

Document:-
A/CN.4/2991

Summary record of the 2991st meeting

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

Extract from the Yearbook of the International Law Commission:-
2008, vol. I

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accident and the 1982 United Nations Convention on the Law of the Sea, but said that it was too vague. For the sake of consistency with earlier commentaries which had quoted specific articles of the Conventions they mentioned, she requested the Secretariat to specify the articles of those Conventions which established an obligation of speedy notification.

Paragraph (3) was adopted on the understanding that the Secretariat would insert a reference to the relevant articles.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

90. Mr. GAJA said that, according to the first sentence, paragraph 2 (b) of draft article 17 “anticipates a corollary obligation of assistance by all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency”, yet paragraph 2 dealt only with the obligation of the State in whose territory the emergency arose. The sentence should therefore be deleted, especially as the need for States to cooperate was mentioned later in the commentary. Moreover, as there was no commentary on paragraph 4 of the draft article, and since some reference needed to be made to it, he proposed that paragraph (5) of the commentary should be moved to the end of the commentary and amended to read: “Paragraph 4 states an obligation of assistance by all the States ...”.

91. Mr. McRAE said that while he agreed with moving paragraph (5), paragraphs (6) and (7) really related to the obligation of notification. It would therefore be illogical to move paragraph (5) and to leave paragraphs (6) and (7) standing alone without any link.

92. Mr. GAJA said that paragraphs (6), (7) and (8) of the commentary all dealt with notification, which was the subject of paragraph 2 (a) of draft guideline 17. The position of the paragraphs of the commentary was therefore logical.

93. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to move paragraph (5) to the end of the commentary to draft article 17.

It was so decided.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted.

The commentary to draft article 17 as a whole, as amended, was adopted.

Commentary to draft article 18 (Protection in time of armed conflict)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft article 18, as a whole was adopted.

Commentary to draft article 19 (Data and information vital to national defence or security)

Paragraph (1)

Paragraph (1) was adopted with a minor editorial amendment to the English text.

Paragraph (2)

94. Mr. GAJA said that, for the sake of greater consistency with the text of the draft article itself, the last sentence of paragraph (2) should be amended to read: “The exception created by draft article 19 does not affect obligations that do not relate to the transmission of data and information.”

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with minor editorial amendments to the English text.

The commentary to draft article 19 as a whole, as amended, was adopted.

The meeting rose at 6 p.m.

2991st MEETING

Tuesday, 5 August 2008, at 10.05 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. 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 IV. *Shared natural resources (concluded)* (A/CN.4/L.731 and Add.1–2)

E. *Draft articles on the law of transboundary aquifers* (A/CN.4/L.731/Add.2)

PART THREE. PROTECTION, PRESERVATION AND MANAGEMENT (concluded)

Commentary to draft article 15 (Planned activities) (concluded)

Paragraph (3) (concluded)

1. The CHAIRPERSON invited Ms. Jacobsson to read out the sentence she was proposing for inclusion at the end of paragraph (3) of the commentary to article 15 of the draft articles on transboundary aquifers.

2. Ms. JACOBSSON said that the sentence read: “Furthermore, article 8 of the Protocol on Environmental Protection to the Antarctic Treaty provides that all activities in the Antarctic Treaty area shall be subject to environmental impact assessment procedures.”

Paragraph (3), as amended, was adopted.

The commentary to draft article 15, as amended, was adopted.

C. Recommendation of the Commission

3. The CHAIRPERSON said that the text prepared by the Special Rapporteur following consultations with the members of the Commission on the Commission’s recommendation to the General Assembly read:

“At its 2991st meeting, on 5 August 2008, the Commission decided, in accordance with Article 23 of its Statute, to recommend to the General Assembly:

“(a) to take note of the draft articles on the law of transboundary aquifers in a resolution, and to annex these articles to the resolution;

“(b) to recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles;

“(c) to also consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.”

The draft recommendation was adopted.

Section C was adopted.

4. Mr. PELLET said that he would have liked the words “and its technicality” to be added after the words “the importance of the topic” in subparagraph (c) of the recommendation.

