

Document:-  
**A/CN.4/3077**

**Summary record of the 3077th 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:-  
**2010, vol. I**

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(<http://legal.un.org/ilc/>)*

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.*

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### 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.

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#### **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

report, and drew attention to the portions of that chapter contained in document A/CN.4/L.764/Add.9.

*Commentary to guideline 3.3.2 [3.3.3]* (Effect of individual acceptance of an impermissible reservation)

Paragraphs (1) to (3)

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

Paragraph (4)

2. Mr. GAJA said that a sentence should be added at the end of the paragraph to reflect a different view—one which might be held by only one Commission member, but which appeared to be in line with the prevailing practice of States and depositaries. Although reference was made later in paragraph (29) of the commentary to guideline 4.5.1 to “one isolated view” on the matter, he thought that it was important to flag it in the commentary to guideline 3.3.2, which outlined the Commission’s general approach to the requirement for the validity of a reservation. The new sentence should read: “However, according to a different view, the prevailing practice shows that the State party to a treaty may consider the treaty to apply subject to the reservation in its relations with the reserving State, whether or not the reservation is regarded as valid by other States.”

3. Mr. VÁZQUEZ-BERMÚDEZ proposed that the word “valid” should be replaced by “invalid”, since that was the focus of the guideline.

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

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

*The commentary to guideline 3.3.2 [3.3.3], as amended, was adopted.*

*Commentary to guideline 3.3.3 [3.3.4]* (Effect of collective acceptance of an impermissible reservation)

Paragraphs (1) to (11)

*Paragraphs (1) to (11) were adopted.*

*The commentary to guideline 3.3.3 [3.3.4] was adopted.*

*General commentary to section 4.5* (Consequences of an invalid reservation)

Paragraphs (1) to (17)

*Paragraphs (1) to (17) were adopted.*

Paragraph (18)

4. Mr. NOLTE said that the paragraph (18) established the general approach that would be followed in subsequent guidelines. Since paragraph (35) of the commentary to guideline 4.5.2 indicated that the positive presumption contained an element of progressive development, he proposed that in the last sentence of paragraph (18), after the words “It is a question not of creating, but of systematizing, the applicable principles and rules in a reasonable

manner”, the phrase “and with elements of progressive development” should be inserted.

*Paragraph (18), as amended, was adopted.*

Paragraphs (19) and (20)

*Paragraphs (19) and (20) were adopted.*

*The general commentary to section 4.5, as amended, was adopted.*

*Commentary to guideline 4.5.1 [4.5.1 and 4.5.2]* (Nullity of an invalid reservation)

Paragraphs (1) to (12)

*Paragraphs (1) to (12) were adopted.*

Paragraph (13)

5. Mr. NOLTE questioned the need for the paragraph, which implied that the lateness of certain objections to reservations meant that they were intended as objections with “super-maximum” effect. He was not convinced by that argument.

6. Mr. PELLET (Special Rapporteur) said that was not what was implied. The paragraph was intended to reflect a point raised by Mr. Gaja during the debate, namely that when States parties considered a reservation to be incompatible with the object and purpose of the treaty, they were not concerned about the period of time within which they were allowed to react to the reservation. They acted on the assumption that the reservation was null and void in objective terms, not that their objection could be the grounds for nullity. He found that argument convincing.

7. Mr. NOLTE said that he would find the argument more convincing if it was clear that States behaved differently with respect to other reservations and did not formulate late objections in these cases. However, if no other members had a problem with the paragraph, he would not press his point.

*Paragraph (13) was adopted.*

Paragraphs (14) to (16)

*Paragraphs (14) to (16) were adopted.*

Paragraph (17)

8. Mr. GAJA pointed out that the example of the objection by the Netherlands to the reservation by the United States to the International Covenant on Civil and Political Rights,<sup>383</sup> given in the first footnote in the paragraph, had been rather overused.

9. Mr. PELLET explained that he had found an example of an objection by Belgium that was more to the point in the commentary to guideline 4.3.1, which the Commission could consider on second reading. The example of the Netherlands would then not be overworked if it were retained in that footnote.

*Paragraph (17) was adopted.*

<sup>383</sup> See footnotes 381 and 382 above.

