

Document:-
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Summary record of the 3076th meeting

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

Extract from the Yearbook of the International Law Commission:-
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(<http://legal.un.org/ilc/>)*

4. Mr. VASCIANNIE said that he wished to nominate Mr. Pellet for that purpose.

5. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the Bureau's recommendation and to fill in the blanks in paragraph 7 accordingly.

It was so decided.

Paragraph 7, as completed, was adopted.

Section D, as completed, was adopted.

E. International Law Seminar

Paragraphs 8 to 21

Paragraphs 8 to 21 were adopted.

Section E was adopted.

Other business (concluded)

[Agenda item 15]

6. Mr. CANDIOTI announced that, on 2 August 2010, in San Juan, Argentina, a framework agreement had been signed between Argentina, Brazil, Paraguay and Uruguay on the management and use of the Guaraní aquifer, which was one of the world's largest transboundary underground water sources. In its preamble, the agreement included an express reference to General Assembly resolution 63/124 of 11 December 2008, which reproduced the Commission's draft articles on the law of transboundary aquifers and urged the States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of those draft articles. It was rewarding to note that the four countries sharing the aquifer had complied with that request in their agreement, and a hopeful sign that States were beginning to take into account the Commission's valuable efforts in that area, in particular the excellent work carried out by Mr. Yamada, former member of the Commission and former Special Rapporteur on the topic of shared natural resources. As soon as the agreement became available, he would provide copies of it to the members of the Commission.

7. The CHAIRPERSON said that, on behalf of the Commission, he wished to express congratulations to the States parties to that auspicious agreement. It was gratifying that the Commission's work had been considered useful; that, in turn, provided encouragement for its future work on shared natural resources.

8. He announced that immediately following the public part of the meeting the Commission would meet in closed session to discuss plans for its sixty-third session.

The meeting rose at 10.25 a.m.

3076th MEETING

Wednesday, 4 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

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

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

Paragraph 12 *bis*

1. The CHAIRPERSON said that a proposal had been made for the insertion of the following new paragraph 12 *bis* (document without a symbol distributed at the meeting):

“Having provisionally adopted the entire set of draft guidelines in the Guide to Practice, the Commission intends to adopt the final version of the Guide to Practice during its sixty-third session, taking into consideration the observations of States and international organizations as well as the bodies with which the Commission cooperates, made since the beginning of the examination of the topic, and also those that could be received by the Secretariat before 31 January 2011.”

He invited the members of the Commission to comment on the proposal.

2. Mr. NOLTE proposed, in the interests of clarity, to split the paragraph into three sentences. The first would end with the words “sixty-third session”. The second would read: “It will take into consideration the observations of States and international organizations as well as the bodies with which the Commission cooperates, made since the beginning of the examination of the topic.” The third and last sentence would read: “The Commission also invites further comments relating to the entire set of draft guidelines contained in the Guide to Practice, which should be received by the Secretariat before 31 January 2011.”

3. Sir Michael WOOD said that while he supported the proposal to end the first sentence after “sixty-third session”, he would prefer to maintain the second part of the initial text as it stood. The second sentence would thus begin: “In doing so, the Commission will take into consideration...”

Sir Michael's proposal was adopted.

Paragraph 12 bis, as amended, was adopted.

* Resumed from the 3070th meeting.

* Resumed from the 3074th meeting.

** Resumed from the 3073rd meeting.

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

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (*continued*)* (A/CN.4/L.764/Add.3–10)

Commentary to guideline 4.3 (Effect of an objection to a valid reservation) (A/CN.4/L.764/Add.8)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

4. Mr. GAJA noted that the words “of article 21, paragraph 3,” should be inserted in the second sentence between “at the end” and “of the Vienna Conventions”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to guideline 4.3, as amended, was adopted.

Commentary to guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted with minor editing changes to the English version.

The commentary to guideline 4.3.1, as amended, was adopted.

Commentary to guideline 4.3.2 (Entry into force of the treaty between the author of a reservation and the author of an objection)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted with minor editing changes.

The commentary to guideline 4.3.2, as amended, was adopted.

Commentary to guideline 4.3.3 (Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required)

Paragraph (1)

Paragraph (1) was adopted with a minor editing change.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

5. Mr. GAJA said that paragraph (3), which was unrelated to guideline 4.3.3, should be moved to the end of the commentary to guideline 4.3.

6. Mr. PELLET (Special Rapporteur) said that he would redraft paragraph (3) with that end in view.

Paragraph (3) was adopted subject to editing changes and on the understanding that it would be moved in accordance with Mr. Gaja's proposal.

