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Summary record of the 3121st meeting

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

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3121st MEETING

Tuesday, 9 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. *Reservations to treaties (continued)* (A/CN.4/L.783 and Add.1–8)

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (*continued*)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (*continued*)

(b) *Text of the guidelines and the commentaries thereto* (continued) (A/CN.4/L.783/Add.5)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.783/Add.5.

3.1.5.1 *Determination of the object and purpose of the treaty*

2. Mr. NOLTE said that, in the second sentence of the guideline, the expression “where appropriate” implied that the subsequent practice of the parties was not on the same level as the preparatory work of the treaty and the circumstances of its conclusion in determining the object and purpose of the treaty. The word order of that sentence was inconsistent with that of the clause in paragraph (6) of the commentary that mentioned the same three factors: “taking into account practice and, where appropriate, the preparatory work of the treaty and the ‘circumstances of its conclusion’”. The word order of that clause was consistent with article 32 of the 1969 Vienna Convention, according to which the preparatory work of a treaty, unlike subsequent practice, was considered to be a supplementary means of interpretation.

3. Although in paragraph (7) the Special Rapporteur made the point, with which he agreed, that the preparatory work of a treaty was of greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions, it did not follow that the subsequent practice was less important than the preparatory work.

4. As a solution, he proposed deleting the words “where appropriate” in the text of the guideline, which would place the preparatory work and the subsequent practice on the same level.

5. Mr. SABOIA, supported by Mr. HMOUD and the CHAIRPERSON, said that it was preferable to align the text of the commentary with that of the guideline rather than the other way around, since the text of the guidelines had already been agreed in the Working Group on reservations to treaties following lengthy analysis and discussion.

Guideline 3.1.5.1 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

6. The CHAIRPERSON, responding to the point raised by Mr. Nolte concerning the inconsistency between the text of the guideline and paragraph (6) of the commentary, suggested that the position of the words “practice” [*de la pratique*] and “the preparatory work of the treaty” [*des travaux préparatoires*] should be reversed.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

7. Sir Michael WOOD proposed that, in the final sentence of the English text, the word “correctly” be deleted, as it did not seem appropriate that the Commission should pass judgment on the objection of Luxembourg to the reservation in question.

8. Mr. PELLET (Special Rapporteur) said that, in any case, there was no word in the French text that corresponded in meaning to the English word “correctly”.

Paragraph (10) was adopted with that amendment to the English text.

Paragraph (11)

Paragraph (11) was adopted.

9. The CHAIRPERSON, responding to a general comment from Sir Michael that, in the English text, there were a number of instances in which the text of guidelines that were quoted in the commentaries differed from the definitive text, said that the secretariat would ensure that the definitive version of the guidelines was accurately reproduced throughout the Guide to Practice.

The commentary to guideline 3.1.5.1, as amended, was adopted.

3.1.5.2 *Vague or general reservations*

Guideline 3.1.5.2 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

10. Mr. HMOUD, referring to the last footnote to the paragraph, said that, for the sake of accuracy, the phrase “many Islamic States” should be replaced with “some Islamic States”.

Paragraph (7), with that amendment to the footnote, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

The commentary to guideline 3.1.5.2, as amended, was adopted.

3.1.5.3 *Reservations to a provision reflecting a customary rule*

Guideline 3.1.5.3 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

11. Mr. GAJA said that, in the second bullet point, the phrase “as of right” was a mistranslation of the French “*comme étant le droit*” and should be replaced with “as law”, as in the cited Article 38 of the Statute of the International Court of Justice.

Paragraph (7) was adopted with that amendment to the English text.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

Paragraph (12)

12. Sir Michael WOOD proposed that, in the second sentence, the portion of the text in brackets that read “which are, moreover, to a great extent codifiers of existing law” be deleted. That was an incorrect statement, as human rights treaties might or might not be codifiers of existing law, and, in fact, they often developed the law in a very significant way. For similar reasons, he proposed to delete the expression in brackets in the second sentence of the second footnote to the paragraph.

13. Mr. PELLET (Special Rapporteur) said that he did not agree with the substance of Sir Michael’s proposal, but he could agree with the deletion of the text in question.