Paragraphs (18) to (22)

*Paragraphs (18) to (22) were adopted.*

Paragraph (23)

10. Mr. NOLTE said that he questioned the appropriateness of the phrase in the last sentence “this practice of making objections with ‘super-maximum’ effect”. Since arguments relating to objections with “super-maximum” effect were developed only later in the text of the commentaries, a reference to them at this juncture was premature. He therefore proposed deleting the words “of making objections with ‘super-maximum’ effect”.

*Paragraph (23), as amended, was adopted.*

Paragraphs (24) to (28)

*Paragraphs (24) to (28) were adopted.*

Paragraph (29)

11. Mr. NOLTE, referring to the first sentence, queried whether the reference to “one, isolated view expressed within the Commission” was accurate, since, to his recollection, there had been at least two Commission members who had identified themselves as sharing that view.

12. Mr. GAJA said that, although the wording referred to by Mr. Nolte was not consistent with the way in which the Commission usually expressed dissenting views, he was more concerned with the Special Rapporteur’s description of that viewpoint and the need, in his opinion, to reformulate it. It was not that the question of validity could not be assessed if there was no third-party settlement but rather that a reservation could be totally deprived of effects only by means of a decision that was binding on all parties to the treaty. He therefore proposed to replace the portion of the first sentence that followed the colon with “a reservation would be totally deprived of effects only if it was held impermissible by a decision binding on all the parties to the treaty”. He had no problem with the rest of the paragraph.

13. Mr. HASSOUNA said that, like Mr. Nolte, he too had some doubts about the formulation of the beginning of the first sentence. He therefore proposed to delete the word “isolated” and to have the sentence begin with the phrase “According to one view expressed within the Commission”.

14. Mr. PELLET (Special Rapporteur) said that, each time the matter had come up during the debate, he had indicated that this dissenting view was held by only one person, and no one had contested his assessment. Perhaps other members shared that minority viewpoint, but none had overtly expressed as much. That said, he was totally indifferent to how the Commission wished to qualify it. For the rest, Mr. Gaja was entitled to his opinion and he wished to reflect it accurately in paragraph (29).

15. Mr. GAJA said that the Commission members had really had no opportunity, following the Special Rapporteur’s summing up of the debate, to indicate whether they shared the isolated view in question.

*Paragraph (29), as amended, was adopted.*

*The commentary to guideline 4.5.1 [4.5.1 and 4.5.2], as amended, was adopted.*

*Commentary to guideline 4.5.2 [4.5.3]* (Status of the author of an invalid reservation in relation to the treaty)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

16. Mr. NOLTE said that the first footnote to the paragraph cited reservations that had been formulated by a number of countries and were purported to have “super-maximum” effect; he wondered, however, whether the example concerning Finland might be deleted, since its objection did not refer to the entry into force of the Convention in question in its entirety.

*Paragraph (5), with the amendment to its first footnote, was adopted.*

Paragraphs (6) to (15)

*Paragraphs (6) to (15) were adopted.*

Paragraphs (16) and (17)

17. Sir Michael WOOD proposed to delete paragraph (17) as it did not seem to add force to the Commission’s argument. Moreover, it was unfair to depositaries to retain it, because there was—in practice, if not intellectually—all the difference in the world between reservations that were clearly prohibited by a treaty and those that might or might not be contrary to the object and purpose of the treaty.

18. Mr. PELLET (Special Rapporteur) said that he would not object to the deletion of paragraph (17); however, he would find it a bit strange to do so since it echoed exactly what was stated in guideline 3.3. If the Commission nevertheless wished to delete it, he suggested that, at the end of the footnote to paragraph (16), a reference to guideline 3.3 be included, which would read: “Concerning this distinction, however, see guideline 3.3 (Consequences of the non-permissibility of a reservation) and the commentary thereto.”

*Paragraph (16), with an amendment to the footnote, was adopted.*

*Paragraph (17) was deleted.*

Paragraph (18)

19. Sir Michael WOOD said that the wording of the paragraph and the examples provided in order to illustrate the inconsistency of State practice were confusing, in that they seemed to indicate that the practice of Israel contrasted with that of Italy and the United Kingdom, when, in fact, it was virtually identical.