E. Draft articles on the law of transboundary aquifers (concluded) (A/CN.4/L.731/Add.2)

*General commentary (concluded)**

*Paragraph (3) (concluded)**

5. The CHAIRPERSON said that, now that the draft recommendation to the General Assembly had been adopted, the members of the Commission should consider paragraph (3) of the general commentary, which had been left pending.

6. Mr. YAMADA (Special Rapporteur) said that the end of the fourth sentence, starting with the words “and (b)”, and the beginning of the fifth sentence should be amended to read: “considering, at a later stage, the elaboration of a convention on the basis of the draft articles. Since there would be some time before a decision is made on the second step, the Commission decided to refrain from...”

7. Mr. WAKO said that he agreed with the Special Rapporteur’s proposal, but, in his view, subparagraph (a) of the fourth sentence should also be amended, by using the terms contained in subparagraph (b) of the recommendation the Commission had just adopted, to read: “to take note of the draft articles, which would be annexed to its resolution, and to recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles”.

8. After a discussion in which Mr. YAMADA (Special Rapporteur), Mr. SABOIA, Mr. WISNUMURTI and Mr. VALENCIA-OSPINA took part, the CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt Mr. Wako’s proposal.

It was so decided.

The general commentary, as a whole, as amended, was adopted.

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

D. Tribute to the Special Rapporteur

9. The CHAIRPERSON invited the members of the Commission to adopt a resolution paying tribute to the Special Rapporteur, Mr. Chusei Yamada, the text of which would read:

“At its 2991st meeting, on 5 August 2008, the International Law Commission, having adopted the draft articles on the law of transboundary aquifers, adopted the following resolution by acclamation:

“The International Law Commission,

“Having adopted the draft articles on the law of transboundary aquifers,

“Expresses to the Special Rapporteur, Mr. Chusei Yamada, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on the law of transboundary aquifers. The Commission also acknowledges the untiring efforts of the Special Rapporteur during the development of the topic in organizing various briefings by experts on groundwaters from the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization, the Economic Commission for Europe and the International Association of Hydrogeologists. In this connection, the Commission also notes that the International Association of Hydrogeologists honoured the Special Rapporteur with a distinguished associate membership award for his outstanding contribution to the field.”

The resolution was adopted by acclamation.

10. Ms. ESCARAMEIA, supported by Mr. HASSOUNA and Mr. GALICKI, proposed that the following sentence should be added to the resolution: “The Commission also expressed its deep appreciation to Mr. Enrique Candiotti

* Resumed from the 2989th meeting.

as Chairperson for several years of the Working Group on shared natural resources for his significant contribution to the work on the topic.”

The proposed text was adopted by acclamation.

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

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

11. The CHAIRPERSON invited the members of the Commission to consider chapter VI, section A of the draft report on reservations to treaties.

A. Introduction (A/CN.4/L.733 and Corr.1)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

12. Mr. PELLET (Special Rapporteur) proposed that the words “31 July 2003” in footnote 6 should be replaced by the words “31 July 2008”.

Paragraph 2, as amended, was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Section A, as amended, was adopted.

13. The CHAIRPERSON invited the members of the Commission to consider the text of the draft guidelines and commentaries thereto, as adopted by the Commission at its sixtieth session.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (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 (A/CN.4/L.733/Add.3)

Commentary to draft guideline 2.1.6 (Procedure for communication of reservations)

14. Mr. PELLET (Special Rapporteur) said he did not think that it was really necessary to indicate the number of the corresponding preliminary draft guideline in square brackets after the number of the draft guideline under consideration. That practice, which was helpful during the year when the draft guidelines were being discussed, did not serve much purpose once they had been adopted. He therefore proposed that the numbering in square brackets in document A/CN.4/L.733/Add.3 should be deleted.

15. Ms. ARSANJANI (Secretary to the Commission) said that the purpose of the numbering in square brackets was to refer to the draft guidelines initially proposed by the special rapporteurs. That procedure was used only for texts adopted on first reading and, if the numbering in square brackets was deleted in the chapter on reservations to treaties, the same would have to be done for the other chapters of the report, especially the chapter on responsibility of international organizations.

16. Ms. JACOBSSON said that she could understand the Special Rapporteur’s proposal, but the numbering in square brackets was particularly helpful for practitioners.