The commentary to guideline 4.3.3, as amended, was adopted.

Commentary to guideline 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

7. Mr. GAJA proposed replacing “an objection to a reservation results in the entry into force of the treaty” with “an objection to a reservation does not constitute an obstacle to the entry into force of a treaty”, since an objection never resulted in the entry into force of a treaty.

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor editing change.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted with a minor editing change to the English version.

Paragraphs (8) to (13)

Paragraphs (8) to (13) were adopted.

The commentary to guideline 4.3.4, as amended, was adopted.

Commentary to guideline 4.3.5 (Effects of an objection on treaty relations)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

Paragraph (14)

8. Mr. GAJA proposed deleting paragraph (14), which seemed to contradict the remainder of the commentary.

It was so agreed.

Paragraph (14) was deleted.

* Resumed from the 3074th meeting.

Paragraphs (15) to (20)

Paragraphs (15) to (20) were adopted.

Paragraph (21)

9. Mr. HMOUD said that the objection in the example cited seemed to constitute an objection with “super-maximum” effect.

10. Mr. PELLET (Special Rapporteur) said that almost all objections concerning the incompatibility of a reservation with the object and purpose of a treaty were couched in such terms, but they were clearly objections with minimum effect since they did not preclude the entry into force of the treaty. The objection by the Netherlands³⁸¹ to the reservation entered by the United States³⁸² to the International Covenant on Civil and Political Rights, cited in paragraph (4) of the commentary to draft guideline 4.3.1, was an example that Mr. Hmoud should find more convincing. It could not constitute an objection with “super-maximum” effect since it contained an explicit reference to article 21, paragraph 3, of the Vienna Convention, according to which the effect of reservations could only be minimum or maximum. The objection could only be one with minimum effect, since the Netherlands had not ruled out the entry into force of the Covenant between the United States and the Netherlands. It was therefore clearly an objection with minimum effect and had been designated as such by the objecting State’s reference to article 21, paragraph 3, of the Vienna Convention, even though it characterized the reservation as being “incompatible with the object and purpose of the treaty”. In his view, it was sufficient, in the paragraph under discussion, to refer to the quotation in paragraph (4) of the commentary to draft guideline 4.3.1 and to amend the related footnote accordingly. He offered to transmit a text of paragraph (21) amended along those lines to the secretariat.

It was so decided.

Paragraph (21) was adopted subject to the requisite editing changes.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

11. Mr. GAJA proposed replacing “the Commission” with “the Conventions” in the second sentence for reasons of accuracy.

It was so agreed.

Paragraph (23), as amended, was adopted.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were adopted.

Paragraph (26)

Paragraph (26) was adopted with a minor editing change to the English version.

Paragraphs (27) to (35)

Paragraphs (27) to (35) were adopted.

Paragraph (36)

Paragraph (36) was adopted with a minor editing change to the English version.

Paragraphs (37) to (44)

Paragraphs (37) to (44) were adopted.

The commentary to guideline 4.3.5, as amended, was adopted.

Commentary to guideline 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editing change.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

Paragraph (7) was adopted with a minor editing change.

Paragraphs (8) to (12)

Paragraphs (8) to (12) were adopted.

Paragraphs (13) to (15)

12. Sir Michael WOOD proposed deleting the phrase “Falling within the domain of the progressive development of international law” at the beginning of the first sentence of paragraph (14), because it implied that the other provisions fell within the domain of customary law.

13. Mr. PELLET (Special Rapporteur) said that the consensual position of the members of the Commission should be reflected, namely that the case in question fell within the domain of *lex ferenda* rather than *lex lata*.

14. Mr. GAJA expressed support for Sir Michael’s proposal. He proposed amending the beginning of the first sentence of paragraph 15 to read: “It seemed reasonable, as a step of progressive development, to set a time period...”.

15. Mr. PELLET (Special Rapporteur) concurred with the proposals. If they were adopted, however, he suggested that paragraph (14) be merged with paragraph (13).

The proposals made by Sir Michael, Mr. Gaja and the Special Rapporteur were adopted.

Paragraphs (13) to (15), as amended, were adopted.

³⁸¹ *Multilateral Treaties ...* (see footnote 81 above), chap. IV.4.

³⁸² *Ibid.*

Paragraph (16)

Paragraph (16) was adopted.

The commentary to guideline 4.3.6, as amended, was adopted.