20. Mr. PELLET (Special Rapporteur) said that the inconsistency in State practice the paragraph was intended to illustrate was between the practice of the three States referred to in the first footnote to the paragraph, on the

one hand, and that of the two referred to in the second footnote, on the other. If that was unclear, the text of the reservations of Italy and the United Kingdom could be deleted from the first footnote, leaving only the reference to their source.

21. Mr. GAJA said that the text needed further clarification. As it currently read, the phrase “the other two States” appeared to refer to Italy and the United Kingdom, not to the Federal Republic of Germany and France, as intended. He proposed that, in the third sentence, the phrase “the other two States” should be replaced by “two other States”, followed by the names of those States.

22. Mr. HASSOUNA said that Sir Michael had raised a valid point. He agreed with Mr. Pellet’s suggestion to delete the text of the objections currently contained in the first footnote.

23. Sir Michael WOOD said that, in the third sentence, the first words “But whereas” should be replaced by “For example”, followed by the quoted material describing the of practice Israel. That, in turn, could be followed by a new sentence that would begin: “Two other States, the Federal Republic of Germany and France,”. That would make it clear that there were two distinct groups—one made up of three States that followed one practice, and a second one made up of two States that followed another practice.

24. Mr. PELLET (Special Rapporteur) said that, while the comments of Sir Michael had helped to clarify matters, he would suggest an alternative formulation for the third sentence that would eliminate the direct quotation and would read: “But whereas these three States regarded the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and were unable to consider Burundi as having validly acceded to the Convention until such time as the reservation was withdrawn, two other States that objected to the reservation by Burundi—the Federal Republic of Germany and France—did not include such a statement in their objections.” The first footnote would then consist only of the reference to the source where the objections could be found. The first two sentences of the paragraph would remain unchanged.

*Paragraph 18, as amended and with an amendment to the first footnote of the paragraph, was adopted.*

Paragraph (19)

*Paragraph (19) was adopted.*

Paragraph (20)

25. Sir Michael WOOD, referring to the second sentence, proposed to delete the phrase “Struck by this practice, which may seem inconsistent”, as it seemed excessive to state that the Commission had been astonished.

*Paragraph (20), as amended, was adopted.*

Paragraphs (21) to (30)

*Paragraphs (21) to (30) were adopted.*

Paragraph (31)

26. Sir Michael WOOD proposed that, in the second sentence, the phrase “serious consideration” should be replaced by “inclusion”, since that was, in effect, what the Commission was proposing.

27. Mr. PELLET (Special Rapporteur), agreeing with Sir Michael’s proposal, suggested that the beginning of the second sentence could be reformulated to read: “The Commission has included this position in the Guide to Practice since it offers a reasonable compromise”.

*Paragraph (31), as amended, was adopted.*

Paragraphs (32) to (34)

*Paragraphs (32) to (34) were adopted.*

Paragraph (35)

28. Sir Michael WOOD said that the first sentence of paragraph (35) seemed, perhaps, a little overcautious. The Commission should not emphasize that the positive presumption was not based on existing law, since it was, after all, supported by State practice. For that reason, the phrase “it is clear that” [“*sans aucun doute*”] should be deleted and the end of the sentence should read “nor probably of customary international law”.

*Paragraph (35), as amended, was adopted.*

Paragraph (36)

29. Sir Michael WOOD said that the quotation of Ryan Goodman was not particularly helpful and might perhaps be deleted.

30. Mr. PELLET (Special Rapporteur) said that even if the quotation, which he rather liked, was deleted from the commentary, it would still appear in his fifteenth report (A/CN.4/624 and Add.1–2, para. 179 [469]).

*Paragraph (36), as amended, was adopted.*

Paragraph (37)

31. Mr. NOLTE, noting that paragraph (37) concerned the relationship between the positive presumption and the reservations dialogue, said that the last sentence was somewhat surprising in that it stated that the goal might more readily be achieved if the reserving State or reserving international organization was deemed to be a party to the treaty. His position, which he would like to have seen reflected in the commentary, had been that a presumption that the author of an invalid reservation became a party to the treaty without the benefit of the reservation was not likely to facilitate the reservations dialogue, since such a dialogue might be regarded as unnecessary, if the parties concerned were fully bound by the treaty. If the premise of a positive presumption were accepted, it was doubtful that States would have any interest in discussing whether a reservation was valid.

