

Document:-  
**A/CN.4/SR.2786**

**Summary record of the 2786th meeting**

Topic:  
**Adoption of the report**

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**B. Consideration of the topic at the present session (A/CN.4/L.640 Add.1–3)**

Paragraphs 18 to 21 (A/CN.4/L.640/Add.1)

*Paragraphs 18 to 21 were adopted.*

**C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.640 and Add.1)****1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.640/Add.1)**

Paragraph 22

*Paragraph 22 was adopted.*

*Section C.1 was adopted.*

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

[Agenda item 2]

74. Mr. PELLET said that the meetings being held at the present session to discuss reservations to treaties with individual human rights bodies were extremely interesting. It might be useful, however, to hold a general colloquium or symposium bringing together all the human rights bodies for a slightly more structured discussion, perhaps on the basis of reports. Such a meeting could be held during the Commission's session in 2004 or 2005; it would be particularly useful before the Commission took a decision on the preliminary conclusions on reservations to multi-lateral normative treaties, including human rights treaties, that it had adopted at its forty-ninth session.<sup>1</sup> What did members of the Commission think?

75. Mr. DUGARD said he strongly supported the proposal and thought it should be implemented in 2004, if possible. The meetings with human rights bodies had been encouraging. They should become an ongoing dialogue on an issue on which there was a great need for cooperation.

76. Mr. MANSFIELD said he also supported the proposal. The meetings with human rights bodies had allowed some progress to be made in harmonizing positions that had initially appeared very far apart. The organizational aspects of implementing the proposal, including venue and cost implications, should be investigated.

77. Ms. ESCARAMEIA said the meetings with human rights bodies were extremely useful but what was lacking was some sort of structure. Often the bodies had taken positions in individual cases but had not reflected very deeply on the overall question of reservations. She would like to see the dialogue with individual bodies continued, with particular emphasis on their reasoning about reservations to the treaties that concerned them. As for holding a symposium, it was certainly an interesting idea and she could support it, but not at the expense of a continuing dialogue with individual human rights bodies.

78. Mr. Sreenivasa RAO said exchanges were useful but should not amount to negotiation between the Commission and the human rights bodies.

79. Mr. BROWNLIE said the proposal was very attractive from the logical standpoint, but his intuitive reaction was that it was premature. It would be absolutely appropriate, but at a later stage in the dialogue with the human rights bodies. Bilateral, somewhat informal contacts were probably all they were prepared for at the moment. They were feeling their way forward, and the Commission should not be seen to be imposing a structure on the discussion or pressing for a resolution of the issue.

80. Mr. PELLET said the point was for everyone to feel the way forward together. He understood Mr. Sreenivasa Rao's concerns about not entering into negotiations, but it would be useful to seek a synthesis of positions about reservations to treaties, especially since he sincerely hoped that in 2005 the Commission would adopt a decision on the preliminary conclusions it had adopted at its forty-ninth session. He would not, however, press his proposal.

81. The CHAIR said there was no substantive opposition to Mr. Pellet's proposal but some questions had been raised about the logistical implications. Members of the Commission should continue to reflect on the idea.

*The meeting rose at 6.05 p.m.*

**2786th MEETING**

*Tuesday, 5 August 2003, at 10 a.m.*

*Chair: Mr. Enrique CANDIOTI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.*

\* Resumed from the 2780th meeting.

<sup>1</sup> See 2781st meeting, footnote 11.

**Draft report of the Commission on the work of its fifty-fifth session (*continued*)**

**CHAPTER VIII. Reservations to treaties (*continued*) (A/CN.4/L.640 and Add.1–3)**

**C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.640 and Add.1)**

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.640)

*Commentary to the explanatory note*

Paragraph (1)

1. Mr. GAJA proposed that the words “Following a suggestion by the Drafting Committee”, which were inappropriate in that context, should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

2. Mr. GAJA, referring to the peremptory tone of the last sentence, said it suggested that readers were incapable of reaching their own conclusions and had to rely on the commentaries to the model clauses to determine whether the situation was one in which the inclusion of the clauses in the treaty would be useful.

3. Mr. MANSFIELD proposed that the words “alone can determine” should be replaced by the words “may help in determining”.

*Paragraph (4), as amended, was adopted.*

*Commentary to draft guideline 2.5 (Withdrawal and modification of reservations and interpretative declarations)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph [(3)]

4. Mr. PELLET (Special Rapporteur) said that, since the Commission had not adopted draft guideline 2.3.5, paragraph [(3)] should be deleted for the time being.

