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Summary record of the 3123rd meeting

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

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3.4.2 *Permissibility of an objection to a reservation (concluded)**

Commentary (concluded) (A/CN.4/L.783/Add.5)*

Paragraph (2) *(concluded)**

55. Mr. PELLET (Special Rapporteur) said that, upon verification, and as assumed by Mr. Nolte, it had in fact been the People's Republic of China that had formulated a reservation to article 66 of the 1969 Vienna Convention. He failed to see why any change needed to be made to the footnote in question.

56. Mr. HUANG thanked the Special Rapporteur for that explanation, but wished to reiterate that the word "China" employed indiscriminately in the Special Rapporteur's report to designate both the People's Republic of China and the so-called "Republic of China" was misleading. There was only one China, and the name "China" must only designate the People's Republic of China. Therefore, all references in the report to the name "China" which referred to the so-called "Republic of China" should be deleted.

57. The CHAIRPERSON said that, as had already been stressed at the previous meeting, that was not a purely technical question. Moreover, the Special Rapporteur could not be instructed to carry out that task. On the other hand, whenever Mr. Huang considered that the problem arose, he was free to intervene to formulate a proposal. In any event, the Special Rapporteur's explanation showed that the problem did not arise for the footnote being discussed. If he heard no objection, he would take it that the Commission wished to adopt the footnote as it stood.

It was so decided.

The commentary to guideline 3.4.2, as amended, was adopted.

The meeting rose at 6 p.m.

3123rd MEETING

Wednesday, 10 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, 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.6)*

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter IV of the draft report and drew attention to Part 4 of the Guide to Practice contained in document A/CN.4/L.783/Add.6.

4.3 *Effect of an objection to a valid reservation*

Guideline 4.3 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. NOLTE said that the statement in the last sentence that reservations were consubstantial with the State's consent to be bound by the treaty should be amended in accordance with the formulation adopted for the first sentence of paragraph (16) of the commentary to guideline 4.2.6.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to guideline 4.3, as amended, was adopted.

4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*

Guideline 4.3.1 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

3. Mr. NOLTE said that since in the first sentence the word "objection" was described as "simple", for the sake of clarity and consistency, the second sentence should be redrafted to read: "This, in fact, is one of the fundamental differences between a simple objection and acceptance, one which, along with other considerations, means that such an objection is not 'tantamount to acceptance' ...".

Paragraph (3), as amended, was adopted.

* Resumed from the 3121st meeting, paragraph 55.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 4.3.1, as amended, was adopted.

4.3.2 *Effect of an objection to a reservation that is formulated late*

Guideline 4.3.2 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 4.3.2 was adopted.

4.3.3 *Entry into force of the treaty between the author of a reservation and the author of an objection*

Guideline 4.3.3 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 4.3.3 was adopted.

4.3.4 *Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*

Guideline 4.3.4 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to guideline 4.3.4 was adopted.

4.3.5 *Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect*

Guideline 4.3.5 was adopted.

Commentary

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to guideline 4.3.5 was adopted.

4.3.6 *Effect of an objection on treaty relations*

Guideline 4.3.6 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

Paragraphs (10) and (11)

4. Mr. NOLTE said that it was not clear from paragraph (11) as currently drafted what was meant by “the episode”; it might be understood as referring to the “few unfortunate changes which the Conference fairly quickly

reconsidered” mentioned in paragraph (10). For the sake of simplicity and clarity, he proposed that the two paragraphs be merged. The new paragraph should begin: “During the debate of the United Nations Conference on the Law of Treaties on what would become article 21, paragraph 3, an episode occurred, which is relevant for understanding this article. The Conference Drafting Committee ...”

5. Mr. PELLET (Special Rapporteur) said that his preference was to retain the whole of paragraph (10); otherwise the reference to the unfortunate changes would be lost. By way of solution, he proposed that the first sentence of paragraph (11) be redrafted to begin: “An episode which occurred at that time is relevant, however, for understanding ...” [*Un épisode qui s’est produit à cette occasion n’est cependant pas sans intérêt pour comprendre ...*].

6. The CHAIRPERSON said he would take it that Mr. Pellet’s proposal concerning paragraphs (10) and (11) was acceptable to the Commission.

Paragraph (10) was adopted.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

Paragraph (14)

7. Mr. NOLTE queried the appropriateness of the adjective “true” in the phrase “the Commission restores the true meaning and effects of objections” and proposed that it be replaced by the word “original”.

