

Document:-  
**A/CN.4/3012**

**Summary record of the 3012th meeting**

Topic:  
**<multiple topics>**

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Special Rapporteur that it was also unnecessary to state the reasons for an interpretative declaration because of the explanatory nature of the latter. However, he was in favour of supplying reasons for reactions to interpretative declarations and consequently thought that draft guideline 2.9.6 was of value.

40. The two draft guidelines contained in the fourteenth report should be referred to the Drafting Committee.

41. Mr. CAFLISCH said that he agreed with the view expressed at the sixth inter-committee meeting of the human rights treaty bodies by the working group on reservations in its recommendation No. 7, which was reproduced in paragraph 53 of the Special Rapporteur's report, although, like the Special Rapporteur, he could do without the word "incontrovertibly", as something was either established or it was not.

42. Turning to paragraph 69 of the report, he said that he fully agreed with the Special Rapporteur that there was no need to specify the form that an interpretative declaration should take, or the procedure by which it should be communicated, or to indicate the reason that it was made. However, he also concurred with the Special Rapporteur that interpretative declarations should be made in writing.

43. In draft guideline 2.4.0 he would prefer the deletion of "whenever possible", since the use of the word "should" was sufficient to convey the idea that there was no legal obligation.

44. That said, he considered that draft guidelines 2.4.0 and 2.4.3 *bis* could be referred to the Drafting Committee.

*The meeting rose at 11.20 a.m.*

### 3012th MEETING

*Friday, 29 May 2009, at 10.05 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present:* Mr. Caflich, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

#### **Tribute to the memory of John Alan Beesley, former member of the Commission**

1. The CHAIRPERSON said that he had received the sad news that John Alan Beesley, a member of the Commission from 1987 to 1991, had passed away. A distinguished diplomat and eminent jurist, he had spent a good

part of his career at the Department of External Affairs of Canada. It was unusual, especially in the modern era, to be both a diplomat and a jurist specialized in international law, but John Alan Beesley had combined both activities with great skill, as evidenced by the many awards and honours he had received in the course of his career. It would be recalled that he had negotiated a number of important agreements on behalf of the Government of Canada, which had also benefited from his expertise in various fields, in particular the law of the sea.

*At the invitation of the Chairperson, the members of the Commission observed a minute of silence.*

2. Mr. PELLET recalled that John Alan Beesley, as a high-ranking diplomat and legal counsel of the Government of Canada, had served as head of delegation in many international negotiations, notably in the area of disarmament. He would be remembered in particular for his participation in the work of the third United Nations Conference on the Law of the Sea. In the Commission, the quality of his contributions to debate, which were always rich in specific examples drawn from his own experience, had also been outstanding. Particularly memorable was a statement he had made during the Commission's work on State responsibility in which he had stressed that the Commission risked getting bogged down in past case law, whereas its mandate was to codify rules for the future, not necessarily in an idealistic sense but in keeping with actual developments in the modern-day world.<sup>155</sup> Pragmatic and prudent but nonetheless forward-looking, John Alan Beesley had also been a pioneer in environmental law.

3. At a sad time when the field of international law was losing some of its most illustrious representatives, he would also like to pay tribute to memory of one who, although not a member of the Commission, had been the conscience of contemporary international law and a close friend, namely, Thomas Franck, who had passed away just two days earlier.

4. Mr. DUGARD said that he would like to join in paying tribute to the memory of Thomas Franck, who had been a distinguished professor of international law at New York University and had served as President of the American Society of International Law and an arbitrator and judge *ad hoc* of the International Court of Justice. As Mr. Pellet had rightly said, he had been the conscience of international law. His writings were characterized by independence of thought, wisdom and clarity of language. His passing was a great loss to international law.