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (18)

Paragraphs (13) to (18) were adopted.

Paragraph (19)

14. Mr. NOLTE proposed the deletion, in the first sentence, of the clause “particularly since it is unacceptable that a persistent objector should be able to thwart such

a norm”, as he found it to be superfluous. Although the clause was plausible, the Commission should not make such a broad statement in the limited context of the law on reservations to treaties if it was not necessary, but rather should consider dealing with it under a suggested new topic entitled “Formation and evidence of customary international law”.

15. Mr. PELLET (Special Rapporteur) said that he disagreed with Mr. Nolte’s assessment of that part of the text of the guideline as superfluous or debatable. That a persistent objector could not, through a reservation, thwart a rule of *jus cogens* was indisputable; there was thus no reason why the Commission should refrain from saying so. Moreover, making the point that reservations to a *jus cogens* norm by a persistent objector were particularly unacceptable did, in fact, add something to the text.

16. Sir Michael WOOD, referring to the first footnote to the paragraph, proposed the deletion of the example of the reservation formulated by Myanmar on its accession to the Convention on the rights of the child, since it was unclear how that example related to the prohibition against the formulation of a reservation to a peremptory norm of international law.

17. Mr. PELLET (Special Rapporteur) said that he disagreed with the substance of Sir Michael’s point, but acknowledged that the reason for including the example was not self-evident. He could agree to its deletion, but noted that another example would have to be found.

Paragraph (19), with that amendment to the footnote, was adopted.

Paragraphs (20) to (22)

Paragraphs (20) to (22) were adopted.

The commentary to guideline 3.1.5.3, as amended, was adopted.

3.1.5.4 *Reservations to provisions concerning rights from which no derogation is permissible under any circumstances*

Guideline 3.1.5.4 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 3.1.5.4 was adopted.

3.1.5.5 *Reservations relating to internal law*

18. Mr. NOLTE, referring to what he considered to be an inconsistency between guidelines 3.1.5.5 and 3.1.5, proposed that, in guideline 3.1.5.5, the phrase “nor its general tenor” be replaced by “that is necessary to its general tenor” for the sake of consistency with the master formulation contained in guideline 3.1.5, which was reproduced in a number of other guidelines and which read: “an essential element of the treaty that is necessary to its general tenor”.

19. Mr. PELLET (Special Rapporteur) said that he was not convinced that the text of guideline 3.1.5.5 reflected an inconsistency, nor did he consider Mr. Nolte's point important enough to justify amending the guideline. However, he would leave the matter to the discretion of the Commission.

20. After a discussion in which Mr. MELESCANU, Mr. NOLTE, Mr. PETRIČ, Sir Michael WOOD, Mr. SABOIA and Mr. PELLET took part, the CHAIRPERSON said he took it that the Commission wished to allow members to propose amendments to the text of the guidelines when they concerned questions of substance that might have significant effects on the quality of the text, but that amendments concerning their form would be conveyed directly to the secretariat and would not be raised during the debate in plenary.

It was so decided.

Guideline 3.1.5.5 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 3.1.5.5 was adopted.

3.1.5.6 *Reservations to treaties containing numerous interdependent rights and obligations*

Guideline 3.1.5.6 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

21. Mr. NOLTE proposed that the words "a bundle of obligations" should be replaced by the words "bundles of obligations", which made more sense in the context.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to guideline 3.1.5.6, as amended, was adopted.

3.1.5.7 *Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty*

Guideline 3.1.5.7 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

22. Mr. McRAE said that in the second sentence of the English text it was not clear from the phrase "which had

held that" whether the reference was to the Democratic Republic of the Congo or the International Court of Justice. In the former case, the phrase should be "which had claimed that" or similar wording aligned with the French text.

Paragraph (2) was adopted on the understanding that the English text would be aligned with the French.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor editorial correction to the French text.

The commentary to guideline 3.1.5.7, as amended, was adopted.

3.2 *Assessment of the permissibility of a reservation*

Guideline 3.2 was adopted.