32. Mr. PELLET (Special Rapporteur) said that he was quite prepared to reflect what was, after all, the view of a minority of Commission members in the commentary

and suggested that the sentence could begin “Although this point of view was challenged, the Commission considered that”.

33. Sir Michael WOOD said that the French wording, “*Cet objectif est plus facilement réalisable*”, was too definite. Something corresponding to the English words “This goal may well be more easily achieved” would convey the underlying idea better.

34. Mr. NOLTE said that he agreed with the new wording proposed by the Special Rapporteur, as amended by Sir Michael, which conveyed the idea that the issue had been controversial.

*Paragraph (37), as amended, was adopted.*

Paragraph (38)

35. Mr. NOLTE said that in the second sentence the presumption was described as “*pas irréfragable*”. It would be wiser to employ a positive rather than a negative formulation, as a double negative sometimes had different connotations than a positive. The English in the first set of brackets would then read: “which is rebuttable”. The phrase “fill the inevitable legal vacuum” should also be replaced with a more appropriate expression.

36. Sir Michael WOOD suggested the phrase “contribute to resolve the uncertainty”. He further proposed that, after the phrase in brackets “which may last several years”, the words “or indefinitely” should be inserted since no decision was usually taken on the nullity of the reservation. He wondered how best to convey the sense in English of the French verb “*s’avérer*”. In his opinion, it meant that nullity was established authoritatively by someone with the power to do so.

37. Mr. HASSOUNA agreed that “establish” was the correct meaning of “*s’avérer*”.

38. Mr. GAJA said that “ascertain” might be the right translation of “*s’avérer*”.

39. Mr. PELLET (Special Rapporteur) said that he was unconvinced that the term “*réfragable*” existed in French, the correct term would be “*présomption simple*”, but as the word “rebuttable” was commonly used in English he had tried to find a mirror concept in French. As the word “*réfragable*” was used elsewhere, he would employ it in paragraph (38), even if it led to protests from French speakers. He also agreed to replace “legal vacuum” with “uncertainty”. On the other hand, Sir Michael’s proposal regarding the insertion of the word “indefinitely” posed a problem, since the uncertainty usually came to an end, although many years might have elapsed before it did so. Logically it would be impossible to say “the author of the reservation has conducted itself” if the word “indefinitely” were inserted. He would prefer to keep the second phrase in brackets as it stood and to add a footnote stating that if no competent body reached a decision, the uncertainty could last indefinitely.

*Paragraph (38), as amended and completed by the addition of a footnote, was adopted.*

Paragraph (39)

40. Sir Michael WOOD said that the words “relative and” should be deleted from the phrase “relative and rebuttable presumption” because they did not mean much. The key idea was that the presumption was rebuttable. The word “*effectivement*” should likewise be deleted from the phrase “*effectivement entré en vigueur*” in the French text, as it had been removed elsewhere in the commentaries.

41. Mr. NOLTE said that the paragraph stated that the Commission adhered to the positive presumption. It would, however, be fair to indicate that this was the majority position. He therefore suggested that the first sentence should begin: “In the light of these considerations, the majority of the members of the Commission”. That rewording might also elicit some discussion by States on that key issue.

*Paragraph (39), as amended, was adopted.*

Paragraph (40)

42. Mr. NOLTE suggested that in the footnote the adjective “English-speaking” should be deleted.

*Paragraph (40), with the amendment to the footnote, was adopted.*

Paragraph (41)

43. Sir Michael WOOD said that the word “recommendation” should be replaced by the word “provision”. The expression “declared invalid” should probably be rendered as “ascertained to be invalid”, for the sake of consistency with paragraph (38). While it was elegant to say “Although certain members of the Commission found that proposal attractive”, it might be better to say simply that “It appeared necessary to certain members”. Lastly, it was a bit strong to say that it would be impossible to reconcile such a recommendation, or provision, with what was prescribed in the Vienna Convention. It would therefore be better to say “it would, perhaps, be difficult to reconcile”.

44. Mr. PELLET (Special Rapporteur) said that it was Mr. Hmoud who had urged the use of the term “recommendation”. As far as he knew, Mr. Hmoud had never suggested that the Commission draw up a guideline calling for particular action and what he had always had in mind was a recommendation to States. For that reason, it was rather disconcerting that Sir Michael wished to make the wording stronger. The phrase “*déclarée non valide*” was fine in French and “established to be invalid” would be acceptable in English. The word “attractive” [“*séduisant*”] might seem a trifle literary, but he had never thought it necessary to ease the conditions for the withdrawal from a treaty in the event that a reservation was declared invalid. “Difficult to reconcile” without the qualification of “perhaps” would be sufficient.