17. Mr. PELLET (Special Rapporteur) said that his proposal was not designed to change practice with regard to the current year’s reports, which would continue to indicate in square brackets the numbering he had proposed so that the reader could refer to his views. The numbering in square brackets should, however, be deleted in the recapitulative chapters.

18. The CHAIRPERSON suggested that the question should be left pending and that the Commission should come back to it at a later meeting.

It was so decided.

Paragraphs (1) to (23)

Paragraphs (1) to (23) were adopted.

The commentary to draft guideline 2.1.6 was adopted.

Commentary to draft guideline 2.1.9 (Statement of reasons)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

19. Mr. McRAE, supported by Mr. PELLET, proposed that, in the last sentence, the word “However” should be deleted, because it introduced an unnecessary shade of meaning.

Paragraph (3), as amended, was adopted.

20. Mr. PELLET (Special Rapporteur), referring to the case where the Commission had adopted a draft guideline in the context of draft articles, said that he would like it to indicate whether the word “draft” should continue to be used or whether the guideline was now part of a more general set of draft articles. In his opinion, it would be better to refer to “articles” and “guidelines”. The Commission seemed to be in the habit of keeping the word “draft”, but that was unnecessary because what was being discussed could only be draft articles and guidelines. It should clear up that point once and for all.

21. Mr. SABOIA said that he agreed with the Special Rapporteur. The Commission might restrict the use of the word “draft” to the title of the topic and the introductory chapter and then simply use the words “article” and “guideline”. That would be more practical and prevent repetition in the text of the commentaries.

22. Mr. VÁZQUEZ-BERMÚDEZ said that the Commission never submitted anything but “draft” provisions to the General Assembly, which was, ultimately, the only body competent to adopt them.

23. Mr. HASSOUNA proposed that, in order to meet the Special Rapporteur’s concern, the Commission should recall in a footnote that, from a legal and technical point of view, it was dealing with “draft” guidelines and that it was using the word “guidelines” only to avoid repetition.

24. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Saboia and Mr. Hassouna. Since the texts prepared by the Commission were drafts, it would be reasonable to say that they contained guidelines or articles.

25. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Saboia and Mr. Hassouna.

It was so decided.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

26. Mr. PELLET (Special Rapporteur) proposed that the word “très” in the French text of the sentence preceding the quotation should be deleted.

Paragraph (7), as amended, was adopted.

Paragraph (8)

27. Mr. PELLET (Special Rapporteur) said that the words “draft guideline 2.1.6” should be amended to read “draft guideline 2.1.9”.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

The commentary to draft guideline 2.1.9, as amended, was adopted.

2.6 Formulation of objections

Commentary to draft guideline 2.6.5 (Author)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

28. Mr. NOLTE said that the term “declarations”, as explained in the penultimate sentence, was not sufficiently clear. He proposed that the words “, which do not produce the same legal effects as an objection made by a contracting State or a contracting international organization,” should be replaced by the words “that are so far merely entitled to become parties to the treaty”.

29. Mr. PELLET (Special Rapporteur) said that the end of the last sentence should be amended to read: “in the case of an open treaty, the parties to such a treaty might not have been aware of certain objections”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

30. Mr. PELLET (Special Rapporteur) proposed that the words “and organizations” should be added after the word “States” in the fourth and fifth sentences.

Paragraph (4), as amended, was adopted.

Paragraph (5)

31. Mr. HMOUD proposed that the following sentence should be added at the end of paragraph (5): “However, it is noted that this language was left out in the 1969 Vienna Convention on the Law of Treaties in relation to objections.”

32. Mr. PELLET (Special Rapporteur) said that, in order to ensure the consistency of paragraph (5), the sentence proposed by Mr. Hmoud should be added in a footnote or at the end of paragraph (3).

33. Mr. GAJA suggested that the last two sentences and the sentence proposed by Mr. Hmoud should be included in a footnote.

34. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission adopted Mr. Gaja’s proposal.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

The commentary to draft guideline 2.6.5, as amended, was adopted.