8. Mr. PELLET (Special Rapporteur) said that the word “true” was an accurate translation of the word used in the French text “*véritable*”. He did not understand what Mr. Nolte meant, since the use of the word “original” would require there to be some form of comparison.

9. Mr. NOLTE said that the expression “true meaning” implied that there was one set definition of objections and acceptances; however, during the United Nations Conference on the Law of Treaties, States had been free to define those terms as they had wished. Various definitions had been proposed and accepted, but in the end, the original definition had been restored.

10. Mr. PELLET (Special Rapporteur) said that paragraph (14) described a situation where the Conference had at one time agreed on a definition that did not make sense (objection means acceptance), but had subsequently reverted to a more reasonable definition (objection means objection).

Paragraph (14) was adopted.

Paragraphs (15) to (40)

Paragraphs (15) to (40) were adopted.

Paragraph (41)

11. Mr. NOLTE said that although the paragraph concerned modifying reservations, it did not provide any

examples of them, unlike the preceding paragraphs which gave examples of excluding reservations. He therefore proposed that a footnote be added to the paragraph, which should read: “Examples of modifying reservations can be found in paragraphs (20) to (23) of the commentary to guideline 4.2.4.”

Paragraph (41), supplemented by that footnote, was adopted.

Paragraph (42)

Paragraph (42) was adopted.

Paragraph (43)

12. Mr. PELLET (Special Rapporteur) said that the words “declarations ‘with intermediate effect’” [*déclarations “à effet intermédiaire”*] should read “objections ‘with intermediate effect’” [*objections “à effet intermédiaire”*].

Paragraph (43), as amended, was adopted.

The commentary to guideline 4.3.6, as amended, was adopted.

4.3.7 *Effect of an objection on provisions other than those to which the reservation relates*

Guideline 4.3.7 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

13. Mr. NOLTE, referring to the phrase in the penultimate sentence “set of interrelated provisions”, proposed the insertion of the word “closely” before the word “interrelated”, which better captured the idea of the close link between the set of provisions in question.

14. Mr. PELLET (Special Rapporteur) said that the addition of the word “closely” would be going further than the French text, which used the word “*connexes*”.

15. Mr. McRAE proposed, by way of a solution, that the word “interrelated” be replaced by the word “connected” in the English text.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

16. Mr. NOLTE proposed that the words “specific link” be amended to read “sufficient link”, in line with the wording of guideline 3.4.2.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

The commentary to guideline 4.3.7, as amended, was adopted.

4.3.8 *Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation*

Guideline 4.3.8 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

17. Mr. NOLTE said that paragraph (2) referred to an objection raised by Sweden to a reservation formulated by El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities. The reservation in question was vague. Sweden considered that it did not specify the extent of the derogation from the Convention and that it was null and void. Paragraph (3) referred to the objection as having “super-maximum” effect. While he did not question the substance of the point being made by the Special Rapporteur, he wondered whether a better example could be found. In that connection, he drew attention to paragraph (11) of the commentary to guideline 3.1.5.2 which, with regard to vague reservations, stated, *inter alia*, that they raised particular problems and that it was difficult to maintain that they were invalid *ipso jure*. The case of vague reservations was thus perhaps not as clear-cut as it appeared in paragraphs (2) and (3). He therefore proposed that a decision on the paragraphs be deferred until a better example of an objection to a vague reservation was found.

18. Mr. PELLET (Special Rapporteur) said that he doubted whether another example would make much of a difference; however, he would have no problem if Mr. Nolte wished to look for one. The issue at stake was not whether the reservation was null and void, but whether it was considered to be null and void by the objecting State and what the latter considered to be the consequences of its objection. However, in most cases, objections with super-maximum effect or purported to have super-maximum effect related to vague reservations.

19. Mr. NOLTE said that, in the light of Mr. Pellet’s comments, he would not need to look for another example. However, he proposed that the first sentence of paragraph (3) be amended to read: “Regardless of the consequence of such an objection with a purported super-maximum effect in the case of an invalid reservation ...” That would make it clear that it was not as obvious as the Government of Sweden alleged that in respect of vague reservations objections had a super-maximum effect. It would also be more consistent with paragraph (11) of the commentary to guideline 3.1.5.2.

20. The CHAIRPERSON said he would take it that the Commission wished to adopt paragraph (2) as it stood and paragraph (3), as amended by Mr. Nolte.

Paragraph (2) was adopted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 4.3.8, as amended, was adopted.

4.4 *Effect of a reservation on rights and obligations independent of the treaty*

4.4.1 *Absence of effect on rights and obligations under other treaties*

Guideline 4.4.1 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 4.4.1 was adopted.