5. Mr. McRAE recalled that John Alan Beesley had considered international law a key instrument of human progress, one that must be adapted to meet new needs. For that reason, he had been more interested in progressive development of international law than in codification. He had followed closely the work of the Commission on the law of the non-navigational uses of international watercourses and on international liability for injurious consequences arising out of acts not prohibited by international law and had advocated turning the "soft law" in the

<sup>155</sup> *Yearbook ... 1990*, vol. I, 2173rd meeting, p. 184, para. 63.

outcome of the United Nations Conference on the Human Environment<sup>156</sup> (Stockholm Declaration) into “hard law”. As both diplomat and lawyer, he had seen his role as defending the interests of his Government in accordance with international law and acting when necessary to promote changes in that law. He had played a central role in Canada’s assertion of environmental jurisdiction in the Arctic in 1970 and had led Canadian delegations at the Stockholm Conference and the conference resulting in the International Convention for the Prevention of Pollution from Ships, 1973 (“MARPOL Convention”) in their efforts to gain international acceptance of that position. Those efforts had been crowned with success when the provisions of what became articles 2, 3 and 4 of the United Nations Convention on the Law of the Sea had been adopted. At the third United Nations Conference on the Law of the Sea, for which he had served as Chairperson of the Drafting Committee, his single-minded approach, particularly on environmental issues, had not always been universally appreciated, but some believed that, thanks to his energy and skill, he had been a key contributor to the success of the Conference, one of the most complex exercises in multilateral treaty-making ever undertaken. That record of service had gained him his election to the Commission by a wide margin the first time he had stood as a candidate.

**Reservations to treaties (continued) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)**

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL  
RAPPORTEUR (continued)

6. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2) and asked the Special Rapporteur, Mr. Pellet, to summarize the debate.

7. Mr. PELLET (Special Rapporteur) said that paragraph 54 of his report, in which he had expressed his cautious approval of the position of the treaty bodies, which was somewhat more nuanced than their earlier stance, as to the consequences of the formulation of an invalid reservation, had attracted some pointed, though few, comments. Ms. Escarameia had wanted to know why the Special Rapporteur did not fully support the new position of the treaty bodies, since the presumption in paragraph 7 of the recommendations of the working group on reservations to the sixth inter-committee meeting of human rights treaty bodies<sup>157</sup> was rebuttable. That was in fact the case, but the presumption was so narrowly rebuttable that a proper balance had not yet been achieved. Greater caution was called for in that regard, as Mr. Fomba had rightly stressed, and, as Mr. Cafilisch had remarked, the problem lay in the word “incontrovertibly”, which was too strong.

8. With regard to paragraph 64 of his report, Ms. Escarameia had asked whether CAHDI, in the context of its operation as European Observatory of Reservations to International Treaties, was recommending to the States members of the Council of Europe that they should object to certain reservations after the expiration of the one-year limit that applied in principle. That was in fact the case, and the Observatory was fully aware of what it was doing: even while noting that the one-year limit had passed, it still recommended that States should object. In consequence, the Commission should avoid ruling out late objections, and it might be better to be less non-committal in draft guideline 2.6.15 (Late objections); that point should perhaps be considered on second reading.

9. He did not share Mr. Melescanu’s view that the position expressed by the ICJ in its judgment of 3 February 2009 (*Maritime Delimitation in the Black Sea*) with regard to interpretative declaration of Romania on article 121 (Regime of islands) of the United Nations Convention on the Law of the Sea had dealt a fatal blow to the idea of closely aligning the regime of interpretative declarations with that of reservations. It was true that the Commission was posing the same questions about reservations and interpretative declarations, but it was answering them in quite a different way. For example, silence by one of the parties with respect to a reservation surely did not have the same effect as silence with respect to a declaration, and the Guide to Practice did not claim otherwise. As Mr. Gaja had pointed out, interpretative declarations actually bore little similarity to reservations, apart from the fact that both were declarations in respect of a treaty. In any case, there was no reason to become polarized over a phrase buried in a long judgment, since in other cases the Court had stressed the importance it accorded to States’ interpretations of treaties. With his customary common sense, Mr. Melescanu had said that it was unimportant to determine whether an interpretative declaration was valid if in any case it had no effect, and that might be true in practice. An act would, of course, have no effect if it was not valid, but one could not determine that independently of the legal effects that its author purported to produce. That was the difference between the logic of validity and the logic of opposability. Moreover, the distinction was consistent with the plan the Commission had adopted for the Guide to Practice. Even if an interpretative declaration did not produce the effect anticipated by its author with regard to the other parties, it was by no means clear that the interpretative declaration would not have an effect with regard to its author. In the above-mentioned case, the Court did, of course, hold that the declaration of Romania had no effect with regard to Ukraine, and it did not take it into account in arriving at its judgment (although no conclusion can be drawn from that, since it did not interpret article 121 of the United Nations Convention on the Law of the Sea), but it is not at all certain that it would have come to a similar conclusion if it had had to examine the effects produced by the declaration with regard to Romania itself.

