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Summary record of the 3069th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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3. Mr. McRAE (Chairperson of the Drafting Committee) said that in 2007 the Commission had referred to the Drafting Committee draft articles 1 and 2, as proposed by the Special Rapporteur in his second report³²² and subsequently revised in the light of the debate,³²³ as well as draft articles 3 to 7, which had been contained in the Special Rapporteur's third report.³²⁴ In 2007 and 2008, the Drafting Committee had provisionally adopted draft articles 1 and 2, entitled "Scope" and "Use of terms", respectively, although it had recognized the need to revisit certain questions at a later stage. In 2008, it had also provisionally adopted draft article 3, entitled "Right to expulsion"³²⁵ and, in 2009, it had provisionally adopted draft articles 5, 6 and 7 on refugees, stateless persons and the issue of collective expulsion.³²⁶ On the other hand, it had been unable to agree on a text for the proposed draft article 4 concerning non-expulsion by a State of its nationals.

4. At the current session, the Drafting Committee had held eight meetings on 7, 12 and 14 May and on 8, 9, 12 and 13 July. During those meetings, it had considered a set of draft articles on the protection of the human rights of persons who had been or were being expelled, which had been referred to it during the first part of the session³²⁷ and which had been restructured in the light of comments made during the plenary debate at the previous session.³²⁸ The Drafting Committee's work on those draft articles had been very productive. In that connection, he wished to thank the Special Rapporteur for his cooperation and the efficient guidance which he had given to the Committee. He also thanked the members of the Drafting Committee for their active participation and contributions and the secretariat for its valuable assistance.

5. The Drafting Committee had provisionally adopted eight draft articles,³²⁹ namely: draft article 8, entitled "Obligation to respect the human dignity and human rights of persons subject to expulsion", which amalgamated the draft articles 8 and 9 which had been referred to the Committee; draft article 9, entitled "Obligation not to discriminate", in which ethnic origin and other grounds impermissible under international law had been added to the list of prohibited grounds; draft article 10, entitled "Obligation to protect the right to life of persons subject to expulsion"; draft article 11, entitled "Prohibition of torture or cruel, inhuman or degrading treatment or punishment"; draft article 12, entitled "Obligation to respect the right to family life"; draft article 13, entitled "Vulnerable persons", which covered children, older persons, persons with disabilities, pregnant women and other vulnerable persons subject to expulsion; draft article 14, entitled

"Obligation not to expel a person to a State where his or her life or freedom would be threatened", which covered not only threats based on the discriminatory grounds enumerated in draft article 9, but also the threat resulting from the imposition of the death penalty, or the execution of a death sentence which had already been passed in the State of destination, and, lastly, draft article 15, entitled "Obligation not to expel a person to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

6. In keeping with the practice followed in 2007, 2008 and 2009 in respect of the topic, the Drafting Committee had decided that the draft articles provisionally adopted in 2010 would remain with the Drafting Committee. In principle, they would be presented to the Commission for adoption at its following session, together with the draft articles adopted at previous sessions and any draft article that would be adopted in 2011. At that point, all the draft articles would be introduced in detail.

The meeting rose at 10.10 a.m.

3069th MEETING

Tuesday, 27 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

Reservations to treaties (*concluded*)^{*} (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)^{**}

1. Mr. McRAE (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 3.3.3 and 3.3.4, and draft guidelines 4.5 to 4.7.3, provisionally adopted by the Drafting Committee in the course of three meetings held on 20, 21 and 22 July 2010, as contained in document A/CN.4/L.760/Add.3, which read:

3.3.3 *Effect of individual acceptance of an impermissible reservation*

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation.

^{*} Resumed from the 3067th meeting.

^{**} Resumed from the 3061st meeting.

³²² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

³²³ *Yearbook ... 2007*, vol. II (Part Two), p. 61, para. 188, and p. 68, para. 258, footnotes 326–327.

³²⁴ See footnote 25 above.

³²⁵ *Yearbook ... 2008*, vol. I, 2989th meeting, p. 252, paras. 22–28.

³²⁶ *Yearbook ... 2009*, vol. I, 3027th meeting, p. 198, paras. 1–6.

³²⁷ Revised version of draft article B in paragraph 276 of the sixth report of the Special Rapporteur (ILC(LXII)/EA/CRP.1) (see footnote 305 above), session distribution limited to the members of the Commission.

³²⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617; see also footnote 16 above.

³²⁹ Session document ILC(LXII)/DC/EA/CRP.3, distribution limited to the members of the Commission.

3.3.4 *Effect of collective acceptance of an impermissible reservation*

A reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.