4.4.2 *Absence of effect on rights and obligations under customary international law*

Guideline 4.4.2 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 4.4.2 was adopted.

4.4.3 *Absence of effect on a peremptory norm of general international law (jus cogens)*

Guideline 4.4.3 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

21. Mr. NOLTE, referring to the phrase in the last sentence “doubtless the notion of *jus cogens* will continue to evolve”, proposed the deletion of the words “the notion of”.

22. Mr. PELLET (Special Rapporteur) proposed instead that the words “the notion of” be replaced by “the rules of” [*les règles de*].

Paragraph (3) was adopted with the latter amendment.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor editorial amendment to the French text.

The commentary to guideline 4.4.3, as amended, was adopted.

4.5 *Consequences of an invalid reservation*

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

23. Mr. NOLTE said that in the first line the word “objection” should be replaced with “reservation”.

24. Mr. McRAE said that, for the sake of clarity, it would be better to reword the phrase “the effect of an objection” to read “this effect of a reservation”.

25. Mr. PELLET (Special Rapporteur) said that, on reflection, he considered it wiser to retain “objection”, so as to avoid a possible contradiction between the first and second sentences.

26. Mr. GAJA said that the solution might be to delete the words “the effect of” in the first sentence.

27. Mr. PELLET (Special Rapporteur) said that he agreed with the substance of Mr. Gaja’s proposal, but thought that, in the interests of readability, the position of the words “at that time” [*alors*] should be changed and the first sentence should be reworded to read: “It is also clear from this formula that an objection—which was also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of the International Court of Justice—was envisaged at that time only in the case of reservations incompatible (or deemed incompatible) with the object and purpose of the treaty” [*Il ressort également de cette formule que l’on n’envisageait alors une objection – elle aussi soumise à la condition de la compatibilité avec l’objet et le but conformément à l’avis consultatif de la Cour internationale de Justice – que pour le cas des réserves contraires (ou considérées comme contraires) à l’objet et au but du traité*].

28. Mr. McRAE said that in the final sentence, the phrase “and would remain so to the adoption of the Vienna Convention” seemed unclear and should perhaps be deleted. He supposed it to mean that even the adoption of the Vienna Convention did not resolve the question of impermissible reservations.

29. Mr. PELLET (Special Rapporteur) said that he was not in favour of deleting the phrase. Instead, he proposed that the end of the last sentence be amended by placing a full stop after “of the Commission and the Conference” and by starting a new sentence which would read: “The Vienna Convention makes no reference to the question” [*La Convention de Vienne ne fait aucune mention de la question*].

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

Paragraph (13)

30. Mr. NOLTE said that, in the final sentence, the phrase “It is, however, clear” was too strong and somewhat

misleading; it would be more appropriate to reword the first part of the sentence to read: “It seems, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of the rules adopted at the conclusion of their work”.

Paragraph (13), as amended, was adopted.

Paragraphs (14) to (20)

Paragraphs (14) to (20) were adopted.

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

4.5.1 Nullity of an invalid reservation

Guideline 4.5.1 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor editorial correction to the English text.

Paragraph (5)

31. Mr. NOLTE said that he was concerned about the way the phrase “*valeur juridique*” had been translated in the English text. He wondered whether “legal force” might be a more appropriate translation than “legal value”, which appeared twice in the paragraph.

32. After a discussion in which Sir Michael WOOD, Mr. McRAE, Mr. PELLET (Special Rapporteur) and Mr. GAJA took part, the CHAIRPERSON said that he took it that the Commission wished to replace the expression “legal value” with “legal effect”.

Paragraph (5) was adopted with that amendment to the English text and with a minor editorial correction to the French text.

Paragraph (6)

33. Mr. McRAE said that the order of the last part of the final sentence should be reversed so as to read: “this would contradict guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and deprive article 19 of any substance”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

34. Mr. PELLET (Special Rapporteur) said that, in the second sentence of the first footnote to paragraph (7), the reference to “paragraph (3)” should be replaced with “paragraph (4)”.

35. Mr. NOLTE said that, in the interests of readability and clarity, the last sentence of paragraph (7) should be moved to the beginning of paragraph (8).

Paragraphs (7) and (8), as amended, were adopted.

Paragraphs (9) to (14)

Paragraphs (9) to (14) were adopted.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

Paragraph (15)

36. Mr. PETRIČ said that he was concerned that on several occasions, including in paragraph (15), references had been made to “Eastern countries” and “Western States”. Such terminology belonged to an earlier age and was no longer relevant.

37. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Petrič as far as the current situation in Europe was concerned. It would, however, be absurd to delete all reference to the difficulties that had arisen in the past on account of the presence of two political blocs within Europe. It would be tantamount to rewriting history to ignore their former existence and to talk about the past as if the current situation had obtained in those days.

38. Mr. PETRIČ said that he was not advocating the rewriting of history, but he still took issue with the term “Eastern countries” because it was ambiguous. Perhaps the expression “Eastern bloc countries” would be a clearer reference to the historical context. It would be helpful if the secretariat could decide on more suitable language at the final editing stage.

39. Mr. PELLET (Special Rapporteur) said that he could not agree with that terminology, since at the time of the United Nations Conference on the Law of Treaties there would have been an outcry if the States in question had been described as “Eastern bloc countries”.

40. Mr. HUANG said that Mr. Petrič had made an important point. In the second decade of the twenty-first century some colleagues were still displaying the cold war mindset of the 1970s and 1980s of the previous century. In the context of reservations to treaties, a distinction should be drawn, not between Eastern and Western countries, but between countries that had entered reservations or objections. If the Commission’s text reflected antiquated ideology, it would not be widely accepted by the international community. The Commission should keep up with the times.

41. Mr. McRAE noted that, in some places, there were references to “Eastern countries” and in others to “Eastern European countries”. It would therefore be advisable to ensure greater consistency in the text’s terminology.

Paragraph (15) was adopted.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

42. Mr. NOLTE said that, in the first sentence, the approach taken in the objection by Belgium⁴⁵⁶ to the reservations of the United Arab Republic and the Kingdom

⁴⁵⁶ *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. III.3.

of Cambodia to the Vienna Convention on Diplomatic Relations was described as “somewhat unusual”. The text of the corresponding footnote, however, gave further examples which were in line with the type of objection that Belgium had formulated. Recently, the United States had also made a similar objection to reservations formulated by Pakistan upon ratification of the International Covenant on Civil and Political Rights. In its objection of 29 June 2011, the United States had stated that it “considers the totality of Pakistan’s reservations to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan’s reservations”.⁴⁵⁷ That example, together with the examples quoted in the above-mentioned footnote, clearly demonstrated that the approach taken in the objection by Belgium was not unusual. He therefore proposed that the words “which is somewhat unusual” be deleted and that the content of the footnote be moved to the following footnote. He also proposed that the above-quoted objection by the United States to the reservation by Pakistan be included in the footnote.

43. The recent wave of objections against the reservations formulated by Pakistan upon ratification of the International Covenant on Civil and Political Rights seemed to demonstrate that the approach taken by Belgium was the rule rather than the exception. Of the 24 mostly Western States that had so far formulated objections against the reservations by Pakistan on the ground that those reservations were incompatible with the object and purpose of the treaty, only 7 had said that they regarded the reservations as invalid with the effect that the treaty applied in its entirety between the reserving and the objecting State. On the other hand, 17 States had limited themselves to saying that they considered the reservation by Pakistan to be incompatible with the object and purpose of the treaty, but that that would not prevent the entry into force of the treaty between Pakistan and the objecting State. Although those States had not referred to article 21, paragraph 3, of the 1969 Vienna Convention on the law of treaties as clearly as had the United States, it was reasonable to assume that many of those States presumed that their objection would have the effect explicitly described in the objection by the United States. In fact, the recent wave of reactions by States to the reservations by Pakistan was particularly significant for the purpose of the project, as those reactions had been formulated on the basis of or with awareness of the Commission’s draft guidelines. Thus, recent practice with respect to the reservations by Pakistan upon its ratification of the Covenant was an additional reason why the words “which is somewhat unusual” should be deleted.

44. In response to queries by Mr. Pellet (Special Rapporteur) and Mr. Hmoud, Mr. NOLTE explained that, in addition to that deletion, he proposed consolidating the two footnotes and adding a reference to the objection by the United States to the footnote, without commenting on it.

Paragraph (17), as amended and with an amendment to the related footnote, was adopted.

Mr. Kamto resumed the Chair.

⁴⁵⁷ *Ibid.*, chap. IV.4.