Commentary

Paragraph (1)

23. Sir Michael WOOD said that the second sentence would make better sense with the deletion of "in particular and" before "including".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editorial correction to the antepenultimate footnote in the English text.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

24. Mr. McRAE questioned the need for the last bullet point and proposed its deletion, not least because it was not clear from the text which human rights activists were compounding a contentious debate that was nevertheless largely artificial.

25. Mr. PELLET (Special Rapporteur) said that he was in favour of retaining the bullet point since it was a statement of fact: the human rights activists had focused on a problem that, in his view, did not really exist.

26. Sir Michael WOOD endorsed Mr. McRae's proposal concerning the last bullet point. Referring to the expression in the penultimate bullet point "some States have even denied that the bodies in question have any jurisdiction in the matter", he queried the appropriateness of the word "even" and proposed its deletion.

Paragraph (5), as amended by Mr. McRae and Sir Michael Wood, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

27. Sir Michael WOOD questioned the need for the words “more particularly human rights treaties” in the first sentence and proposed their deletion.

28. Mr. McRAE, referring to the phrase in the third bullet point, “including jurisdictional or arbitral methods”, proposed that, in the English text, the word “jurisdictional” be replaced by “judicial”. He further proposed that similar references that appeared elsewhere in the English text should be checked and amended, as necessary.

29. Mr. PELLET (Special Rapporteur), while endorsing Mr. McRae’s proposal concerning the English text, said that the term “*juridictionnel*” should be retained in the French text.

30. Mr. CAFLISCH said that, since in French the term “*juridictionnel*” applied to permanent courts or arbitral methods, the equivalent phrase in the French text “*y compris juridictionnels et arbitraux*” should read either “*y compris juridictionnels*” or “*y compris judiciaires ou arbitraux*”; his preference was for the latter.

31. The CHAIRPERSON said he took it that the proposals made by Sir Michael, Mr. McRae and Mr. Caflich were acceptable to the Commission.

It was so decided.

Paragraph (11), as amended, was adopted.

Paragraph (12)

32. Mr. NOLTE questioned the appropriateness of the expression “no doubt” in the second sentence.

33. Mr. PELLET (Special Rapporteur) proposed, for the sake of accuracy, that the expression should be replaced by the word “probably” in the English text.

Paragraph (12) was adopted with that amendment to the English text.

Paragraph (13)

34. Mr. NOLTE, referring to the phrase in the penultimate sentence “which is intended to ensure compliance with the treaty by the parties”, proposed the addition of the word “continuously” in order to emphasize the importance of treaty bodies monitoring compliance by States parties after the expiration of the 12-month period in question.

35. Mr. McRAE, referring to the phrase in the same sentence “the relevant texts currently in force”, proposed that, for the sake of clarity, the word “texts” should be replaced by the word “treaties” in the English text.

Paragraph (13), as amended, was adopted.

Paragraph (14)

36. Sir Michael WOOD, referring to the statement in the last sentence “it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties”, said that the phrase “guardians of treaties” was unnecessary and slightly contentious and should therefore be deleted.

37. Mr. PELLET (Special Rapporteur), supported by Mr. SABOIA, said that, while some States might not like the fact that treaty monitoring bodies were referred to as “guardians of treaties”, it was in fact the role they played, and the phrase expressed the essence of the sentence.

38. Sir Michael WOOD said he wished to have it placed on record that he was in disagreement with Mr. Pellet on that point.

Paragraph (14) was adopted.

Paragraph (15)

Paragraph (15) was adopted.

The commentary to guideline 3.2, as amended, was adopted.

3.2.1 *Competence of the treaty monitoring bodies to assess the permissibility of reservations*

Guideline 3.2.1 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 3.2.1 was adopted.

3.2.2 *Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations*

Guideline 3.2.2 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 3.2.2 was adopted.

3.2.3 *Consideration of the assessments of treaty monitoring bodies*

Guideline 3.2.3 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

39. Mr. McRAE proposed that the words “there should be reciprocity, and”, which implied that the monitoring bodies were on an equal footing with States, be deleted. Monitoring bodies should, of course, take account of the positions expressed by States and international

organizations with respect to a reservation, irrespective of whether there was reciprocity.

Paragraph (4), as amended, was adopted.