4.5 *Consequences of an invalid reservation*

4.5.1 [4.5.1 and 4.5.2] *Nullity of an invalid reservation*

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts II and III of the Guide to Practice is null and void, and therefore devoid of legal effect.

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

1. When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.

2. The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- (a) the wording of the reservation;
- (b) statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty;
- (c) subsequent conduct of the author of the reservation;
- (d) reactions of other contracting States and contracting organizations;
- (e) the provision or provisions to which the reservation relates; and
- (f) the object and purpose of the treaty.

4.5.3 [4.5.4] *Reactions to an invalid reservation*

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

4.6 *Absence of effect of a reservation on the relations between the other parties to the treaty*

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 *Effect of an interpretative declaration*

4.7.1 [4.7 and 4.7.1] *Clarification of the terms of the treaty by an interpretative declaration*

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

4.7.2 *Effect of the modification or the withdrawal of an interpretative declaration in respect of its author*

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

4.7.3 *Effect of an interpretative declaration approved by all the contracting States and contracting organizations*

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

2. Draft guidelines 3.3.3 and 3.3.4, which had initially been proposed by the Special Rapporteur in his tenth report³³⁰ (and reiterated in his fifteenth report in paragraph 198 [488] and 205 [495] (A/CN.4/624/Add.1), would be included in Part 3 of the Guide to Practice, dealing with the permissibility of reservations. The other seven draft guidelines proposed by the Special Rapporteur in the last sections of his fifteenth report would be included in Part 4 of the Guide to Practice, concerning the legal effects of reservations and interpretative declarations.

3. Draft guideline 3.3.3 was entitled “Effect of individual acceptance of an impermissible reservation”. The Drafting Committee had made only minor changes to the text proposed by the Special Rapporteur. In the title, the term “invalid” had been replaced by the term “impermissible” in the English version, and, in the text, for the sake of clarity, the word “impermissible” had been inserted before “reservation”. That change in terminology had to do with the placement of draft guidelines 3.3.3 and 3.3.4 in Part 3 of the Guide to Practice, which dealt with the substantive conditions for the validity of a reservation. In that connection, he recalled the approach laid out in the report of the Commission on the work of its fifty-eighth session³³¹—and followed ever since—which was to use the term “permissibility” in the English version of the draft guidelines to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the 1969 and 1986 Vienna Conventions.

4. Also in the title of the draft guideline, the Drafting Committee had decided to replace the expression “unilateral acceptance”, originally proposed by Special Rapporteur, with the expression “individual acceptance”. It was felt that the term “individual” more adequately reflected the relationship between draft guideline 3.3.3, which referred to acceptance by a contracting State or a contracting organization of an impermissible reservation, and draft guideline 3.3.4, which, as its title indicated, referred to the collective acceptance of an impermissible reservation. Moreover, the expression “individual acceptance” had already been used in the Guide to Practice in guideline 2.8.9, which concerned the modalities of the acceptance of a reservation to a constituent instrument of an international organization. In addition, in order to align the English text more closely with the French, the expression “cure the nullity” had been substituted for the expression “change the nullity”, which some members of the Drafting Committee had considered to be ambiguous. Lastly, in order to bring about consistency with the text of other draft guidelines and of the 1986 Vienna Convention, the expression “contracting international organization” had been replaced by “contracting organization”.

³³⁰ *Yearbook ... 2005*, vol. II (Part One), A/CN.4/558 and Add.1–2, p. 188, para. 202, and p. 189, para. 207.

³³¹ *Yearbook ... 2006*, vol. II (Part Two), p. 144, para. (7) of the general commentary to section 3 of the Guide to Practice.

5. Draft guideline 3.3.4 was entitled “Effect of collective acceptance of an impermissible reservation”. In addition to replacing the word “invalid” with “impermissible” in the title in the English version, as in draft guideline 3.3.3, the Drafting Committee had introduced a number of other changes to the text of draft guideline 3.3.4.

6. In the first paragraph of the Special Rapporteur’s proposed text, the Drafting Committee had decided, following a suggestion made during the plenary debate, to replace the expression “may be formulated by a State or an international organization” by the expression “shall be deemed permissible”. That formulation was considered to be more appropriate for describing the situation envisaged in the draft guideline, where, after a reservation prohibited by the treaty or incompatible with its object and purpose had been formulated and notification had been sent to the contracting States and contracting organizations by the depositary, a contracting State or a contracting organization that considered the reservation to be impermissible requested the depositary to communicate its position to the other contracting States and contracting organizations; and if, after having been expressly informed thereof by the depositary, no contracting State or contracting organization objected to the reservation on the basis of its alleged impermissibility, the reservation was “deemed permissible” in the light of its collective acceptance by all contracting States and contracting organizations. It should be noted that the expression “shall be deemed permissible” was understood as applying without prejudice to the possibility that the reservation might, at a later stage, be found to be impermissible—for example, on the grounds of its incompatibility with *jus cogens*—by a body competent to adopt binding decisions on the matter. That point would be addressed in the commentary.