45. Mr. GAJA said that, since readers of the Guide to Practice might not know by heart the provisions of the Vienna Conventions, he would suggest that the end of the last sentence should be amended by placing a full stop after “law of reservations” and by starting a new sentence which would read: “It would be difficult to reconcile that proposal with the text of article 42 of the Vienna Conventions,

according to which ‘the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present Convention’; articles 54 and 56 of the Vienna Conventions confirm this point.”

46. Mr. HMOUD said that initially he had in fact proposed the inclusion in the draft guidelines of a provision on withdrawal, but the Drafting Committee had deemed it advisable to speak of a “recommendation”. It would be preferable to speak of “giving States the possibility of withdrawal” or “providing States with the option of withdrawal”, rather than “easing the conditions for withdrawal”, because there was a gap in the provisions of the Vienna Convention with regard to the effects of an invalid reservation. He was of the view that the gap could have been filled by providing the State which was the author of the invalid reservation with the possibility of withdrawal. The majority had not agreed, but that view should be accurately reflected.

47. Mr. Gaja’s suggestion that a quotation of article 42 of the Vienna Convention be included in the commentary would unduly lengthen the paragraph and would not solve the dilemma, because that article stated that withdrawal could take place only in accordance with the treaty or with the Convention, but the Convention had a gap in that respect. On balance, he was happy with the paragraph as it stood, without any additions, apart from changing the word “impossible” to “difficult” and changing the words “easing the conditions for withdrawal” to “giving the reserving State the possibility of withdrawal”.

48. Mr. NOLTE agreed with Sir Michael that the Commission had originally considered a provision rather than a recommendation.

49. Mr. HASSOUNA said that since Mr. Hmoud had originally intended that the Commission should make something much stronger than a “recommendation”, replacing the word “recommendation” with “formulation” would obviate the question of whether what the Commission was proposing was a recommendation or a provision. “Attractive” might not be quite the right term, perhaps “valid” would be more apt. Thirdly, he agreed that “impossible” should be replaced with “difficult”, but there was no need for the qualification “perhaps”—“difficult” would suffice.

50. Mr. PELLET (Special Rapporteur) suggested that, in order to explain the reasons behind the proposal made by Mr. Hmoud, in the first sentence, the words “recommendation ... that advised easing the conditions for withdrawal from a treaty” should be replaced by the phrase “provision ... recommending that additional options should be provided for withdrawal from a treaty”. The words “since the Vienna Conventions do not envisage such a situation” should be added at the end of the first sentence. In the second sentence, the words “certain members of the Commission found that proposal attractive” should be replaced by “that proposal had been supported by certain members of the Commission”. In the third sentence, the word “recommendation” should be replaced by “formulation”. The end of the sentence, following the words “difficult to reconcile”, should be replaced by the wording proposed by Mr. Gaja, which he endorsed.

51. Mr. HMOUD said that he endorsed the wording proposed by the Special Rapporteur, except that he was not in favour of Mr. Gaja’s proposed addition.

52. Mr. GAJA noted that several members of the Commission did not agree with Mr. Hmoud. The Vienna Convention contained a list of cases of withdrawal that could not be supplemented, as article 42 clearly indicated.

*Paragraph (41), with the amendments outlined by Mr. Pellet, was adopted.*

Paragraph (42)

53. Sir Michael WOOD suggested that in the first sentence, the words in the French text “*est délicat*” should be amended to read “*peut être délicat*”, with a corresponding change in English, and that in the second sentence, the words “in international society at the present stage” should be omitted from the quotation.

*Paragraph (42), as amended, was adopted.*

Paragraph (42) bis

54. Sir Michael WOOD proposed the addition of a new paragraph to describe briefly the thrust of the second paragraph of guideline 4.5.2. It would read: “The second paragraph of the guideline therefore provides that the intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, and then gives a non-exhaustive list of such factors.” It would then be clear that the following paragraphs discussed those factors.

