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Summary record of the 3049th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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3049th MEETING

Friday, 21 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET (Special Rapporteur), introducing the addendum to his sixteenth report (A/CN.4/626/Add.1), said that the addendum was divided into two parts. The first part (paras. 139–150) concerned the status of acceptances of and objections to reservations in the case of succession of States, as set out in draft guidelines 5.16 *bis*, 5.17 and 5.18, while the second part (paras. 151–158) concerned interpretative declarations in the context of State succession, as set out in draft guideline 5.19.

2. Before discussing each of those draft guidelines at greater length, he wished to make three general comments. First, the question of the status of acceptances in the context of State succession arose only insofar as it related to express acceptances formulated by the predecessor State. That was because the status of tacit acceptances by predecessor States was governed by the rules on succession with regard to objections, as contained in draft guidelines 5.14 and 5.15, which dealt with the capacity, or lack thereof, of successor States to formulate objections to reservations, the issue at stake being whether a successor State could reverse tacit acceptance of a reservation by the predecessor State by formulating an objection. Since the question of tacit acceptance was dealt with implicitly in draft guideline 5.14, there was no need to come back to it.

3. Secondly, it went without saying that, in accordance with guideline 2.8.3, which the Commission had already adopted, a successor State could at any time expressly accept a reservation. That meant that a State's status as a successor State did not affect its capacity expressly to accept a reservation because it had that capacity whether or not it was a successor State.

4. Thirdly, the Commission should bear in mind that one of the main thrusts of the sixteenth report was to draw a distinction between cases of voluntary succession, namely, those that occurred through notification of succession, and those in which succession was automatic. On that basis, he wished to begin by introducing draft guideline 5.16 *bis* (Maintenance by a newly independent State of express acceptances formulated by the predecessor State), noting first of all that the word "international", which had been erroneously included in the text, should be deleted.

5. Draft guideline 5.16 *bis* concerned the maintenance by a newly independent State of express acceptances formulated by the predecessor State. He would not go so far as to claim that the draft guideline codified an existing practice; it was merely a logical transposition of the application to acceptances of reservations of the principle that applied to reservations themselves, as set out in article 20 of the 1978 Vienna Convention and reproduced in draft guideline 5.1 (Newly independent States). Thus, despite what some people believed, Cartesian logic and common sense were not necessarily contradictory.

6. Yet that principle, namely the principle of continuity, was not absolute: it could be presumed, as it was for reservations, but it could not be imposed on a successor State against its will. It was the logical consequence of the freedom of choice to which newly independent States were entitled since, as its title indicated, draft guideline 5.16 *bis* concerned only newly independent States—namely, States that had gained independence as a result of decolonization. Such States had the capacity to exercise succession rights but did not have an obligation to do so. While a successor State could revoke an express acceptance, it could not do so at any time without seriously endangering the stability of treaty relations. Accordingly, he had proposed that draft guideline 5.16 *bis* should provide for the exercise of that option within 12 months of the date of the notification of succession to the treaty. In his view, the withdrawal of an express acceptance could in fact be equated with an objection, thus making it reasonable to apply the same deadline as that applicable to the formulation of objections. Moreover, it was not reasonable to require that the first task of a State in the process of becoming independent should be to determine the status of all reservations, acceptances or objections formulated by the predecessor State. Thus the 12-month deadline was also aimed at allowing the newly independent State some time for reflection. In practice, it was quite probable that if a newly independent State chose to withdraw an express acceptance formulated by the predecessor State, it would do so when it formulated its own objection to the reservation in question. Moreover, the withdrawal of the express acceptance would doubtless be the implicit result of the objection, so that a separate declaration would not be necessary.

7. Turning to draft guideline 5.17 (Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State), he noted that the word "international" should again be deleted from the text. Draft guideline 5.17 also dealt with the problem of determining the status of express acceptances formulated by the predecessor State. However, it did not address the case of the newly independent State, within the relatively strict meaning assigned to that term in both the 1978 Vienna Convention and the Vienna Convention on Succession of States in respect of State Property, Archives and Debt, but rather other cases of