*Paragraph [(3)] was deleted.*

Paragraph (4)

*Paragraph (4), which became paragraph (3), was adopted with a minor drafting change.*

*Commentary to draft guideline 2.5.1 (Withdrawal of reservations)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted with minor drafting changes.*

Paragraph (3)

5. Mr. GAJA noted that paragraph (3) stated that the new draft article 19 no longer mentioned the notification procedure for the withdrawal of reservations. The proposal by Sir Gerald Fitzmaurice on formal notification<sup>2</sup> was reproduced in full in paragraph (2), while the description of the notification procedure proposed by Sir Humphrey Waldock<sup>3</sup> was relegated to a footnote. It would be clearer if it was included in the body of paragraph (3) in order to indicate that there had been a specific proposal on the notification procedure.

6. Mr. PELLET (Special Rapporteur) said that he agreed with that proposal and indicated that some footnotes corresponding to the paragraph in question should be merged.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

Paragraph (10)

7. Mr. GAJA said that the last sentence implied that reservations were only the result of the unilateral expression of the will of a State, but the Commission had not yet considered the question of the existence of an agreement. He therefore proposed that that sentence should be deleted.

8. Mr. MATHESON said that the word “unilateralism” had taken on a negative political connotation and referred to action carried out by a State in total disregard for the rights and interests of others, but that was certainly not what was meant at the end of the second sentence. He therefore suggested that that word should be replaced by a term such as “unilateral action” or “unilateral decision”, which would not have the same political implications.

9. Mr. MELESCANU said that, in his view, the last sentence contained a very important idea and an argument in favour of the idea that a reservation could be withdrawn unilaterally. It was important to indicate that the withdrawal of a reservation could be done without the agreement of the other contracting parties, although he did agree that the concept of unilateralism, which was perhaps overemphasized, should be eliminated.

10. Mr. PELLET (Special Rapporteur) said that he supported Mr. Gaja’s proposal even though he disagreed with him. Two unilateral acts did not make an agreement. The idea he was trying to put across was that an agreement was one unilateral act and a reservation was another. It might

<sup>2</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

<sup>3</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 76.

be considered that two unilateral acts ultimately ended up as an agreement, but that was not the case. The question was complicated and the Commission would have an opportunity to come back to what non-objection meant. The sentence under discussion was not wrong, but it did represent a doctrinal stand, and it was perhaps too early to lead the Commission into its adoption without having discussed it. It should therefore be deleted.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted with a minor drafting change in the French text.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

*Paragraph (13) was adopted with a minor drafting change in the French text.*

Paragraphs (14) to (16)

*Paragraphs (14) to (16) were adopted.*

*Commentary to draft guideline 2.5.2 (Form of withdrawal)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

*Paragraph (5) was adopted with a minor drafting change.*

Paragraphs (6) to (10)

*Paragraphs (6) to (10) were adopted.*

Paragraph (11)

11. Mr. GAJA said that he had problems with the theoretical approach taken in paragraph (11). The relationship between treaties and domestic law was very complex and it could not simply be assumed that the treaty would in any event be regarded as exclusively applicable and that a domestic law should just be ignored. If a reference to monism or dualism had to be included, it should be more flexible. Perhaps the text should be redrafted to take account of the fact that a treaty did not necessarily take precedence over an amended domestic law.

12. Mr. PELLET (Special Rapporteur) said that Mr. Gaja's argument about the complexity of the relationship between treaties and domestic law was not necessarily transposable to the problem covered by paragraph (11), which dealt with the relationship between reservations to treaties and domestic law.

13. Mr. GAJA said that the theoretical element of paragraph (3) gave a rather sketchy idea of the relationship between treaties, including reservations, and domestic law. He therefore proposed that the two sentences referring to monism and dualism should be deleted.

14. Mr. PELLET (Special Rapporteur) said that the deletion of those two sentences would disrupt his reasoning and was all the more unnecessary in that the sentences indicated that the result could but did not have to be legal chaos. For example, in monist countries, the court might have to decide whether it should apply the treaty—and the reservation thereto—or domestic law, even though the reservation had been based on that law.

15. Mr. GAJA said that a problem of interpretation could arise regardless of the legal theory prevailing in the country concerned.

16. The CHAIR noted that the majority of the members of the Commission were in favour of retaining the two sentences referred to by Mr. Gaja.

17. Mr. ECONOMIDES said that the words “the scope of which, however, is still uncertain” in the last sentence were unnecessary and should be deleted.

18. Mr. BROWNLIE said that the legal chaos referred to in paragraph (11) did not have to be described as “total”.

19. Mr. PELLET (Special Rapporteur) said that the French text of the last sentence referred to the possibility that the reserving State could continue “à s'en prévaloir à l'égard des autres parties”, whereas the English text used the words “to have an advantage over the other parties”. In his opinion, the words “to avail itself of” should be used.