7. The final phrase “at the request of a contracting State or a contracting organization” had been added by the Drafting Committee in order to clarify that, for the purposes of draft guideline 3.3.4, the depositary was not expected to take any initiative in matters concerning the permissibility of reservations. In the text originally proposed by the Special Rapporteur, reference had been made to the depositary’s role in conducting consultations regarding the permissibility of a reservation. In response to doubts raised in the Drafting Committee concerning the competence of the depositary to conduct consultations with contracting States or contracting organizations, the Committee had decided to replace the word “consulted” by the phrase “informed thereof”.

8. In that same spirit, the Drafting Committee had decided to delete the second paragraph of the text proposed by the Special Rapporteur. It had required the depositary to draw the attention of the signatory States and international organizations—and, where appropriate, the competent organ of the international organization concerned—to the nature of legal problems raised by an impermissible reservation. Some members of the Commission had expressed disagreement with such an approach during the debate on the draft guideline that had taken place during the Commission’s fifty-eighth session. Similar concerns had been raised by several members of the Drafting Committee, who considered the second paragraph of the original text to be excessive, in that it

purported to confer on the depositary a substantive role in matters of reservations exceeding the nature of its functions. The Drafting Committee had therefore decided to delete the paragraph.

9. The question of the time period within which a reaction should be expected from a contracting State or a contracting organization had been raised by some members in the Drafting Committee. It had been agreed to address that question in the commentary, which would specify that such a reaction should take place within a reasonable time period, to be determined in the light of relevant circumstances. While allowing for the necessary flexibility in that regard, the commentary would also draw attention to the 12-month deadline for objections to reservations prescribed by the Vienna Conventions. Lastly, in order to ensure consistency with the text of other draft guidelines, the phrase “explicitly or implicitly” before the word “prohibited” had been deleted, leaving it to the commentary to recall the fact that the prohibition of a reservation by the treaty could be either explicit or implicit.

10. Turning to the draft guidelines pertaining to section 4.5, he noted that the title of the section was “Consequences of an invalid reservation”, whereas the title proposed by the Special Rapporteur had been “Effects of an invalid reservation”. Following a suggestion made during the plenary debate, the Drafting Committee had decided to replace the word “effects” by “consequences”, as it was felt that the use of the word “effects” in the title of section 4.5 could be problematic, given that the main assumption underlying the guidelines in the section was that an invalid reservation was devoid of legal effect.

11. Unlike draft guidelines 3.3.3 and 3.3.4, the draft guidelines in section 4.5 referred, in general terms, to the validity or invalidity of a reservation, and not solely to its permissibility or impermissibility. An invalid reservation within the meaning of the draft guidelines in section 4.5 was either a reservation that did not meet the formal requirements enunciated in Part 2 of the Guide to Practice or a reservation that did not fulfil the substantive requirements for permissibility set out in Part 3. That broader meaning ascribed to the terms “validity” and “invalidity” was consistent with the approach laid out in the report of the Commission on the work of its fifty-eighth session,³³² according to which the expression “validity of reservations” was assigned a general meaning, encompassing both formal validity and permissibility, in order to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization, was capable of producing the effects attached in principle to the formulation of a reservation.

12. Draft guideline 4.5.1 was entitled “Nullity of an invalid reservation” and had resulted from the merger of the originally proposed draft guidelines 4.5.1 and 4.5.2. Although one Commission member had expressed the view during the plenary debate that draft guidelines 4.5.1 and 4.5.2 as formulated by the Special Rapporteur were

³³² *Ibid.*, p. 143, para. (2).

problematic in that they envisaged consequences that would apply only in respect of those contracting States or contracting organizations that regarded the reservation as invalid, a large majority of the members who had spoken during the debate had expressed support for the content and formulation of those guidelines. The Drafting Committee had subsequently retained and merged the original text of the two draft guidelines. The only change introduced by the Drafting Committee to the text of draft guideline 4.5.1 concerned the alignment of the English text with the French text by replacing the phrase “permissibility and validity” by the phrase “formal validity and permissibility”. That change was intended to make it clear that the draft guideline referred both to the formal (or procedural) conditions for the formulation of a reservation and to the conditions for its permissibility.