The commentary to guideline 3.2.3, as amended, was adopted.

3.2.4 *Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body*

Guideline 3.2.4 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 3.2.4 was adopted.

3.2.5 *Competence of dispute settlement bodies to assess the permissibility of reservations*

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 3.2.5 was adopted.

3.3 *Consequences of the non-permissibility of a reservation*

3.3.1 *Irrelevance of distinction among the grounds for non-permissibility*

Guideline 3.3.1 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

40. Mr. NOLTE questioned the accuracy of the clause in the first sentence which read “Moreover, nothing, either in the text of article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases”. While it was true that there was nothing said along those lines in article 19 of the 1969 and 1986 Vienna Conventions, the bullet points in paragraph (3) of the commentary did suggest that such a distinction had been contemplated in the *travaux préparatoires*. That was confirmed by the statement by Sir Humphrey Waldock⁴⁵¹ quoted in paragraph (3) of the commentary to guideline 3.3.3. He therefore proposed that the first sentence be redrafted to begin: “Nothing in the text of article 19 gives grounds”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

⁴⁵¹ *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 25th meeting, 16 April 1968, p. 144, para. 2.*

Paragraph (8)

41. Mr. NOLTE proposed, for the sake of consistency with the amendment to paragraph (4), the deletion of the phrase “or in the *travaux préparatoires* for the Conventions.”.

Paragraph (8), as amended, was adopted.

The commentary to guideline 3.3.1, as amended, was adopted.

3.3.2 *Non-permissibility of reservations and international responsibility*

Guideline 3.3.2 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraphs (5) and (6)

42. Mr. PELLET (Special Rapporteur) recalled the decision taken by the Commission at an earlier meeting to transpose the contents of paragraph (6) to the general commentary to Part 3. He proposed that a footnote be inserted at the end of paragraph (5) referring readers to paragraph (6) of the general commentary for the related terminology problems.

Paragraph (5), as supplemented with a footnote, was adopted.

Paragraph (6) was deleted.

The commentary to guideline 3.3.2, as amended, was adopted.

3.3.3 *Absence of effect of individual acceptance of a reservation on the permissibility of the reservation*

Guideline 3.3.3 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

43. Mr. NOLTE questioned the appropriateness of the word “nullity” and proposed that it should be replaced by the word “impermissibility”, since the issue being discussed was the acceptance of an impermissible reservation.

Paragraph (6), as amended, was adopted.

Paragraph (7)

44. Mr. NOLTE said that, for similar reasons, the words “the nullity of” should be deleted from the first sentence.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

45. Mr. NOLTE said that the statement “silence on the part of a State party does not mean that it is taking a position as to the permissibility of a reservation” needed to be qualified. He therefore proposed the insertion of the word “necessarily” before the word “mean”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

46. Mr. NOLTE proposed that the words “amendment of treaties” be replaced by the words “amendment or modification of treaties”, which would be more in keeping with the 1969 and 1986 Vienna Conventions.

Paragraph (13), as amended, was adopted.

The commentary to guideline 3.3.3, as amended, was adopted.

3.4 *Permissibility of reactions to reservations*

Commentary

Paragraph (1)

47. Mr. NOLTE said that, in the final sentence, the word “may” should be replaced with “should” for the sake of consistency with the commentary to guideline 3.2.3 regarding the need to take account of the positions of States and international organizations. The current wording suggested that the same weight was not given to all points of view.

48. Mr. PELLET (Special Rapporteur) said that the Commission should not give the impression that monitoring bodies were bound by the positions of States and international organizations. There was a need for caution in that regard.

49. Sir Michael WOOD said that he agreed with the Special Rapporteur. It would be prudent to retain the word “may”.

50. Mr. PELLET (Special Rapporteur) said that the opening phrase of the final sentence, which currently read “The fact remains, however, that acceptances and objections provide a means” [*Il n’en reste pas moins que les acceptations et les objections constituent un moyen*], should be reworded to read “Acceptances and objections, however, provide a means” [*Les acceptations et les objections constituent pendant un moyen*].

Paragraph (1), as amended by the Special Rapporteur, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to section 3.4, as amended, was adopted.