Paragraph (18)

45. Mr. NOLTE said that in paragraph (18) the same issue arose as in paragraph (13) of the commentary to section 4.5. In the second sentence, “it is clear” should be replaced with “it seems clear”.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Paragraph (21)

46. Mr. PETRIČ again emphasized the need for consistency in terminology with reference to Eastern European countries.

47. Mr. PELLET (Special Rapporteur) said that, on a sensitive issue, the secretariat should not be expected to select terminology. Mr. Petrič should make it clear what terms he wished the Commission to use in each case.

Paragraph (21) was adopted.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

48. Mr. GAJA said that the phrase “and even some international organizations” should be replaced with “and also the European Union”.

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (26)

Paragraphs (24) to (26) were adopted.

Paragraph (27)

Paragraph (27) was adopted with a minor editorial correction to the English text.

Paragraph (28)

Paragraph (28) was adopted.

Paragraph (29)

49. Mr. GAJA said that, in the penultimate sentence, in the phrase “nullity is not a subjective or relative matter, but can and must be determined objectively”, “can and must” should be altered to “should”, because in most cases nullity could not be determined objectively.

50. Mr. PELLET (Special Rapporteur) said that the phrase “whenever possible” [*autant que faire se peut*] should be added.

Paragraph (29), as amended, was adopted.

The commentary to guideline 4.5.1, as amended, was adopted.

4.5.2 *Reactions to a reservation considered invalid*

Guideline 4.5.2 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

51. Mr. NOLTE said that, since the paragraph described the wide variety of legal effects which could be produced by objections to reservations, the footnote to the paragraph should include the example of reactions to the reservation by Pakistan to which he had adverted in connection with the footnote to paragraph (17) of the commentary to guideline 4.5.1, since it was the most recent, broadly based example of diverse objections with many different effects.

Paragraph (3) was adopted with that amendment to the footnote.

Paragraph (4)

Paragraph (4) was adopted with a minor editorial correction to the French text.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

52. Mr. NOLTE queried the advisability of quoting the same statement by Sweden in the commentary to two succeeding guidelines. He therefore suggested deleting paragraph (7).

53. Ms. JACOBSSON emphasized that whenever the statement of one of the Nordic countries was quoted, it was important to ascertain whether that country was speaking only for itself or also on behalf of the Nordic countries.

Paragraph (7) was deleted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

54. Mr. PELLET (Special Rapporteur) said that the reference to the second footnote should be moved to the end of the quotation, since the phrase “including, of course, on the issue of reservations” reflected the Commission’s opinion and was not part of the decision in question.

55. Mr. NOLTE objected to the expression “marginal existence” and said that “scarcity” might be more suitable.

56. Mr. McRAE said that the phrase “there is no point in obsessing about” was very colourful but possibly not the most appropriate turn of phrase. It would make sense to say “this is all the more important because of the scarcity of bodies”.

57. Mr. PELLET (Special Rapporteur) said that the French expression “*il ne faut pas se laisser obnubiler*” would be rendered more accurately in that context by the phrase “there is no need to focus on”.

58. The CHAIRPERSON noted that the phrase would then read “there is no need to focus on the scarcity of bodies”.

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (15)

Paragraphs (12) to (15) were adopted.

The commentary to guideline 4.5.2, as amended, was adopted.

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

59. Mr. NOLTE said that paragraph 3 of the guideline had been inserted and adopted during the first part of the current session after a somewhat hasty discussion in the Working Group on reservations to treaties. While he did not wish to call into question the substance of paragraph 3, its current formulation was somewhat misleading and might have unintended consequences. It seemed to suggest that the expression of the intention not to be bound by a treaty without the benefit of the reservation would produce an effect at the moment that intention was declared. Such an expression of intention would presumably have a similar effect to withdrawal from the treaty, thus an *ex nunc* effect. He doubted whether that was really the Commission’s intent, as it would signify that the State which had formulated the invalid reservation would be bound by the treaty until, but not after, it had expressed its contrary intention. That would raise serious problems of legal certainty. He supposed that when the Commission had drafted paragraph 3, it had taken the view that the declaration by a State of its intention not to be bound by the treaty without the benefit of the reservation was meant to clarify the original intention of the author of the reservation. If that was the case, paragraph 3 should be recast to read:

“Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may declare at any time that it was its intention not to be bound by the treaty without the benefit of the reservation.”