13. Draft guideline 4.5.2, which corresponded to original draft guideline 4.5.3, was entitled “Status of the author of an invalid reservation in relation to the treaty”. In the French version of the title, the word “non” was missing; the title should read: “*Statut de l’auteur d’une réserve non valide à l’égard du traité.*” During the plenary debate, some members had expressed opposition to the establishment of a presumption of severability of an invalid reservation and had emphasized the role of consent in treaty relations, stressing in particular that a reservation should be regarded as a condition of the consent of its author to be bound by the treaty. However, since the majority of members had favoured the presumption of severability enunciated in the original draft guideline 4.5.3, the Drafting Committee had decided to incorporate it.

14. While the substance of the first paragraph proposed by the Special Rapporteur had been retained, a number of changes in its wording had been introduced by the Drafting Committee. The first change concerned the deletion of the phrase “in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole”, which qualified the reservation in the original text but was considered by the Drafting Committee to be superfluous. A second change concerned the replacement of the phrase “the treaty applies to the reserving State or the reserving international organization, notwithstanding the reservation” by wording considered to be both more accurate and more precise: the new formulation stated that the reserving State or reserving international organization was considered “a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation”. It was felt, in particular, that the expression “the treaty applies” did not adequately reflect the fact that the first paragraph stated only a presumption. Moreover, the expression “notwithstanding the reservation” had been regarded as ambiguous by some members of the Drafting Committee.

15. At the end of the first paragraph, the word “established” had been replaced, in the English text, by the word “identified”. Some members were of the view that the term “established” would have made the presumption of severability of the invalid reservation too strong. It was also observed that the English word “established” seemed to presuppose a degree of clarity that was not necessarily implied by the elements listed in paragraph 2. The commentary would indicate that the “contrary intention”

referred to in the first paragraph should be understood as the intention of the reserving State or organization not to be bound by the treaty at all in the event that the reservation was deemed invalid; if such an intention could be identified, then the presumption embodied in paragraph 1 was overturned.

16. Changes had also been introduced by the Drafting Committee to the second paragraph, which provided a list of factors to be taken into consideration in order to identify the intention of the author of the reservation. In the *chapeau* of the second paragraph, the word “established” had again been replaced by “identified” in the English text. Moreover, in order to capture more completely the various elements listed in the second paragraph, in the *chapeau* the phrase “all the available information” had been replaced by “all factors that may be relevant to that end”—the “end” being understood as the identification of the intention of the author of the reservation. The purpose of that formulation was to indicate that the factors enumerated would be taken into consideration only to the extent that they were relevant to the identification of the intention of the reserving State or the reserving international organization—a point that would be clarified in the commentary. Although the Drafting Committee had deleted the term “*inter alia*” after the word “including,” in the *chapeau*, the commentary would emphasize that the list of factors was to be regarded as non-exhaustive.

17. The Drafting Committee had decided to modify the order in which the various factors were listed so as to mention, first, the wording of the reservation; second, statements by the author of the reservation; third, conduct of the author; followed by the reactions of other contracting States or organizations; and, lastly, two factors of a more general nature, the provision or provisions to which the reservation related and the object and purpose of the treaty, divided into two separate points. Although the reason for revising the order of the list was to suggest a logical sequence to be followed when taking into consideration the factors that identified the intention of the author of the reservation, the new ordering was not meant to suggest that certain factors should necessarily be given more weight than others in identifying the author’s intention. That point would also be clarified in the commentary.

18. In addition, a few changes had been made to the wording of the list. In the second point, reference was made to “statements” by the author of the reservation, instead of “declarations”, as had originally been proposed, and the phrase “or otherwise expressing its consent to be bound by the treaty” had been added in order to cover the various modalities of the expression of the consent to be bound by a treaty that were recognized in article 11 of the 1969 and 1986 Vienna Conventions. In the third point, the term “attitude” had been replaced by “conduct” so as to cover both actions and omissions, in keeping with the approach taken in article 2 of the draft articles on responsibility of States for internationally wrongful acts,³³³ annexed to General Assembly resolution 56/83 of 12 December 2001.

³³³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 and 34.

19. During the plenary debate, and again in the Drafting Committee, a suggestion had been made to include in the draft guideline a reference to the nature or character of the treaty, on the reasoning that it could be relevant in identifying the intention of the author of an invalid reservation concerning the severability of the reservation and also in determining the way in which the presumption of severability set out in the first paragraph should operate. The Drafting Committee had decided not to follow that suggestion, as the majority of its members were opposed to the idea of singling out certain categories of treaties, in particular, human rights treaties, in contradistinction to other types of treaties. However, the minority view, according to which the nature of a treaty was relevant in determining the severability of an invalid reservation to it, would be reflected in the commentary.