10. As Ms. Escarameia had rightly pointed out in relation to draft guideline 2.4.3 *bis* (Communication of interpretative declarations), interpretative declarations could be invalid if the treaty prohibited any interpretative declaration or some specified types of interpretative

<sup>156</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), Part One, chap. I.

<sup>157</sup> See footnote 139 above.

declarations. Examples were scarce, but some did exist, as was indicated in the second part of his fourteenth report (paras. 131–133), an advance copy of which had been circulated in French only. On the other hand, he was less convinced by the argument that, when a State put forward an interpretation that differed from a definition set forth in the treaty, its declaration was invalid. In such a case, the declaration was merely incorrect, which was quite a different problem.

11. It was true, nonetheless, that an interpretative declaration could, in fact, be invalid, and that raised the question of whether draft guideline 2.4.3 *bis* should refer to guideline 2.1.8 (Procedure in case of manifestly invalid reservations), as Ms. Escarameia and Mr. Gaja had proposed, or should not refer to it, as Mr. Fomba and Mr. McRae seemed to prefer. Without having a clear-cut position on the matter, the Special Rapporteur continued to lean towards not referring to guideline 2.1.8, since the hypothesis was academic and the question was of secondary importance. The Commission could refer the issue to the Drafting Committee. On the other hand, the Special Rapporteur did not share the view of Mr. McRae that draft guideline 2.4.3 *bis* should not refer to guideline 2.1.7 (Functions of depositaries); he did not see why the depositary could not, or should not, exercise the same functions, *mutatis mutandis*—that of a careful go-between—in relation to interpretative declarations, as it did in relation to reservations. That said, he had no objection to having the Drafting Committee debate the matter. On the other hand, he had far greater reservations about another proposal by Ms. Escarameia to insert a reference to draft guideline 2.1.9 (Statement of reasons) in draft guideline 2.4.3 *bis*, and he would be totally opposed to the idea if Ms. Escarameia and Mr. McRae agreed, as it seemed they would, despite some hesitation on the latter's part, that a separate draft guideline could be adopted on the statement of reasons for interpretative declarations.

12. On that last point, he did not have a firm opinion. He was not entirely convinced by the example given by Ms. Escarameia of the interpretative declaration formulated by the United States concerning intent in relation to genocide. However, he agreed with Mr. McRae that in some cases it would be useful to know whether a declaration had been inspired by the *travaux préparatoires*, or by a desire to be consistent with previous practice or by problems arising out of domestic law, and States did often justify their interpretation by considerations of that kind. On the other hand, Mr. Caffisch and Mr. Fomba had expressed themselves clearly as being in favour of omitting such a guideline, while Mr. Melescanu seemed to doubt that it would be useful. He himself was still not convinced that there was a need for a guideline recommending the statement of reasons for interpretative declarations. That said, since his ideas on the matter were not fixed where no decision of principle was concerned, he was willing to draft such a guideline if the Commission wished him to do so, and he proposed that the Commission should take an indicative vote in order to reach a decision.

13. To return to draft guideline 2.4.3 *bis* and to Ms. Escarameia's proposal to reverse the wording by making draft guidelines 2.1.5 and those following the subject

of the sentence, the Drafting Committee could consider that suggestion, making sure that the style of the draft guideline was more or less consistent with that of similar draft guidelines already adopted. Mr. Caffisch wished to delete the phrase “whenever possible”, which appeared in both draft guidelines 2.4.3 *bis* and 2.4.0 as proposed by the Special Rapporteur. The Drafting Committee could consider that suggestion, bearing in mind that the same phrase in French (“*autant que possible*”; rendered as “to the extent possible” in English) had been used only in draft guidelines 2.1.9 and 2.6.10, already adopted, which concerned the statement of reasons. With regard to draft guideline 2.4.0, Ms. Escarameia wanted the commentary to explain that an interpretative declaration, even when formulated orally, could produce effects—that would be done—and in consequence wished to amend the title of the guideline to read: “Form of interpretative declarations”. The Special Rapporteur hoped that the Drafting Committee would accept that excellent proposal.