60. Mr. PELLET (Special Rapporteur) said that Mr. Nolte had touched on a substantive problem because paragraph 3 did not indicate the point in time at which a State’s expression, or declaration, of its intention produced its effects. That was a lacuna in the guideline as a whole. He was unsure that the guideline’s meaning was that attributed to it by Mr. Nolte. While he was rather reluctant to amend a guideline which contained such a substantial lacuna, he had nothing against replacing “express” with “declare”. He would, however, like to hear what other members thought on the matter. Mr. Nolte’s arguments regarding an *ex nunc* or *ex tunc* effect were unconvincing and the wording which he had proposed might not solve the real problem, which was that of knowing when the expression of intention produced its effects. Rather than

amending paragraph 3, it might be better to explain in one or two additional paragraphs in the commentary that the point in time was not specified in paragraph 3 and to indicate what approach the Commission deemed most appropriate. The terms *ex nunc* or *ex tunc* were rather obscure. It would be wise to hold that a State's intention not to be bound by a treaty without the benefit of its reservation did not have retroactive effects, because acting as if a situation that had been regarded as established had never existed might entail endless difficulties.

61. Mr. HMOUD said that he supported the Special Rapporteur's proposal on the whole, although he considered that the Commission should not decide at the last minute the point in time at which the expression of intention produced its effects. That was a very important issue and the text as it stood was sufficient. Perhaps, as the Special Rapporteur had said, it should be made clear that the issue was still undecided. To say that all the effects of a reservation which was found to be incompatible with the object and purpose of a treaty were non-existent meant that whatever had gone before would have no legal effect. That assumption would create many problems. If the State in question indicated that it did not intend to be bound without the benefit of its reservation, that expression of intention would have the same effect as withdrawal. Although the 1969 Vienna Convention had made no provision for such a situation, the Commission could engage in an exercise *de lege ferenda* in that regard.

62. Mr. PELLET (Special Rapporteur) said that he had formerly been against the position proposed by Mr. Hmoud, because he had been sceptical about its compatibility with the 1969 Vienna Convention but, in view of the debates in the Sixth Committee at the sixty-fifth session of the General Assembly, it appeared to be a good compromise. The adoption of Mr. Nolte's position might give rise to practical problems, since it was tantamount to saying that a State's participation in a treaty was erased retrospectively. In theory that might be a neat solution, but in practice the problems which it would pose would be of such magnitude that it would be better to consider that the State's participation would end as from the time of its expression of intention. The Commission should not be reluctant to engage in an exercise *de lege ferenda*. It would be better to leave the text as it stood and to explain in the commentary that the Commission had not specified the point in time at which the expression of intention produced its effects, because that was still a matter *de lege ferenda* and it was necessary to determine how that issue would be dealt with in practice.

63. Mr. MELESCANU endorsed Mr. Hmoud's position and said that if the Commission really wanted to include a *lex ferenda* provision in the Guide to Practice, it would have to base itself on an analysis of State and international practice. At the current stage in its work that was impossible. While the solution proposed by the Special Rapporteur was not ideal, it was the best that could be achieved in the circumstances. Perhaps Mr. Nolte's concerns could be addressed in the commentary.

64. Sir Michael WOOD said that it would be difficult for the Commission to specify more precisely the point in time at which the expression of the intention

not to be bound by the treaty without the benefit of the reservation produced its effects. He supported the Special Rapporteur's proposal to indicate in the commentary that the Commission acknowledged that there was an issue and that it had not dealt with it fully. Another reason for taking that approach was that the point in time might actually vary, depending on the particular circumstances in each case. The new commentary could therefore indicate that the question would be resolved on a case-by-case basis and in the light of practice.

65. Mr. NOLTE said that he, too, agreed with the Special Rapporteur's proposal, given that the aim of his own proposal had been to highlight the issue and to preempt accusations that the Commission had overlooked it. However, since there might be cause for the Commission to reflect on the text of the guideline in the light of the Special Rapporteur's new formulation, the Commission could wait to see the proposed text before deciding whether to amend the guideline. It was important for the issue to be resolved as appropriately as possible, since it could potentially be identified as a core issue of the Guide to Practice.

66. Mr. SABOIA said that the Commission could not afford to wait until it had reviewed the Special Rapporteur's proposed additions to the commentary before deciding how to proceed. Instead, it should adopt his proposal to leave the text of the guideline intact, since that was the proposal that had been supported by the majority of Commission members.

67. Mr. FOMBA said that the Commission had a fairly clear idea of the nature and content of the paragraph that should be added to the commentary. It should therefore not wait to see the new paragraph before adopting guideline 4.5.3.