3.4.1 *Permissibility of the acceptance of a reservation*

Guideline 3.4.1 was adopted.

Commentary

51. The CHAIRPERSON suggested that, in view of the need to correct the numbering of the paragraphs in the French text, the Commission should adopt the paragraphs as numbered in the English version.

It was so decided.

Paragraph (1)

Paragraph (1) was adopted with an editorial correction to the English text.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

The commentary to guideline 3.4.1, as amended, was adopted.

3.4.2 *Permissibility of an objection to a reservation*

Guideline 3.4.2 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. NOLTE said that, for the sake of accuracy and readability, in the second sentence the word “certain” should be inserted before the phrase “reservations to the 1969 Vienna Convention itself”.

53. Mr. HUANG said that he wished to draw attention to a factual error in information relating to China in the second footnote to the paragraph. China had formulated a reservation to article 66 of the 1969 Vienna Convention on becoming a party to the Convention in 1997 and that reservation had not been withdrawn. Upon accession to the Convention, China had made a declaration stating that signature to the Convention by the Taiwan authorities in 1970 in the name of China was illegal and therefore null and void.⁴⁵² Accordingly, he proposed that the information on China be deleted from the footnote.

54. Mr. NOLTE said that it was necessary to clarify whether the reference to China related to a reservation made before 1971 or not. If the reservation had been formulated by the People’s Republic of China, then the reference was correct. The following sentence relating to the withdrawal of reservations did not mention China.

55. The CHAIRPERSON suggested that the facts relating to the reference to China in the above-mentioned footnote be verified.

Paragraph (2), as amended by Mr. Nolte, was adopted, subject to factual verification regarding the second footnote to the paragraph.

⁴⁵² *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. XXIII.1.

Paragraphs (3) to (19)

Paragraphs (3) to (19) were adopted.

The commentary to guideline 3.4.2, as amended and subject to the factual verification regarding the footnote to paragraph (2), was adopted.

3.5 *Permissibility of an interpretative declaration*

Guideline 3.5 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

56. Sir Michael WOOD questioned the relevance of the reference, at the end of the paragraph, to the third draft agreement for the Free Trade Area of the Americas⁴⁵³ of November 2003.

57. Mr. PELLET (Special Rapporteur) said that the importance of the reference lay in the fact that it was the only multilateral treaty which illustrated the possibility of prohibiting interpretative declarations.

58. The CHAIRPERSON, speaking as a member of the Commission, suggested that, since the agreement in question had not been adopted, the reference to it should be moved to the last footnote to the paragraph.

Paragraph (5), as amended, including the amendment to the last footnote, was adopted.

Paragraphs (6) to (14)

Paragraphs (6) to (14) were adopted.

Paragraph (15)

59. Mr. NOLTE said that the citation from the opinion of the Permanent Court of International Justice in the *Jaworzina* case did not seem to support the assertion at the beginning of the paragraph that the value of an interpretation was assessed on the basis, not of its content, but of its authority. He therefore proposed that the paragraph be deleted.

60. Mr. McRAE said that perhaps the point of the quotation was that it suggested that an opinion formulated after the drafting of an agreement did not have the same authority as one expressed at the time of drafting.

61. Mr. PELLET (Special Rapporteur) said that, on reflection, he agreed that the quotation appeared to contradict the point being made earlier in the paragraph. It would therefore be wiser to delete the paragraph.

Paragraph (15) was deleted.

Paragraphs (16) and (17)

Paragraphs (16) and (17) were adopted.

The commentary to guideline 3.5, as amended, was adopted.

3.5.1 *Permissibility of an interpretative declaration which is in fact a reservation*

Guideline 3.5.1 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 3.5.1 was adopted.

3.6 *Permissibility of reactions to interpretative declarations*

Guideline 3.6 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 3.6 was adopted.

62. The CHAIRPERSON invited the members of the Commission to consider the portion of the Guide to Practice contained in document A/CN.4/L.783/Add.6.

4. *Legal effects of reservations and interpretative declarations (A/CN.4/L.783/Add.6)*

Commentary

Paragraphs (1) to (21)

Paragraphs (1) to (21) were adopted.