20. The CHAIR proposed the following amendments: to delete the word “total” in the third sentence; to replace the words “to have an advantage over” by the words “to avail itself of the reservation with regard to” in the fourth sentence; and to delete the phrase referred to by Mr. Economides.

*It was so decided.*

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

*Commentary to draft guideline 2.5.3 (Periodic review of the usefulness of reservations)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

21. Mr. MATHESON proposed that the scope of the second sentence should be reduced by replacing the word “undermines” by the words “may undermine”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*Commentary to draft guideline 2.5.4 [2.5.5]* (Formulation of the withdrawal of a reservation at the international level)

Paragraphs (1) to (8)

*Paragraphs (1) to (8) were adopted.*

Paragraph (9)

22. Mr. PELLET (Special Rapporteur) said that he would check with the secretariat that it was draft guideline 2.1.3 that should be referred to in this paragraph and that the text of that provision, as contained in the footnote, actually corresponded to the version adopted by the Commission.

*Paragraph (9) was adopted, subject to that condition.*

Paragraphs (10) to (17)

*Paragraphs (10) to (17) were adopted.*

*Commentary to draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter]* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

23. Mr. GAJA said that, at the end of the footnote, the word “international” should be replaced by the word “internal”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

24. Mr. PELLET (Special Rapporteur) said that the last footnote in the paragraph should read: “See commentary to draft guideline 2.5.4, para. (17)”. The next footnote should read: “*Ibid.*, para. (1)”.

25. Mr. GAJA proposed that, in the second sentence, the words “the position that it took” should be replaced by the words “the position taken”.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft guideline 2.5.6* (Communication of withdrawal of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

26. Mr. GAJA proposed that the words “recipients of withdrawals of reservations” should be replaced by the

words “recipients of communications of the withdrawal of reservations”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*Commentary to draft guideline 2.5.7 [2.5.7, 2.5.8]* (Effect of withdrawal of a reservation)

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted, on the understanding that the secretariat would rearrange the presentation of paragraph (2) to make it more readable.*

Paragraph (7)

27. Mr. PELLET (Special Rapporteur) said that, in the first sentence of the French text, the words *lui-même et* should be deleted.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

28. Mr. GAJA proposed that, in order to remove any ambiguity, the words “as of the entry” should be replaced by the words “as from the entry”.

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

*Commentary to draft guideline 2.5.8 [2.5.9]* (Effective date of withdrawal of a reservation)

Paragraphs (1) to (10)

*Paragraphs (1) to (10) were adopted.*

Paragraph (11)

29. Mr. GAJA said that the words “in respect of them” should be added after the word “effect” in the second sentence because the withdrawal did not take effect at the same time in respect of all the States and international organizations concerned.

*Paragraph (11), as amended, was adopted.*

Paragraphs (12) to (14)

*Paragraphs (12) to (14) were adopted.*

*Commentary to model clause A* (Deferment of the effective date of the withdrawal of a reservation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

30. Mr. GAJA said that, in the penultimate sentence of the French text, the words *projet de directive 2.5.8* should be replaced by the words *projet de directive 2.5.9*.

*Paragraph (2), as amended, was adopted.*

*Commentary to model clause B* (Earlier effective date of withdrawal of a reservation)

Paragraph (1)

31. Mr. GAJA proposed that the following sentence should be added at the end to indicate when the model clause could be used: “This is especially true when there is no need to modify internal law as a consequence of the withdrawal of a reservation by another State or organization.”

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

*Commentary to model clause C* (Freedom to set the effective date of withdrawal of a reservation)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

*Commentary to draft guideline 2.5.9 [2.5.10]* (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

32. Mr. GAJA said that he did not understand the second sentence of the French text.

33. Mr. PELLET (Special Rapporteur) said that that was perhaps because the sentence contained a mistake which distorted its meaning: the word *préservé* should be replaced by the word *réserver*.

34. Mr. GALICKI, referring to the words “integral obligations”, asked whether the quotation marks were really necessary.

35. Mr. PELLET (Special Rapporteur) said that that concept was in quotation marks because it was not yet fully accepted by writers on law.

36. Mr. MANSFIELD proposed that that term should be defined in a footnote.

37. Mr. PELLET (Special Rapporteur) said that he did not want to get into the definition of a controversial concept in a footnote. The obligations in question were primarily “non-reciprocal” obligations that also existed, for example, in environmental law. The concept had originated with Sir Gerald Fitzmaurice.