68. Mr. PELLET (Special Rapporteur) said that he proposed to base the new commentary on the existing guideline, as it would be more difficult to draft the commentary if there was the possibility that the Commission might subsequently amend the guideline. The new paragraphs could explain that paragraph 3 deliberately left open the question of the precise point in time at which the expression of the intention not to be bound by the treaty without the benefit of the reservation produced its effects. They could describe the implications of a State's expression of its intention either to be bound by the treaty or not to be bound by the treaty without the benefit of the reservation, and indicate that the Commission wished to allow for the development of practice in that area. The new commentary could also mention Sir Michael's point that solutions to the question might vary depending on the particular circumstances in each case.

69. Mr. GAJA said that the Commission might wish to consider adding yet another paragraph to the commentary, as there was currently no explanation regarding paragraph 4, which recommended that, if a treaty monitoring body expressed the view that a reservation was invalid and the reserving State or international organization intended not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of 12 months from

the date at which the treaty monitoring body had made its assessment. The new commentary should explain how the Commission understood paragraph 4 in the context of guideline 3.2.3, which dealt with the recommendation that States and international organizations that had formulated a reservation to a treaty establishing a treaty monitoring body should give consideration to that body's assessment of the permissibility of the reservation. While guideline 3.2.3 did not give the assessments of treaty monitoring bodies any more effect than that which existed under the treaty they monitored, paragraph 4 of guideline 4.5.3 went further and seemed to imply that, even if the assessment of the permissibility of a reservation of a treaty monitoring body was not binding on a reserving State, the deadline set out in paragraph 4 should nevertheless apply. While he had no objection to the Commission taking that extra step, he did find it necessary to explain it in the commentary.

70. Sir Michael WOOD agreed that an explanation of paragraph 4 was necessary but added that it should be based on the principle that the powers of a treaty monitoring body were no more than those it had been granted under the treaty it monitored. If such powers did not include deciding with binding effect whether a reservation was valid or invalid, the commentary relating to paragraph 4 should reflect that.

71. The CHAIRPERSON said he took it that the Commission wished the Special Rapporteur to draft an additional paragraph or paragraphs to the commentary to guideline 4.5.3 relating to the issue raised by Mr. Nolte and based on suggestions made notably by Mr. Hmoud and Sir Michael. The proposed new commentary would indicate that the Commission had deliberately left the issue open-ended, considering it to be *de lege ferenda*, thereby sending a signal to the Sixth Committee that the Commission was fully aware of the issue and leaving room for researchers interested in the Commission's work to explore it further. The issue raised by Mr. Gaja regarding paragraph 4 would be dealt with in a similar fashion, based on suggestions made by Mr. Gaja and Sir Michael.

It was so decided.

Guideline 4.5.3 was adopted.

Commentary

Paragraphs (1) to (17)

Paragraphs (1) to (17) were adopted.

Paragraph (18)

72. Mr. HUANG said that the overall commentary to guideline 4.5.3, which contained a record number of paragraphs, was too lengthy, and that consideration should be given to condensing it from 50 to 10 paragraphs. However, given that there was not much time left before the end of the session, he would not insist on that point.

73. As to paragraph (18), he flatly objected to its inclusion in the commentary. He also objected to several footnotes in the draft report that contained references to reservations formulated by "China" that were no doubt references to the Republic of China and not to the People's

Republic of China. The Commission could either consider each of the footnotes in question individually or it could request that the secretariat deal with them according to principles agreed in advance.

74. In the antepenultimate footnote to paragraph (3) of the commentary to guideline 3.2, he proposed simply to delete the reference to "China", as it obviously did not refer to the People's Republic of China. For the following footnotes: (a) the second footnote to paragraph (5) of the commentary to guideline 2.5.6, (b) the penultimate footnote to paragraph (7) of the commentary to guideline 2.6.6, (c) the penultimate footnote to paragraph (7) of the commentary to guideline 2.8.2 and (d) the first footnote to paragraph (3) of the commentary to guideline 2.8.11, which also contained references to "China", the Commission could agree that references to reservations attributed to "China" that were made by the People's Republic of China should be retained in the footnotes, while those referring to reservations made by the Republic of China should be deleted.

75. Sir Michael WOOD said that he did not see how the Commission could accept the option simply to delete all references that did not suit one member of the Commission. It was up to the Commission as a whole to decide whether or not to review portions of the Guide to Practice that it had already adopted. Since it would be difficult to resolve all the issues raised by Mr. Huang in the time remaining, he proposed that one member of the Commission might place on record his or her views on the matter.

76. Mr. DUGARD said that, although the footnote references related to the statements of a former Government of China, the present Government was bound by them unless it had repudiated them. It was unclear whether the People's Republic of China had actually repudiated the statements to which Mr. Huang took exception; if it had not, he did not see how the Commission could amend those statements.