14. Since all those who had spoken had been in favour of referring the draft guidelines to the Drafting Committee, the Special Rapporteur hoped that the Commission would agree. Lastly, he hoped that the Commission would agree to the publication of the study done by the Secretariat on reservations to treaties in the context of the succession of States, as Mr. Melescanu had requested; on the basis of that study he proposed to draft some guidelines with commentaries, if possible by the time the session resumed.

15. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft guidelines 2.4.0 and 2.4.3 *bis* to the Drafting Committee.

*It was so decided.*

*Following an indicative vote, the Commission decided not to take up the proposal to have the Special Rapporteur on reservations to treaties draft an additional guideline on the statement of reasons for interpretative declarations.*

16. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission approved the Special Rapporteur's request that the study by the Secretariat on reservations to treaties in the context of the succession of States should be published in all official languages as a document of the Commission.

*It was so decided.*

#### **Organization of the work of the session (continued)\***

[Agenda item 1]

17. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to appoint Mr. Caffisch the new Special Rapporteur for the topic “Effects of armed conflicts on treaties”.

*It was so decided.*

\* Resumed from the 3007th meeting.

18. The CHAIRPERSON said that, following consultations, and if he heard no objection, he would take it that Mr. Nolte would chair the Study Group on the topic "Treaties over time" and that Mr. McRae and Mr. Perera would co-chair the Study Group on the topic "The most-favoured-nation clause".

*It was so decided.*

*The meeting rose at 10.55 a.m.*

### 3013th MEETING

*Tuesday, 2 June 2009, at 10.10 a.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vascianne, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

#### Organization of the work of the session (*concluded*)

[Agenda item 1]

1. Mr. NOLTE (Chairperson of the Study Group on Treaties over time) announced that the Study Group would be composed of the following members: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianne, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

2. Mr. McRAE (Chairperson of the Study Group on The most-favoured-nation clause) announced that the Study Group would be composed of the following members: Mr. Cafilisch, Mr. Candioti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianne, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

3. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) announced that the working group would be composed of the following members: Mr. Cafilisch, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianne, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

*The meeting rose at 10.20 a.m.*

### 3014th MEETING

*Friday, 5 June 2009, at 10.05 a.m.*

*Chairperson:* Mr. Ernest PETRIĆ

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianne, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

#### Responsibility of international organizations (*continued*)\* (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1

[Agenda item 4]

#### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the draft articles on responsibility of international organizations provisionally adopted by the Drafting Committee and contained in document A/CN.4/L.743 and Add.1.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) said that, at its 3009th meeting on 22 May 2009, the Commission had referred to the Drafting Committee the six new draft articles proposed by the Special Rapporteur in his seventh report, namely draft articles 15 *bis*, 19 and 61 to 64. It had also referred a proposal made by the Special Rapporteur to restructure those draft articles and to amend or revise seven draft articles which had already been provisionally adopted, in other words draft articles: 2; 4, paragraph 2; 8; 15, paragraph 2 (*b*); 18; 28, paragraph 1, and 55.

3. The Drafting Committee had completed its consideration of all the draft articles referred to it in six meetings on 25, 26 and 27 May and 2 June 2009. The structure of the draft articles and draft articles 2, 4, paragraph 2, 8, 15, paragraph 2 (*b*), 15 *bis*, 18, 19 and 55, as contained in the Drafting Committee's report, would be introduced at the current meeting, while the Drafting Committee's conclusions on the other draft articles would be presented during the second part of the session.

4. The Commission, meeting in plenary session, had agreed to the restructuring proposed by the Special Rapporteur in his seventh report. The Drafting Committee had endorsed that proposal on the understanding that, once it had finished its consideration of the topic, the general structure and position of the draft articles could be reviewed in order to ensure the consistency of the final text to be adopted at first reading.

\* Resumed from the 3009th meeting.