Commentary to draft guideline 2.6.6 (Joint formulation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

35. Mr. PELLET (Special Rapporteur) said that, in the first line, the words “draft guideline 2.6.1” should be replaced by the words “draft guideline 2.6.6”.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 2.6.6, as amended, was adopted.

Commentary to draft guideline 2.6.7 (Written form)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

36. Mr. PELLET (Special Rapporteur) said that, in the second sentence, the words “which dealt entirely with objections to reservations” should be deleted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft guideline 2.6.7, as amended, was adopted.

Commentary to draft guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty)

Paragraph (1)

37. Mr. PELLET (Special Rapporteur) said that, at the end of the first sentence, the words “or organization” should be added after the words “reserving State”, since a reservation could also be formulated by an international organization.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft guideline 2.6.8, as amended, was adopted.

Commentary to draft guideline 2.6.9 (Procedure for the formulation of objections)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft guideline 2.6.9 was adopted.

Commentary to draft guideline 2.6.10 (Statement of reasons)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

38. Mr. GAJA proposed that the beginning of the second sentence, up to the word “nevertheless”, should be deleted because the State whose opinion was cited in the footnote did not consider that such a legal obligation existed, and it would also be rather strange to raise such a question without replying to it somewhere in the commentary to the draft guidelines. Secondly, in the French text of the footnote, the words “avec l’objet et le but du traité” should be added after the word “incompatibles”. The end of the paragraph was not very clear and he wondered whether the penultimate sentence might not be deleted. He also proposed that the words “even necessary” in the last sentence should be deleted.

39. Mr. NOLTE, supported by Ms. ESCARAMEIA, said that he took the opinion of the Netherlands, as described in the footnote, to mean that that country considered a legal obligation to be possible. In any event, if the Commission had decided to refer to a question raised by a State, there was no reason to delete the beginning of the second sentence, as Mr. Gaja had proposed.

40. Mr. McRAE said that, in the footnote, the words “this is also the Commission’s position” were ambiguous; it was not clear to which position they referred.

41. Mr. SABOIA said that he agreed with the comments by Mr. Nolte and Ms. Escarameia. The proposal in question was important and the paragraph’s logic required it to be retained.

42. Mr. PELLET (Special Rapporteur) said that, in view of Mr. Gaja’s concern, the proposal under consideration should be retained, but the beginning should be amended to read: “Leaving aside the question whether there might be a legal obligation for States”. That issue would be dealt with somewhere in the 1,000 or so pages that would make up the commentary to the draft guidelines. In the French text of the footnote, the words “avec l’objet et le but du traité” could be added after the word “incompatibles”. With regard to Mr. McRae’s comment, the proposal in question was indeed ambiguous and it could be deleted without any problem because he would come back to the matter later. Mr. Gaja’s concern could be met by reversing the order of the last two sentences and deleting the words “even necessary” in the last sentence, as suggested.

43. Mr. WAKO pointed out that the words “the question” at the beginning of the first and second sentences did not refer to the same question. He therefore proposed that, in the first sentence, they should be replaced by the words “the problem”.

Paragraph (3), as amended by the Special Rapporteur and Mr. Wako, was adopted.

Paragraph (4)

44. Mr. GAJA proposed that, for the sake of clarity, the words “the reservation of Turkey” in the second sentence should be replaced by the words “the reservation of Turkey to its declaration of acceptance of the Court’s jurisdiction”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to draft guideline 2.6.10, as amended, was adopted.

Draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation)

45. Mr. PELLET (Special Rapporteur), referring to the French text of the title, recalled that the Drafting Committee had decided on the words “Non-exigence de la confirmation”.

46. Mr. CAFLISCH, supported by Mr. HASSOUNA, said that the words “Absence d’exigence de la confirmation” would be more elegant. He would nevertheless go along with the majority opinion.

47. Mr. PELLET (Special Rapporteur) said that the adoption of Mr. Cafilisch’s proposal would require far too many changes in the rest of the text and he strongly recommended that the Commission bring the French text into line with the English text, which referred to “Non-requirement”. He assured Mr. Cafilisch that his position would be duly reflected.

The title of draft guideline 2.6.11, as amended by the Special Rapporteur, was adopted.

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*)