Commentary to guideline 4.3.7 (Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editing change to its footnote.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

16. Mr. GAJA proposed deleting paragraph (6), which seemed to have no bearing on the guideline to which the commentary under discussion referred.

It was so agreed.

Paragraph (6) was deleted.

The commentary to guideline 4.3.7, as amended, was adopted.

4.4 (Effects of a reservation on rights and obligations outside of the treaty)

Commentary to guideline 4.4.1 (Absence of effect on rights and obligations under another treaty)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 4.4.1 was adopted.

Commentary to guideline 4.4.2 (Absence of effect on rights and obligations under customary international law)

Paragraph (1)

17. Mr. NOLTE said that the words “as such” in the tenth line of the English version of the paragraph should be replaced with “of itself”, which were the words used in the draft guideline.

It was so agreed.

18. Sir Michael WOOD noted that the term “norm”, which was used in the paragraph under discussion and in those that followed, was highly ambiguous and was generally used only in the context of *jus cogens* to designate peremptory norms. He proposed using the word “rule” instead of “norm” throughout the document under discussion.

19. Mr. PELLET (Special Rapporteur), supported by Mr. DUGARD and Mr. NOLTE, said that he was puzzled by Sir Michael’s proposal to outlaw the word “norm”.

While he had no objection to his proposal to replace “norm” with “rule” in the commentary to draft guideline 4.4.2, since the guideline itself used the word “rule”, he wished to retain the word “norm” in other parts of the document under discussion. He also wished to place on record his view that there was no taboo against using the word “norm”.

Paragraph (1), as amended in the English version by Mr. Nolte, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

20. Mr. McRAE said that the word “dispute” should be inserted before “settlement clause” in the second sentence for the sake of clarity.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

21. Mr. NOLTE said that the second sentence of the paragraph was confusing because it stated that the guideline had more to do with the effects of a reservation than its validity, although paragraph (1) of guideline 3.1.8, cited in paragraph (5), concerned the validity of a reservation.

22. Mr. PELLET (Special Rapporteur) said that there was indeed some ambiguity, at least in the English text.

23. Mr. GAJA proposed resolving the ambiguity by replacing “the guideline” by “that paragraph” in the English version and “elle” by “ce paragraphe” in the French version.

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Commentary to guideline 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*))

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

24. Mr. NOLTE, noting that he had supported the insertion of the term “of itself” in guideline 4.4.3, said that he wished to add the phrase “despite a view to the contrary” after the words “in guideline 4.4.3” in the last sentence of the paragraph.

Paragraph (4), as amended, was adopted.

The commentary to guideline 4.4.3, as amended, was adopted.

25. The CHAIRPERSON invited the members of the Commission to consider the addendum to chapter IV of the Commission's draft report (Reservations to treaties) published as document A/CN.4/L.764/Add.1 which completed section B.

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

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

26. Mr. NOLTE said that the third sentence should be amended to make it clear that the views expressed were those of the Special Rapporteur and not those of the Commission. He proposed replacing "that constituted" with "which in his view constituted" and deleting the phrase "and which he considered reasonable".

It was so decided.

27. Sir Michael WOOD proposed inserting the French words "*juste milieu*" in brackets in the English version after the words "happy medium".

It was so decided.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 18

Paragraphs 8 to 18 were adopted.

Document A/CN.4/L.764/Add.1, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its sixty-second session (A/CN.4/L.762)

28. The CHAIRPERSON invited the members of the Commission to consider chapter II of the Commission's draft report (Summary of the work of the Commission at its sixty-second session) published as document A/CN.4/L.762.

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

29. Mr. GAJA said that the chapter presented an overview of the Commission's work at the current session. He therefore proposed adding the following sentence at the end of the paragraph: "The Commission thus completed the provisional adoption of the set of draft guidelines on reservations to treaties."

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

30. Mr. GAJA proposed amending the paragraph to read: "The Commission did not consider the topic 'Immunity of State officials' (chap. IX)."

It was so decided.

31. Sir Michael WOOD proposed inserting the words "at the present session" after "State officials".

It was so decided.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

32. Mr. McRAE proposed mentioning the documents considered by the Study Group at the current session.

Paragraph 11 was adopted on that understanding.

Paragraphs 12 to 13

Paragraphs 12 to 13 were adopted.

Chapter II of the Commission's draft report, as amended, was adopted.

The meeting rose at 5.45 p.m.

3077th MEETING

Thursday, 5 August 2010, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

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

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.764 and Add.1-10)

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

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (continued) (A/CN.4/L.764/Add.3-10)

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter IV of the draft