20. Lastly, the Drafting Committee had considered a suggestion made during the plenary debate and reiterated in the Drafting Committee that the draft guideline should include a reference to the right of the author of the reservation to withdraw from the treaty in the event that its reservation was deemed invalid. It was argued that the recognition of such a possibility in the Guide to Practice would not contradict the Vienna Conventions, which were silent on that issue. However, some members were of the view that implementing that suggestion would contradict article 56 of the Vienna Conventions, which regulated the conditions for the withdrawal from a treaty, as well as article 42, paragraph 2, according to which the withdrawal from a treaty could take place only as a result of the application of the provisions of the treaty or of the Convention. The Drafting Committee had ultimately decided not to include in the draft guideline a reference to a right of withdrawal from the treaty by the author of an invalid reservation; however, the commentary would mention the fact that such a proposal had been made and was supported by some members of the Commission.

21. Draft guideline 4.5.3, which corresponded to the original draft guideline 4.5.4, was entitled "Reactions to an invalid reservation". While the substance of the draft guideline proposed by the Special Rapporteur had been retained, the Drafting Committee had introduced a number of changes to the wording. Since section 4.5 referred to both the permissibility and the formal validity of a reservation, the Drafting Committee had replaced, in the title and in the text of the original guideline 4.5.4, the term "impermissible" by the term "invalid", which also appeared in the other draft guidelines in section 4.5.

22. In the first paragraph, reference was made to the "nullity" of an invalid reservation, and not to the "effects of the nullity" as in the original draft guideline, since an invalid reservation was devoid of legal effect. Moreover, for the sake of clarity, the general reference to "the reaction" to a reservation in original draft guideline 4.5.4 had been replaced by a more explicit reference to "the objection or the acceptance" by a contracting State or a contracting organization, it being understood that the contracting State or contracting organization in question did not include the author of the reservation. The commentary would explain the close relationship that existed between that provision and draft guideline 3.3.3, which stated that the acceptance of an impermissible reservation did not cure the nullity of

the reservation. The commentary would also indicate that the 12-month deadline for the formulation of an objection was not applicable in the case of invalid reservations. In addition, it would explain the difference between the situation envisaged in the current draft guideline 4.5.3 and the case of the collective acceptance of an impermissible reservation, which was addressed in draft guideline 3.3.4.

23. The second paragraph of draft guideline 4.5.3, which began with the word "Nevertheless" in the current revision, stated that a contracting State or a contracting organization which considered a reservation to be invalid should, if it deemed it appropriate, formulate a reasoned objection to the reservation as soon as possible. The commentary would emphasize the recommendatory nature of that paragraph. The qualifier "if it deems it appropriate" had been included in response to concerns raised by members who felt that the original formulation of the recommendation was too strong. The point had also been made that various considerations might, in a given case, discourage a State from formulating an objection to a reservation which it considered to be invalid. Moreover, although the phrase "as soon as possible" had been retained at the end of paragraph 2, the commentary would emphasize that this phrase was merely recommendatory, as there was no deadline for the formulation of an objection to an invalid reservation.

24. During the plenary debate, a suggestion had been made to include a reference in the second paragraph to the reservations dialogue. However, the Drafting Committee had considered it inappropriate to include a reference to a concept that did not appear anywhere else in the text of the Guide to Practice. In that connection, the Special Rapporteur had indicated that he intended to cover the issue of the reservations dialogue in his final report, which would be presented to the Commission at its sixty-third session, and that he was likely to propose that the question be addressed in an annex to the Guide to Practice. That said, the commentary to draft guideline 4.5.3 would explain that the purpose of the recommendation contained in the second paragraph was to encourage the reservations dialogue.

25. Draft guideline 4.6 was entitled "Absence of effect of a reservation on the relations between the other parties to the treaty". The Special Rapporteur had presented two options for the text of the draft guideline. According to the first option, the guideline would have simply reproduced the text of article 21, paragraph 2, of the Vienna Conventions, while, according to the second option, the provision would have included the opening phrase "Without prejudice to any agreement between the parties as to its application". Given that a slight preference had been expressed for the first option during the plenary debate, the Drafting Committee had decided to retain that option. Thus, draft guideline 4.6 as provisionally adopted by the Drafting Committee reproduced the exact wording of article 21, paragraph 2, of the Vienna Conventions.

26. Turning to the draft guidelines under section 4.7, he said that the title of the section "Effect of an interpretative declaration" corresponded to the original title of draft guideline 4.7 proposed by the Special Rapporteur, except that the word "effects" had been used in the singular.