succession—namely, the uniting or separation of States. Generally speaking, the solution that should be applied in those cases was the opposite of the solution outlined in draft guideline 5.16 *bis*. Draft guideline 5.17 concerned cases in which succession was automatic, and just as a successor State did not have the capacity to formulate a new objection to a reservation to which the predecessor State had not objected under the terms of draft guideline 5.15, neither did it not have the capacity to revoke an express acceptance formulated by the predecessor State. That was what was prescribed in the first paragraph of draft guideline 5.17. The principle reflected in the present guideline, that of maintenance, should not be absolute because marginal cases existed in which the unification or separation of a State did not give rise to automatic succession. One such case was that in which the predecessor State was a contracting State *vis-à-vis* the treaty, but was not a party to it because the treaty had not come into force for that State at the time the succession occurred. In that particular case, the solution needed to be aligned with that applied to newly independent States, and for the same reason—namely, that the maintenance of express acceptances was chosen rather than inherited. In other words, the successor State in such cases must be able to withdraw the express acceptance under the same conditions as those accorded newly independent States. That was what was provided for in the second paragraph of draft guideline 5.17, the wording of which was admittedly complicated, but since the subject was a technical one, there was apparently no other solution than to reflect all its nuances.

8. All that remained was to determine the precise moment at which the withdrawal of an express acceptance of a reservation produced its effects. Draft guideline 5.18 (Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State) was modelled closely after the solution proposed in draft guideline 5.7 (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State) and described a similar operation. He suggested that the Drafting Committee might wish to employ the word "effect" rather than "effects".

9. Lastly, there were a number of questions that could arise concerning the status of interpretative declarations in the case of a succession of States. Like the 1969 and 1986 Vienna Conventions, the 1978 Vienna Convention was silent on the subject, notwithstanding a timid attempt by the Federal Republic of Germany to raise the issue at the United Nations Conference on Succession of States in Respect of Treaties in 1978, which was described in paragraph 152 of the addendum to his sixteenth report. Even so, it was not clear that the proposal made by the Federal Republic of Germany[129] at that time actually concerned interpretative declarations. In any case, given the silence of the Convention on the status of such declarations, the Commission should be governed by the principle contained in guideline 2.4.3 whereby an interpretative declaration could be formulated at any time. That principle was sufficient to establish that any successor State was entitled to formulate an interpretative declaration under the same terms as any other State.

10. Thus a specific draft guideline on that subject was not necessary in the fifth part of the Guide to Practice because the question did not specifically concern State succession. On the other hand, it would be useful to include some indication of the status of interpretative declarations formulated by the predecessor State. That said, he did not think that such an indication could be very substantive, since interpretative declarations were quite diverse in nature, as members would see when the Commission turned its attention to the effects of interpretative declarations, a subject to be addressed in an addendum to the fifteenth report (A/CN.4/624 and Add.1–2). Those effects were relatively uncertain, and it was therefore advisable to exercise prudence with regard to the wording of draft guideline 5.19. Accordingly, he had proposed that, as it had done in other instances, the Commission should formulate draft guideline 5.19 in the form of a recommendation in order to avoid being overly prescriptive; the draft guideline should be entitled "Clarification of the status of interpretative declarations formulated by the predecessor State". If such clarification was not expressed in a formal declaration, it ought to be possible to deduce it from the conduct of the successor State, as the second paragraph of the draft guideline made clear.

11. With those comments, he had concluded his introduction of the addendum to his sixteenth report as well as the sixteenth report itself and all the draft guidelines comprising Part 5 of the Guide to Practice that dealt with reservations in the context of succession of States.

12. Mr. HASSOUNA asked whether the term "*réputé*" used in the French version of draft guidelines 5.16 and 5.17 had the same meaning as the term "*présumé*".

13. Mr. PELLET (Special Rapporteur) said that he understood the two terms to mean the same thing. It was true that one spoke of "*présomption irréfragable*" and not of "*réputation irréfragable*". He had simply used the term "*réputé*" in order to maintain consistency with other draft guidelines in which he had employed that term.

14. The CHAIRPERSON invited the Commission to resume its consideration of the sixteenth report on reservations to treaties.

15. Mr. NOLTE said that he was largely in agreement with the substance of the draft guidelines proposed in the sixteenth report on reservations to treaties. However, he concurred with Sir Michael that while the fifth part of the Guide to Practice ought to contain a guideline concerning newly independent States, as the Special Rapporteur had suggested, it should not begin with an exception rather than a rule merely because the only article of the 1978 Vienna Convention that addressed reservations concerned newly independent States.

16. Furthermore, there were no grounds for creating the misleading impression that the concept of a newly independent State had grown in importance since 1978. As Sir Michael had rightly noted, the opposite was true.