55. Mr. PELLET (Special Rapporteur) said it would be sufficient simply to say that “several factors come into play, which are presented in a non-exhaustive list in the second paragraph”.

*The proposed paragraph (42) bis, as amended, was adopted.*

Paragraph (43)

*Paragraph (43) was adopted.*

Paragraph (44)

56. Sir Michael WOOD suggested that the word “attitude” should be replaced by “conduct”, as in the guideline.

*Paragraph (44), as amended, was adopted.*

Paragraph (45)

*Paragraph (45) was adopted.*

Paragraph (46)

57. Mr. NOLTE said that the paragraph briefly summarized one of the important points made during the debate. He had argued for the inclusion of the nature of the treaty among the factors for determining the intention of the author of a reservation, and he had the impression that others shared his view. A sentence should therefore be added, to read: “Some members of the Commission,

however, considered that the nature of the treaty should have explicitly been included, as an element of its object and purpose, in the list of factors to be taken into account when determining the intent of the author of the reservation.”

58. Mr. PELLET (Special Rapporteur) said it was true that the Commission had had a long discussion on the subject, and he had no objection to the inclusion of the sentence, on the understanding that it would be harmonized with the second footnote to the paragraph, which explained why the Commission had not ceded to Mr. Nolte’s argument.

*On that understanding, paragraph (46), as amended, was adopted.*

Paragraph (47)

59. Sir Michael WOOD proposed that the word “criteria” in the first sentence should be replaced by “factors” as in the first sentence in paragraph (48).

60. Mr. PELLET (Special Rapporteur) said he had no objection to that proposal, although the French language was apparently more amenable to elegant variation than English.

*Paragraph (47), as amended, was adopted.*

Paragraphs (48) to (50)

*Paragraphs (48) to (50) were adopted.*

*The commentary to guideline 4.5.2 [4.5.3], as amended, was adopted.*

*Commentary to guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation)*

Paragraphs (1) and (2)

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

Paragraph (3)

61. Mr. GAJA said that the final clause described one of the several ways in which objections were formulated when the validity of a reservation was being questioned: the objection precluded the treaty’s entry into force in its entirety in the author’s relations with the reserving State. Often, however, States did not specify that the treaty entered into force in its entirety, and that left the door open to various interpretations of their objection. He proposed that the words “in its entirety” be deleted, as they applied to some but not all of the objections in question.

62. Mr. PELLET (Special Rapporteur) said Mr. Gaja’s analysis was correct, but his solution was unsatisfactory: it would be better to add, at the end of the sentence, “and sometimes it remains silent on that point”.

63. Mr. GAJA said that he agreed with the Special Rapporteur’s approach but thought that the wording could be clearer. The point was that the State objecting to an invalid reservation but stating that the treaty nevertheless entered into force in its bilateral relations with the reserving State

sometimes did not specify whether it meant that the treaty in its entirety entered into force. Perhaps the Special Rapporteur could devise language to convey that idea more succinctly.

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

Paragraph (4)

64. Sir Michael WOOD, drawing attention to the first sentence, which stated that the jurisprudence of the ICJ “was not a model of consistency”, said that surely a more diplomatic formula could be found, something along the lines that the Court’s jurisprudence was developing on that point.

65. Mr. PELLET (Special Rapporteur) said that the statement was nothing but the truth: the Court’s jurisprudence was so inconsistent that it was practically useless.

66. Mr. NOLTE suggested the wording “was not entirely clear”, which was softer while still being slightly critical.

67. Mr. McRAE said that clarity was not the problem with the Court’s jurisprudence: the point was that it was not consistent.

68. Mr. GAJA proposed the phrase “does not appear to be entirely consistent”.

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

Paragraphs (5) to (13)

*Paragraphs (5) to (13) were adopted.*

Paragraph (14)

69. Mr. GAJA proposed that the third and fourth sentences should be deleted, as they blurred the distinction between objections to invalid reservations, which could be made at any time, and late objections to valid reservations that were subject to a 12-month deadline.

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

Paragraph (15)

*Paragraph (15) was adopted.*

*The commentary to guideline 4.5.3 [4.5.4], as amended, was adopted.*

*The meeting rose at 12.55 p.m.*

## 3078th MEETING

*Thursday, 5 August 2010, at 3.10 p.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu,