that did not respond to the questionnaire." The final sentence, which said that the Commission had decided to have the questionnaire on oil and gas circulated once more to States, had no real place in chapter III and should be deleted.

73. Mr. DUGARD said that if that sentence was deleted, the problem would not arise, but he nevertheless wished

<sup>302</sup> See footnote 10 above.

to know to whom the word “they” in the English text referred.

74. The CHAIRPERSON said that in the English text of the final sentence, the word “they” should be replaced by “it”.

75. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) said he himself thought that it was important to say that the Commission had decided to address the questionnaire on oil and gas once again to States, as that reflected the discussion in the Working Group on shared natural resources.

76. The CHAIRPERSON, speaking as a member of the Commission, proposed that the final sentence of paragraph 3 should be retained unchanged.

*It was so decided.*

*Section B, as amended, was adopted.*

**A bis. Expulsion of aliens (A/CN.4/L.747/Add.1)**

*Section A bis was adopted.*

*Chapter III, as a whole, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

### 3035th MEETING

*Friday, 7 August 2009 at 10.10 a.m.*

*Chairperson: Mr. Ernest PETRIČ*

*Present: Mr. Caflisch, Mr. Candiotti, 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. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.*

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

**CHAPTER XIII. Other decisions and conclusions of the Commission (A/CN.4/L.757)**

1. The CHAIRPERSON invited the Commission to consider chapter XIII of its draft report as contained in document A/CN.4/L.757.

**A. Programme, procedures and working methods of the Commission and its documentation**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

1. APPOINTMENT OF SPECIAL RAPPORTEUR FOR THE TOPIC “EFFECTS OF ARMED CONFLICTS ON TREATIES”

Paragraph 3

*Paragraph 3 was adopted.*

2. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 4

*Paragraph 4 was adopted.*

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 63/128 OF 11 DECEMBER 2008 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraph 5

*Paragraph 5 was adopted.*

4. DOCUMENTATION AND PUBLICATIONS

(a) *Processing and issuance of reports of Special Rapporteurs*

Paragraph 6

*Paragraph 6 was adopted.*

(b) *Summary records of the work of the Commission*

Paragraph 7

*Paragraph 7 was adopted.*

(c) *Trust fund on the backlog relating to the Yearbook of the International Law Commission*

Paragraph 8

*Paragraph 8 was adopted.*

(d) *Other publications and the assistance of the Codification Division*

Paragraphs 9 and 10

*Paragraphs 9 and 10 were adopted.*

5. PROPOSALS ON THE ELECTIONS OF THE COMMISSION

Paragraph 11

2. Ms. ESCARAMEIA said that the penultimate sentence should be deleted, since it wrongly implied that the Planning Group wished to remove from its agenda the item of elections, whereas, in fact, the reference was only to a specific proposal under that item.

3. Mr. WISNUMURTI (Chairperson of the Planning Group) recalled that the sentence had been proposed by Mr. Pellet.

4. Mr. CANDIOTI said that he concurred with Ms. Escarameia. The question had been discussed, but no decision had been taken.

5. Mr. HASSOUNA said that, if the sentence was deleted, the word “however” in the last sentence would also need to be deleted.