The commentary to Part 4 of the Guide to Practice was adopted.

4.1 *Establishment of a reservation with regard to another State or international organization*

63. Ms. ESCOBAR HERNÁNDEZ, referring to guideline 4.1 and to other guidelines where reference was made to the “establishment of a reservation” or to an “established reservation”, said that in the Spanish text, those terms were inconsistent with the language of the Spanish version of the 1969 Vienna Convention. In 2010, the Spanish-speaking members of the Commission had drafted a footnote to that guideline, and she proposed that this footnote be reintroduced.

64. Mr. PELLET (Special Rapporteur) said that, while he understood the concerns of Ms. Escobar Hernández, he wondered why the Spanish text could not simply be brought into line with the language of the Vienna Convention.

65. After a discussion in which Ms. ESCOBAR HERNÁNDEZ, Mr. PELLET (Special Rapporteur) and Mr. CANDIOTI took part, the latter made the suggestion,

⁴⁵³ Third draft agreement on the Free Trade Area of the Americas, document FTAA.TNC/w/133/Rev.3, 21 November 2003 (available from www.ftaa-alca.org/FTAADraft03/Index_e.asp), chap. XXIV, art. 4.

endorsed by Mr. VÁZQUEZ-BERMÚDEZ, that the Spanish-speaking members of the Commission clarify the issue of how best to make the Guide to Practice easier to understand for Spanish-speaking users.

It was so decided.

Guideline 4.1 was adopted, subject to clarification of the Spanish text.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

66. Mr. PELLET (Special Rapporteur) said that the footnote to the paragraph should be corrected to read “Paragraph 3 of article 21 does not refer to the validity of a reservation.” [*Le paragraphe 3 de l’article 21 ne se réfère pas à la validité de la réserve*].

Paragraph (2) was adopted with that amendment to the footnote.

Paragraphs (3) to (10)

Paragraphs (3) to (10) were adopted.

Paragraph (11)

67. Mr. NOLTE said that, in the first footnote to the paragraph, the phrase in brackets, “Validity of reservations and interpretative declarations”, should be corrected to read “Permissibility of reservations and interpretative declarations”.

Paragraph (11) was adopted with that correction to the first footnote to the paragraph.

Paragraph (12)

68. Mr. PELLET (Special Rapporteur) said that, in the light of the discussion at the previous meeting on guideline 3.3.3, the phrase in the third sentence which stated “except for the possibility that they might decide by common agreement to ‘permit’ the reservation” should be replaced with “except for the remaining uncertainty about the possibility that they could decide by common agreement to ‘permit’ the reservation” [*sous réserve de l’incertitude qui demeure quant à la possibilité qu’ils décident d’un common accord de ‘valider’ la réserve*].

69. Mr. NOLTE said that the expression “objectively valid” in the fourth sentence was not used in other contexts; the adverb “objectively” should therefore be deleted.

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (16)

Paragraphs (13) to (16) were adopted.

Paragraph (17)

70. Sir Michael WOOD suggested deleting, in the final sentence, the phrase “which covers the effects

of reservations on treaty relations between the other contracting States and contracting organizations”, because the preceding sentence made it clear that reservations had no such legal effects. If the last part of the final sentence were retained it would be confusing, because it really ought to say “which covers the fact that reservations have no effect on treaty relations between the other contracting States and contracting organizations”.

Paragraph (17), as amended, was adopted.

The commentary to guideline 4.1, as amended, was adopted.

4.1.1 *Establishment of a reservation expressly authorized by a treaty*

Guideline 4.1.1 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

71. Mr. NOLTE said that the third sentence, “To accept this way of looking at things would render the Vienna regime utterly meaningless”, was ambiguous. In order to dispel that ambiguity, the phrase “To accept this way of looking at things” should be replaced with “To accept an unlimited right to formulate reservations under such circumstances”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

72. Mr. NOLTE said that, in the penultimate sentence, the phrase “any reservation so formulated is necessarily valid” should be replaced with “any reservation so formulated is necessarily permissible”, since the reference in the related footnote referred to guideline 3.1.4 (Permissibility of specified reservations).