27. Draft guideline 4.7.1 was entitled "Clarification of the terms of the treaty by an interpretative declaration",

as originally proposed by the Special Rapporteur. However, draft guideline 4.7.1 as provisionally adopted by the Drafting Committee was the result of a partial merging of original draft guidelines 4.7 and 4.7.1.

28. The text of the first paragraph was based on the text of draft guideline 4.7 as proposed by the Special Rapporteur, with a number of amendments. In order to align the English version with the French text, the words “may not modify” had been replaced by the words “does not modify”. Also in the English version, the expression “some of its provisions” had been replaced by the words “certain provisions thereof” for the sake of consistency with the definition of an interpretative declaration in draft guideline 1.2. The word “accordingly” in the second sentence had been replaced by the expression “as appropriate”, which purported to indicate that whether, or the extent to which, an interpretative declaration might constitute an element to be taken into account in interpreting the treaty would depend on a variety of factors, including the nature of the declaration and the circumstances in which it had been formulated.

29. The last phrase of the first paragraph in the current version, “in accordance with the general rule of interpretation of treaties”, was taken from the first sentence of original draft guideline 4.7.1, which had also contained further details on treaty interpretation. The rest of the sentence had been deleted by the Drafting Committee at the suggestion of several members, who had been of the view that the Guide to Practice should not deal with the modalities of treaty interpretation. Thus, a reference to the general rule of treaty interpretation had been deemed sufficient in the context.

30. The second paragraph of draft guideline 4.7.1 was a simplified version of the second sentence of the original draft guideline 4.7.1 proposed by the Special Rapporteur. It stated that, in interpreting the treaty, account should also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations. The words “as appropriate” had been added by the Drafting Committee in order to convey the idea that the relevance and the weight to be accorded, in interpreting a treaty, to approval of or opposition to an interpretative declaration needed to be assessed in the light of the relevant circumstances.

31. Draft guideline 4.7.2 was entitled “Effect of the modification or the withdrawal of an interpretative declaration in respect of its author”. The draft guideline originally proposed by the Special Rapporteur had stated that “the author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration”. During the plenary debate, several members had expressed the view that the formulation proposed for the guideline was too strict. In particular, it had been suggested that the guideline include a reference to the right of the author of an interpretative declaration to modify or withdraw it in conformity with draft guidelines 2.4.9 or 2.5.12. The Special Rapporteur had agreed on the need to seek a more nuanced formulation.

32. The general feeling in the Drafting Committee had been that, while the right of a State or an international organization to modify or withdraw an interpretative

declaration ought to be acknowledged, there was also a need to protect the interests of other contracting States or contracting organizations that might have relied upon the initial declaration. In that spirit, the Drafting Committee had agreed on the following formulation: “The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.” To the extent that it referred to the idea of reliance, that text was based on the wording of principle No. 10 of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations,³³⁴ adopted by the Commission in 2006.

33. The assumption was that the effects envisaged in draft guideline 4.7.1 might also be attached to the modification or the withdrawal of an interpretative declaration; in other words, the modification or the withdrawal of an interpretative declaration were elements that might be taken into account, as appropriate, in interpreting a treaty in accordance with the general rule of interpretation of treaties. However, such interpretative effects might not be attached to the withdrawal or the modification of an interpretative declaration to the extent that other contracting States or contracting organizations had relied on that declaration. The commentary would emphasize the role of the principle of good faith and the potential relevance of estoppel in this context. It would also elaborate on the notion of reliance as well as other criteria that were mentioned in Guiding Principle No. 10 and the commentary thereto.

34. After careful consideration, the Drafting Committee had decided not to include a reference to draft guidelines 2.4.9 and 2.5.12 in the text of the draft guideline. The majority of the members had considered that such a reference was not necessary in a provision that addressed the effects of the modification or withdrawal of an interpretative declaration, as opposed to the procedure to be followed in modifying or withdrawing an interpretative declaration. However, the commentary would include a reference to draft guidelines 2.4.9 and 2.5.12.

35. Furthermore, contrary to the text proposed by the Special Rapporteur, the draft guideline provisionally adopted by the Drafting Committee did not refer to the case of a State or an international organization which, having approved an interpretative declaration, intended to put forward a different interpretation of the treaty. Some doubts had been raised in the Drafting Committee as to whether such a State or international organization should be treated in the same way as the author of the interpretative declaration. The case of a State or an international organization that had approved an interpretative declaration would be addressed in the commentary; as a relevant factor, reference would be made to the extent to which other contracting States or contracting organizations had relied on the initial declaration and/or on the approval thereof.