[129] *Official Records of the United Nations Conference on the Law of Treaties, 1977 Session and Resumed Session 1978, Vienna, 4 April–6 May 1977 and 31 July–23 August 1978, vol. III, Documents of the Conference* (A/CONF.80/16/Add.2, United Nations publication, Sales No. E.79.V.10), document A/CONF.80/C.1/L.36, p. 115.

The Commission should therefore define the category of newly independent States in such a way as to limit it to States that had achieved their independence through decolonization, in order to preclude any misunderstanding that the draft guideline in question might apply to most of the States that had achieved statehood in recent years. Accordingly, draft guideline 5.1 should come later in the Guide to Practice and should include a definition of the notion of newly independent States.

17. He also endorsed Sir Michael's view that the guidelines should not be drafted in overly prescriptive terms; rather, their wording should emphasize their residual nature, since State succession was a field in which the legitimate divergence of practice was not a cause for concern.

18. He wondered whether the rule established in draft guideline 5.5, paragraph 3, was not too rigid. In principle, of course, it was up to the reserving State to withdraw any previous reservations that were incompatible with its most recent reservation; there were, however, cases in which mutual incompatibility was not obvious and where it was simply understood that the latest reservation prevailed.

19. Perhaps draft guidelines 5.7 and 5.8 could be merged under the heading "Timing". Like previous speakers, he would prefer to see the final phrase "at the time of the succession" deleted from draft guideline 5.10. He was unsure whether draft guideline 5.13 should be formulated so categorically, because if two States united it was conceivable that the effect of maintaining a predecessor State's reservation might alter its significance and meaning for the other States parties. Was it really always advisable to prevent other States parties from objecting to the extension of the reservation to the entire territory of the successor State?

20. Perhaps that question showed that the Drafting Committee should try to ensure that the draft guidelines encompassed a broader range of practical considerations. At the same time, he hoped that the Committee would be able to simplify those parts of the text where the wording was still difficult to understand. All in all, he was in favour of referring the draft guidelines to the Drafting Committee.

21. Mr. PELLET (Special Rapporteur) said that it was worrying that so few members had chosen to speak on his sixteenth report and that two of them had focused on the position of draft guideline 5.1 and on possible confusion concerning the notion of newly independent States. It was true that, if one was not conversant with the law on the subject, it might be thought that the term referred to any new State. The definition set forth in the 1978 Vienna Convention and the Vienna Convention on Succession of States in respect of State Property, Archives and Debt nevertheless made it clear that the term "newly independent State" meant a State formed by decolonization.

22. One of the basic principles underpinning the sixteenth report was that all the terms encountered in the context of State succession had established definitions. If that premise was not accepted, it would be necessary to reimport almost all the definitions in question into the Guide to Practice, which would be taking matters too far. For that reason, he did not wish to embark on such an exercise, especially as any definition of the term "newly independent States" would merely entail reproduction of the language of the Vienna Conventions.

23. He urged other members of the Commission to express their opinion on the matters raised by Sir Michael and Mr. Nolte. While the position of draft guideline 5.1 was not a major concern, as it was the only guideline in that section that was based on an existing treaty provision, it might serve as a useful starting point. Moreover, he found it somewhat difficult to regard the status of reservations in the case of decolonized States as constituting an exception, as there had been numerous examples of decolonization in the past, even though few instances were likely to occur in the future.

24. He was curious to know whether the opinions of the two aforementioned speakers were widely shared. He personally disagreed with them.

25. Mr. NOLTE pointed out that the 1978 Vienna Convention did not begin with newly independent States: it first set out general provisions and then dealt with newly independent States as an exception. The Commission should therefore reflect that order in the draft guidelines.

26. Mr. CANDIOTI, commenting on the order of the provisions in the draft guidelines, said that the Commission's draft articles on nationality of natural persons in relation to the succession of States[130] had begun with general provisions, which had been followed by provisions relating to specific categories of succession of States. The Drafting Committee might therefore consider first grouping together the general provisions proposed by the Special Rapporteur on the status of reservations in the case of succession of States and then devoting some separate sections to their status when States were formed through decolonization or other ways.