38. Mr. PAMBOU-TCHIVOUNDA proposed that the wording “, i.e., non-reciprocal obligations” should be added after the wording “integral obligations”.

39. Mr. PELLET (Special Rapporteur) said that they were not only non-reciprocal obligations, but also obligations whose breach could not result in the suspension of the treaty. That was a seminal concept, and in his view it would be a mistake for the Commission to leave it out. He proposed that it should be retained and that a footnote relating to it should be prepared.

*Paragraph (5) was adopted, subject to that amendment.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*Commentary to draft guideline 2.5.10 [2.5.11]* (Partial withdrawal of a reservation)

40. Mr. GAJA said that the English and French texts of the draft guideline were different. The French text read: “*Le retrait partiel d’une réserve atténuée ... et assure plus complètement ...*”, while the English text stated: “The partial withdrawal of a reservation purports to limit ... and to achieve a more complete ...”. He suggested that the two texts should be harmonized.

41. Mr. PELLET (Special Rapporteur) said that the Drafting Committee had adopted the French text of the draft guideline and that the authentic English text was the one contained in document A/CN.4/L.640/Add.1, which read: “The partial withdrawal of a reservation limits ... and achieves ...”.

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

42. Mr. BROWNLIE said that the use of the word “we” should be avoided. He proposed that the first sentence should be amended to read: “Reservation clauses expressly ... are to be found more frequently.”

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

43. Mr. PAMBOU-TCHIVOUNDA said that it should be indicated in a footnote, for example, why “This similarity is ... sometimes contested in the literature”.

44. Mr. PELLET (Special Rapporteur) suggested that, in the French text, the words *Cette assimilation, confirmée par la pratique* should be replaced by the words *Ce rapprochement, confirmé par la pratique*.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

45. Mr. PELLET (Special Rapporteur) said that, in the second sentence, the words “to conventions” should be added after the wording “a number of reservations”. The quotation from Mr. Schabas should be in italics.

Paragraph (7)

46. Mr. GAJA proposed that, for the sake of consistency with the quotation contained in paragraph (6), the wording “limits the scope” should be replaced by the wording “does not enlarge the scope”.

47. Mr. PELLET (Special Rapporteur) said that he had no objection to that amendment, provided that the words *n’élargit pas* were in italics in the French text.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

48. Mr. ECONOMIDES said that the words “after much hesitation” and the word “(correctly)” in the footnote at the end of the sentence should be deleted.

49. Mr. PELLET (Special Rapporteur) said he agreed that the word “(correctly)” could be deleted. However, the words “after much hesitation” reflected an objective element and should therefore be maintained.

50. Mr. MOMTAZ said that the use of those words would have to be justified.

51. Mr. ECONOMIDES, agreeing with Mr. Momtaz, said that indications justifying the use of those words should be given in a footnote.

*Paragraph (9), as amended, was adopted, subject to the addition of the footnote proposed by Mr. Economides.*

Paragraph (10)

52. The CHAIR said that, in the French text, the words *le droit des conventions* should be replaced by the words *le droit des traités*.

*Paragraph (10), as amended, was adopted.*

Paragraphs (11) to (20)

*Paragraphs (11) to (20) were adopted.*

*Commentary to draft guideline 2.5.11 [2.5.12] (Effect of a partial withdrawal of a reservation)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

53. Mr. GAJA said that, in the penultimate sentence, the words “does not relate” should be replaced by the words “does not apply” and the words “that has been withdrawn” by the words “which has been withdrawn”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

54. Mr. GAJA said that the words “for there seems to be no case where partial withdrawal of a reservation has led to a withdrawal of objections” should be deleted.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

55. Mr. PELLET (Special Rapporteur) said that the words *prima facie* should be added in the French text of the second sentence and that the words “there might seem, *prima facie*, to be less doubt” should be replaced by the words “it might seem, *prima facie*, very doubtful”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

56. Ms. ESCARAMEIA said that, as it stood, paragraph (6) did not refer to the fact that the withdrawal of a reservation could have a discriminatory effect, not only in respect of the States parties to the treaty but also in respect of the persons directly concerned. The commentary should therefore be amended accordingly.

57. Mr. PELLET (Special Rapporteur) said that he agreed with Ms. Escarameia’s comment and proposed that, at the end of the third sentence, the words “or some categories of beneficiaries to the exclusion of others” should be added after the words “certain parties or categories of parties” and that, in the fourth sentence, the words “In that case” should be replaced by the words “In such cases”.

*Paragraph (6), as amended, was adopted.*

*Section C.2, as amended, was adopted.*

*Section C, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*