36. Draft guideline 4.7.3 was entitled “Effect of an interpretative declaration approved by all the contracting States and contracting organizations”. The term “effect” in the title had been used in the singular for the sake of consistency with other draft guidelines.

³³⁴ See footnote 311 above.

37. The Drafting Committee had retained the text of the draft guideline originally proposed by the Special Rapporteur, except that it had replaced the words “constitutes an agreement” with the words “may constitute an agreement”. It had been felt that the original wording was too affirmative and that the word “may” would adequately express the need that the relevant circumstances should be taken into consideration when assessing the existence of an agreement regarding the interpretation of the treaty. It had been suggested in the Drafting Committee that the words “between the parties”, which appeared in article 31, paragraph 3 (a), of the Vienna Conventions, should be included in order to qualify the agreement regarding the interpretation of the treaty referred to in the draft guideline. However, the Drafting Committee had not followed that suggestion. It had considered that the text of the draft guideline was sufficiently clear; moreover, such an addition could have conveyed the wrong impression that the scope of the draft guideline should be limited to the situation envisaged in article 31, paragraph 3 (a), of the Vienna Conventions.

38. Having thus concluded his introduction of the report of the Drafting Committee, he hoped that the plenary would adopt the draft guidelines contained in it.

39. Mr. MELESCANU recalled that the title and text of draft guideline 4.7.2 originally proposed by the Special Rapporteur had been quite different from the title and text approved by the Drafting Committee. While he had no objection to the current version, he suggested that it should be clearly explained in the commentary that until an interpretative declaration was modified or withdrawn, its author could not invoke an interpretation contrary to that put forward in the original declaration.

40. The CHAIRPERSON said he took it that the Commission wished to adopt the titles and texts of draft guidelines 3.3.3, 3.3.4 and 4.5 to 4.7.3 contained in document A/CN.4/L.760/Add.3 on the understanding that Mr. Melescanu’s suggestion would be taken into account in the commentary to draft guideline 4.7.2.

It was so decided.

Shared natural resources³³⁵ (A/CN.4/620 and Add.1, sect. E, A/CN.4/621,³³⁶ A/CN.4/633³³⁷)

[Agenda item 4]

REPORT OF THE WORKING GROUP

41. Mr. CANDIOTI (Chairperson of the Working Group) said that, since the Commission’s decision at

³³⁵ At its fifty-fourth session (2002), the Commission decided to include the topic “Shared natural resources” in its programme of work and named Mr. Chusei Yamada, Special Rapporteur for the topic (*Yearbook ... 2002*, vol. II (Part Two), p. 100, paras. 518–519). At its sixtieth session (2008), the Commission adopted on second reading a preamble and 19 draft articles on transboundary aquifers (*Yearbook ... 2008*, vol. II (Part Two), p. 19, and General Assembly resolution 63/124 of 11 December 2008). Between 2003 and 2009, the Commission also created five working groups on shared natural resources, the first of which was chaired by the Special Rapporteur; the four other working groups were chaired by Mr. Enrique Candiotti.

³³⁶ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

³³⁷ *Idem.*

its 3053rd meeting on 28 May 2010 to reconstitute the Working Group on shared natural resources, the Working Group had held two meetings. The Working Group’s main task was to continue its assessment of the feasibility of any future work by the Commission on the issue of transboundary oil and gas resources.

42. Among the documents considered³³⁸ was a working paper prepared by Mr. Murase (A/CN.4/621), as requested by the Working Group during the sixty-second session. The topic “Shared natural resources” had been included in the Commission’s programme of work on the basis of a syllabus drawn up by Mr. Rosenstock during the fifty-second session,³³⁹ outlining the general orientation of the topic; however, there was no specific syllabus concerning oil and gas resources. Thus, in accordance with the step-by-step approach proposed by the former Special Rapporteur,³⁴⁰ Mr. Yamada, following completion of the work on transboundary aquifers, it had been deemed necessary to consider the feasibility of work on oil and gas issues.

43. The basic recommendation made in the paper prepared by Mr. Murase was that the transboundary oil and gas aspects of the topic should not be pursued further by the Commission. An analysis of comments received from Governments and statements made by member States in the Sixth Committee showed that they fell into three main groups: those in favour of the Commission addressing the subject; those advocating a more cautious approach based on broad agreement; and those (the preponderant view) suggesting that the Commission not proceed any further.

44. The majority of States held the view that transboundary oil and gas issues were essentially bilateral in nature, as well as highly political or technical, involving diverse regional situations. Doubts had also been expressed about the need for the Commission to proceed with a codification exercise, including the development of universal rules. It was feared that an attempt at generalization might make matters more complex and confused when they had been adequately addressed through bilateral efforts. Moreover, since transboundary oil and gas reserves were often located on the continental shelf, concerns had also been voiced that the politically delicate issue of maritime delimitation would need to be taken into consideration, unless the parties reached agreement beforehand not to deal with it, as had happened in a limited number of cases.