73. Mr. PELLET (Special Rapporteur) said that time could be saved by English-speaking members giving the secretariat a list of places in the text where “valid” should be altered to “permissible”.

74. Mr. NOLTE said that the problem was that the substitution of terms could not be mechanical. In the English text the term “validity” covered situations involving both substantive permissibility and procedural validity. In some places it was therefore appropriate to speak of “validity”, while in others, when only substantive issues were concerned, the term “permissibility” should be used.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (14)

Paragraphs (7) to (14) were adopted.

Paragraph (15)

75. Sir Michael WOOD said that the paragraph in question said in effect that if a particular reservation

fell under article 20, paragraph 1, of the 1986 Vienna Convention, no objection could be made to that reservation. The penultimate sentence drew attention to the fact that an amendment proposed by France at the United Nations Conference on the Law of Treaties,⁴⁵⁴ which had expressed exactly the same idea, had not been adopted by the Drafting Committee. The last footnote to the paragraph indicated that Pierre-Henri Imbert had concluded that the States represented at the Conference had rejected that amendment because they had not wished to restrict the right to object to expressly authorized reservations.⁴⁵⁵ The inclusion of that footnote was rather misleading because it suggested that the Commission agreed with the position expressed therein. He therefore proposed that the footnote be deleted. Alternatively, the Commission could delete the whole sentence that referred to the French amendment. Mention of the latter concerned only a detail of the *travaux préparatoires* and added nothing to the rationale of the paragraph.

76. Mr. NOLTE said that the key issue was whether parties to a treaty intended to exclude the possibility of making objections when they accepted that expressly authorized reservations could be made. Perhaps the Commission should be more flexible and should not state categorically that objections were excluded if there was a possibility of formulating an expressly authorized reservation, since in theory it was conceivable that the parties had not wished to reject that possibility. The Special Rapporteur had rightly emphasized that objections could be formulated without furnishing any reasons.

77. Mr. PELLET (Special Rapporteur) said that clearly the position of the Commission was diametrically opposed to that of Mr. Imbert, but it would be unfortunate to excise any reference to the amendment by France, because it had existed. The footnote in question could simply state: “*Contra*: Pierre-Henri Imbert, see footnote XXX above, p. 55”. Although Imbert was an authority on the subject of reservations to treaties, the Special Rapporteur would not personally be opposed to the deletion of the footnote.

78. Sir Michael WOOD said that the meaning of such an abbreviated footnote would be obscure. For that reason, he would prefer the deletion of the footnote.

79. Mr. NOLTE said that two of the sources underpinning the paragraph pointed to the fact that the existence of an expressly authorized reservation did not necessarily rule out the possibility of making objections; the rejection of the amendment by France and the citation of an authoritative academic source both argued for that position. The Commission should therefore allow for the possibility of objections being formulated even to expressly authorized reservations.

80. Mr. GAJA said that Mr. Nolte seemed to be suggesting that States might make objections even when

⁴⁵⁴ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), document A/CONF.39/C.1/L.169, p. 137.*

⁴⁵⁵ P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 55.

the parties to a treaty had explicitly stated therein that a certain reservation could be made. He himself would not wish to encourage them to do so; there was no reason why they should be allowed to have second thoughts about whether a reservation expressly authorized under a treaty could be made. Perhaps the amendment by France had not been adopted because it had been regarded as superfluous; its rejection did not necessarily indicate that the United Nations Conference on the Law of Treaties wanted to allow States to have second thoughts. He considered that the Commission would be on firm ground if it deleted the footnote in question.

Paragraph (15) was adopted with the deletion of the last footnote to the paragraph.

The meeting rose at 1 p.m.

3122nd MEETING

Tuesday, 9 August 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IX. Protection of persons in the event of disasters (A/CN.4/L.788 and Add.1–2)

1. The CHAIRPERSON invited the Commission to begin its consideration of chapter IX of its report, on protection of persons in the event of disasters, contained in document A/CN.4/L.788 and Add.1–2.

A. Introduction

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 7 to 9

Paragraphs 7 to 9 were adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted, subject to the insertion of the dates and numbers of the meetings.