77. Mr. McRAE, supported by Mr. HMOUD and Mr. SABOIA, agreed that the Commission could not merely delete the references to China to which Mr. Huang objected. Since Mr. Huang had previously expressed approval for the solution found in the first footnote to paragraph (18) of the present commentary, which contained a declaration by the People's Republic of China denouncing as illegal and therefore null and void the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide by the Taiwan authorities in the name of China, the Commission could perhaps follow that model for the other references to reservations attributed to the Republic of China. For the sake of simplicity, the relevant references to "China" could be replaced with "the Republic of China" and a footnote added containing a cross reference to the first footnote to paragraph (18) of the present commentary.

78. The CHAIRPERSON, responding to Mr. Dugard's earlier statement, said that it was not simply a matter of reappraising a situation following a change of government but also involved the relationship between the People's Republic of China and Taiwan Province of China, which had previously referred to itself as "the Republic of China".

79. Mr. HUANG said that the final sentence of the first footnote to paragraph (18) expressed the consistent position of the Chinese Government with regard to all conventions signed by the Taiwanese authorities in the name of China, namely that they were illegal and therefore null and void. It was a position that had been acknowledged and respected by all Member States of the United Nations. Thus, from a purely legal standpoint, it did not make sense for the Commission to cite such a reservation. It was incomprehensible how such a simple issue could become so complicated. If the Commission insisted on including that reference in the Guide to Practice, he would be compelled to object to the Guide to Practice as a whole.

80. The CHAIRPERSON asked whether Mr. McRae's proposal might address Mr. Huang's concerns.

81. Mr. HUANG said that there were enough examples of reservations that the Commission could use without having to resort to an invalid one to which a member of the Commission was opposed.

82. Mr. PELLET (Special Rapporteur) said that Mr. Huang's comments appeared to be those of a representative of the People's Republic of China; if so, he was addressing the wrong forum. Even though Mr. Huang had previously accepted paragraph (18) because its first footnote clarified the reference in the paragraph to the Republic of China, if Mr. Huang was no longer in favour of retaining paragraph (18), the Commission could, in that particular case, amend it without misrepresenting the historical truth, since it was possible to find other pertinent examples.

83. However, with regard to the remaining references, he was of the opinion that one should not attempt to rewrite history. When conducting a scientific study in a forum composed of independent experts, one could not pretend that nothing had happened prior to the restoration of the lawful rights of the People's Republic of China. While he himself was among those who entertained no doubts that there was only one China, as far as the *travaux préparatoires* were concerned, he was strongly opposed to ignoring the existence of the Republic of China prior to 1971, when, in actuality, a representative of Chinese Taipei had taken a position, which, at the time, had been attributed to China.

84. He could agree to the method proposed by Mr. McRae, even though it was common knowledge that, before 1971, China had been represented in the United Nations by an illegitimate Government. Nonetheless, if the Commission wished to highlight that fact each time it referred to the Republic of China, he would not be opposed. It was a reasonable solution, and the Commission should be able to adopt it by consensus.

85. Mr. HUANG said that there were three principles that should guide the Commission in dealing with the issue he had raised. The first was that there was only one China. The second was that any reservation made by the People's Republic of China was acceptable for inclusion in the Guide to Practice. The third was that issues relating to one China or to Taiwan Province of China posed a serious political problem. On that basis, he could propose two

solutions. First, when a list of countries included China, the Commission should delete the reference to "China". That would pose no problem to the Guide to Practice or to the paragraph in question. Secondly, when a reference mentioned only China, he could agree to the inclusion of a footnote, similar to the first footnote to paragraph (18). However, he could not agree to the inclusion of cross references throughout the Guide to Practice that pointed to one exceptional case.

86. Mr. HMOUD, raising a point of order, said that he wished to inform the new members of the Commission that, according to the statute of the International Law Commission, they served on that body as independent experts. Although many members of the Commission might be ambassadors of their States of origin, in plenary sittings of the Commission, they were required to speak in their personal capacity and should not make any references that implied otherwise.

87. The CHAIRPERSON suggested that the Commission should defer consideration of the matter raised by Mr. Huang.

The meeting rose at 1 p.m.

3124th MEETING

Wednesday, 10 August 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflich, Mr. Candioti, 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.6-7)*

1. The CHAIRPERSON invited the Commission to continue its consideration of Part 4 of the Guide to Practice on Reservations to Treaties, contained in document A/CN.4/L.783/Add.6.