45. Furthermore, it had been considered that the option of collecting and analysing information about State practice concerning transboundary oil and gas or elaborating a model agreement on the subject would not be productive because of the specific problems relating to each case involving oil and gas. Moreover, the sensitive nature of

³³⁸ The Study Group had before it: (a) comments and observations received from Governments on oil and gas (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1) and document A/CN.4/633; (b) the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session (A/CN.4/620 and Add.1, sect. E); and (c) a compilation of extracts of analytical summaries for the discussion held in the Sixth Committee in 2007, 2008 and 2009 on oil and gas. For the 2007 questionnaire, see *Yearbook ... 2007*, vol. II (Part Two), p. 56, para. 159, and p. 59, para. 182.

³³⁹ *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141.

³⁴⁰ *Yearbook ... 2002*, vol. II (Part Two), pp. 100–102, para. 520.

certain relevant cases might well hamper any attempt at a sufficiently comprehensive and useful analysis of the issues involved.

46. He recalled that, when selecting a topic, the Commission was generally guided by established criteria, namely that the topic should reflect the needs of States in respect of the progressive development and codification of international law; it should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and it should be concrete and feasible for the purposes of progressive development and codification.

47. Having considered all aspects of the matter in the light of its previous discussions, and taking into account the views of Governments including those reflected in the working paper, the Working Group recommended that the Commission not consider the transboundary oil and gas aspects of the topic “Shared natural resources”.

48. In conclusion, he expressed the hope that the Commission would take note of the report of the Working Group and endorse its recommendation. He expressed his appreciation to Mr. Murase and all the members of the Working Group for their useful contributions, and to the Secretariat for its valuable assistance.

49. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Working Group on shared natural resources and endorse its recommendation.

It was so decided.

The meeting rose at 1 p.m.

3070th MEETING

Thursday, 29 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Other business

[Agenda item 15]

SETTLEMENT OF DISPUTES CLAUSES (A/CN.4/623³⁴¹)

1. The CHAIRPERSON recalled that at its sixty-first session, the Commission had decided to devote at least

one meeting to a discussion on settlement of disputes clauses.³⁴² In that connection, the Secretariat, taking into account the recent practice of the General Assembly, had been requested to prepare a note on the history and practice of the Commission with respect to such clauses, which was contained in document A/CN.4/623.

2. Sir Michael WOOD said that the examination of the topic could be viewed as the Commission’s contribution to the consideration by the General Assembly of the agenda item entitled “The rule of law at the national and international levels”.³⁴³ In its 2009 report, the Commission had reiterated its commitment to the rule of law in all its activities and had stressed that the rule of law constituted its essence, since its basic mission was to guide the development and formulation of the law.³⁴⁴ He would welcome the Commission to provide a fuller response to the General Assembly at the current session and perhaps to mention the current debate in that regard.

3. He welcomed the fact that the debate was taking place. It was good that the Commission took the opportunity from time to time to discuss such cross-cutting issues as the peaceful settlement of disputes, which was of growing importance. Together with the prohibition on the use of force enunciated in Article 2, paragraph 4, of the Charter of the United Nations, the principle of the peaceful settlement of disputes in Article 2, paragraph 3, and Article 33 lay at the heart of the system for the maintenance of international peace and security defined in the Charter of the United Nations. It was one of the principles of international law set forth 40 years previously in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970, and further elaborated in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, approved by the General Assembly in its resolution 37/10 of 15 November 1983, in which it appears as an annex.

4. Reference should also be made to the statement by the President of the Security Council of 29 June 2010, which contained the following passage:

The Security Council is committed to and actively supports the peaceful settlement of disputes and reiterates its call upon Member States to settle their disputes by peaceful means as set forth in Chapter VI of the Charter of the United Nations. The Council emphasizes the key role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work and calls upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute.

The Security Council calls upon States to resort also to other dispute settlement mechanisms, including international and regional courts and tribunals which offer States the possibility of settling their disputes peacefully, contributing thus to the prevention or settlement of conflict.³⁴⁵

³⁴² *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 238.

³⁴³ Item 83 of the agenda of the sixty-fourth session of the General Assembly (A/64/251). See also General Assembly resolution 63/128 of 11 December 2008.

³⁴⁴ *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 231.

³⁴⁵ S/PRST/2010/11, paras. 2–3.

³⁴¹ Reproduced in *Yearbook ... 2010*, vol. II (Part One).