27. Mr. PETRIČ said that the draft guidelines did not reflect the tremendous changes that had occurred in the world since the 1978 Vienna Convention. When the drafters of that Convention had dealt with succession, the main question had been how to regulate the situation arising as a result of decolonization. However, the decolonization process was virtually over. In the 1990s, the States of the former Socialist Federal Republic of Yugoslavia had been confronted with a vacuum when they had looked for rules governing the issues they faced in matters of succession. They had been unable to follow the rules applying to former colonies that had gained independence because their problems had been different from those of the colonies. Moreover, the situation of the successor States to the former Yugoslavia was dissimilar to that of the States which had earlier formed part of the Union of Soviet Socialist Republics. The Russian Federation had retained the legal personality of the Soviet Union, whereas none of the successor States to Yugoslavia had kept its legal personality. The separation of Montenegro and Serbia also raised different issues, as did developments in Kosovo. It was therefore vital

[130] *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 47.

for the Commission to provide guidance in such situations, and in that connection the approach suggested by Mr. Candioti might be best.

28. He pointed out that his own country had also been faced with huge difficulties because of the differentiation between open and closed multilateral treaties, a distinction that had its basis in the 1978 Vienna Convention. It might therefore be advisable for the Drafting Committee to consider the questions posed by that situation.

29. While the rules which the Commission had formulated were a step forward and were ready to be referred to the Drafting Committee, guidance still was needed in addressing the kind of dilemmas encountered by European and Central Asian States in the 1990s.

30. Mr. FOMBA said that draft guideline 5.9 was acceptable. The questions listed in paragraph 101 of the report highlighted the issues raised by objections in the context of succession of States. It was indeed essential to draw attention to the dearth of practice and to the need for caution when interpreting recent practice. He agreed with the view expressed in paragraph 108 with regard to the parallel to be drawn between the presumption in favour of the maintenance of reservations and the presumption in favour of the maintenance of objections for all categories of successor States, although exceptions must be made in some cases involving the unification of States.

31. Draft guideline 5.10 was satisfactory, and he concurred with the comments made in paragraphs 110 and 111. Paragraph 1 of draft guideline 5.11 likewise did not pose any problems. He agreed with the Special Rapporteur's comment in paragraph 111 of the report that paragraph 2 of that guideline provided for a well-justified exception, since it precluded the illogical attitude of wanting to have one's cake and eat it, too. The phrase in brackets, meanwhile, would be better explained in the commentary.

32. Draft guideline 5.12 did not call for any comment and draft guideline 5.13 was acceptable. The reasoning in paragraphs 122 to 124 of the report was convincing, even though examples of practice were scarce. Paragraphs 1 and 2 of draft guideline 5.14 were unproblematic, and the Special Rapporteur had clearly explained which guideline was to be inserted in the square brackets in paragraph 3. He was in favour of the *modus operandi* proposed in paragraph 130 and could accept draft guideline 5.15. Draft guideline 5.16 did not raise any problems, since it was couched in very clear language. The inclusion of the predecessor State, if it continued to exist, in the scope *ratione personae* of the notion of "any contracting State" was wise.

33. He therefore recommended the referral of draft guidelines 5.9 to 5.16 to the Drafting Committee. He was, however, doubtful about the advisability of redefining the term "newly independent States".

The meeting rose at 10.50 a.m.

3050th MEETING

Tuesday, 25 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue the debate on the draft guidelines contained in the sixteenth report on reservations to treaties.

2. Mr. HMOUD commended the Special Rapporteur on his well-researched report, which contained a thorough analysis of the complex issues involved, and he thanked the Secretariat for its memorandum[131] on the subject, which had provided background support for the report.

3. The elaboration of guidelines on the question of reservations to treaties was a difficult task that involved contemplating multiple scenarios in terms of both the form of the succession of States and the type of unilateral statement concerned in the treaty relation at a particular time and in a particular circumstance. That task had been complicated by the insufficiencies of the 1978 Vienna Convention, the scarcity of practice and the lack of a doctrinal basis. The Special Rapporteur had relied mostly on logical reasoning, without imposing ready-made solutions to the complex scenarios that might arise. The draft guidelines did not contradict past practice, no matter how scarce it was, and if the parties concerned did not agree with the presumptions contemplated in the guidelines, they would at least be aware of them and could choose to follow a different approach. The guidelines could constitute a reference that would help parties to treaties and depositaries in dealing with situations of succession of States in which the lack of practice had led to confusion as to which rules to apply, and shown in the report. It was unlikely that the Guide to Practice would resolve all problems in treaty relations associated with succession of States, but it set important principles that would help in addressing most cases which might arise in relation to reservations.

4. Although the 1978 Vienna Convention was not universal, there was no reason to depart from its terminology.

[131] See footnote 12 above.