

Document:-
A/CN.4/3046

Summary record of the 3046th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
2010, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

customary international law, where they might have a place. Their inclusion in 4.4.3 raised an interesting question, one that the Commission probably did not wish to go into in the current context: whether only certain States might be bound by a peremptory norm of general international law. The Commission should avoid appearing to take a position on the matter, which belonged rather to the field of *jus cogens*, and it could do so by omitting the concluding words if it decided to keep the guideline at all.

40. In closing, he said that he was in favour of referring all the draft guidelines presented in the fifteenth report to the Drafting Committee.

The meeting rose at 5.40 p.m.

3046th MEETING

Tuesday, 18 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, 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. Ojo, 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]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to resume the debate on the draft guidelines in cluster 4, contained in the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2). The Special Rapporteur would then introduce his sixteenth report on the topic (A/CN.4/626 and Add.1).

2. Mr. GAJA said he could go along with the Special Rapporteur's proposals on the effects of objections to valid reservations. However, he wished to revisit draft guideline 4.3.4 which, as Mr. Kamto had pointed out, duplicated draft guideline 4.3.1. It would be preferable to employ affirmative wording in that provision and to state that an objection to a valid reservation *precluded* the entry into force of the treaty as between the reserving State and the objecting State if the latter had clearly expressed an intention to that effect. While the differences compared to draft guideline 4.3.1 were minimal, they made it possible to distinguish between an objection that prevented a treaty from entering into force and a "simple" objection which did not have that effect.

3. According to draft guideline 4.3.1, on the other hand, a "simple" objection could not have the same effect as did the acceptance of a reservation on the entry into force of a treaty between the reserving and the objecting State. As the Special Rapporteur had rightly observed, stating that an objection "did not preclude" a treaty from entering into force was not the same thing as saying that it "resulted in" its entry into force. His subsequent conclusion that, in any event, another State then had to accept the reservation, tacitly or expressly, was mystifying, however, given that the treaty was intended to produce effects between the reserving State and the State formulating the simple objection.

4. The Special Rapporteur correctly noted that the effects of a simple objection on the application of the provisions of a treaty were not always the same as those of acceptance. They were most often the same when the reservation purported to exclude the full or partial application of a provision, but they were not the same in the case of a modifying reservation, especially when its purpose was to modify the content of the obligations of the other contracting States as well. A distinction had to be drawn in that context, because objecting to a reservation with a modifying effect was not the same thing as accepting it. Although the Special Rapporteur had ranked him among those who thought that the effects of an objection were identical to those of acceptance, he basically shared the Special Rapporteur's opinion. In fact, in his own article entitled "Unruly treaty reservations",¹¹⁴ he had emphasized that when a reservation purported to extend or modify an obligation of other contracting States, their acceptance of or acquiescence to the reservation was essential if it were to produce its intended effect; in that case, a contracting State's objection certainly ruled out its acquiescence.

5. The objections that the Special Rapporteur termed "with intermediate effect" and which formed the subject of draft guideline 4.3.8 were an aspect of practice that had not been contemplated in the Vienna Conventions. They enabled the objecting State to exclude the application of provisions other than those to which the reservation related, provided that they had a "sufficiently close link" with it. Even if the objecting State abided by that condition, one might ask whether the principle of mutual consent among the parties would require that the reserving State could react against the objection. The reserving State might in fact prefer that there be no treaty relations. The reserving State had to accept or at least acquiesce to an objection with intermediate effect before the latter could produce all its intended effects. In practice, there was normally acquiescence, but whether a presumption should be established on the subject was a moot point.

6. The thrust of draft guideline 4.3.9 was that an objection to a valid reservation could not have "super-maximum" effect, a matter on which the Special Rapporteur was correct. What was less convincing, however, was his argument that an objection with "super-maximum" effect then became a simple objection. At least in some

¹¹⁴ G. Gaja, "Unruly treaty reservations", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I, Milan, Giuffrè, 1987, pp. 307–330.

instances, an objection with “super-maximum” effect should instead be converted into an objection purporting to preclude the entry into force of a treaty in relations with the reserving State.

7. Draft guideline 4.4.3 did not duplicate draft guideline 3.1.9. The former stated that a reservation did not affect the application of a rule of *jus cogens*, whereas the latter was concerned with a reservation, irrespective of the treaty provision to which it related, that was contrary to a rule of *jus cogens*: for example, a reservation intended to cause a treaty to be applied in a discriminatory manner.

8. In conclusion, he thought that all the draft guidelines presented in the fifteenth report on reservations to treaties could be referred to the Drafting Committee.

9. Mr. PELLET (Special Rapporteur) said, with regard to draft guideline 4.3.8, that it would be only fair to give a reserving State the opportunity to react to an objection with intermediate effect, as Mr. Gaja had suggested. That would in fact give the reserving State the last word concerning a kind of “counter-reservation”. Initially, he had thought that what was involved was something more akin to a dialogue between the States concerned than something that should be codified in the Guide to Practice, but he would like to hear the views of other members of the Commission on that point. He was prepared to propose a draft guideline on the subject if the majority of members so wished.

10. Mr. Gaja’s other suggestion, with regard to draft guideline 4.3.9, was also apposite. It seemed obvious that an objection with “super-maximum” effect that related to a valid reservation should become a simple objection, but it was also true that the “super-maximum” effect could be transformed into maximum effect. Although a hostile reaction to legitimizing objections with “super-maximum” effect was to be expected, he was prepared to propose a draft guideline on that subject as well.

11. Sir Michael WOOD supported both of Mr. Gaja’s proposals and was in favour of the drafting of a guideline on each of the points raised.

12. Mr. NOLTE said he agreed with the Special Rapporteur’s decision to draw a distinction between the effects of valid and invalid reservations. He therefore welcomed draft guideline 4.3, which referred to the main effect of objections while indicating that they did not have that effect if the reservation had already been accepted by the objecting State, although the notion of “establishment” did not translate that idea sufficiently clearly. Draft guidelines 4.3.1, 4.3.2, 4.3.3 and 4.3.4 were also satisfactory. It was useful to bring out the basic difference between the effects of an acceptance and those of an objection, as the Special Rapporteur had done in paragraph 44 [334]¹¹⁵ of his report, and to emphasize that the objective of article 21, paragraph 3, of the Vienna Convention was to safeguard as much as possible the agreement between the parties.

13. It was also appropriate to point out, as did draft guideline 4.3.5, that the exclusionary effect of an objection

could be limited to part of a treaty provision, although the current wording inadvertently suggested that the range of possibilities was extremely limited.

14. The distinction made in draft guidelines 4.3.6 and 4.3.7 between modifying and excluding reservations certainly helped to give a better understanding of the various possible effects of those reservations, but the distinction was not always clear and might be interpreted by someone who did not read the commentaries carefully as meaning that the two cases were mutually exclusive. In fact, however, certain reservations could have combined effects that must be taken into account. As the Special Rapporteur pointed out, quoting Frank Horn in paragraph 53 [343] in his fifteenth report: “A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An ‘exclusion’ of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms.”¹¹⁶ It would be worthwhile to stipulate in one of the two draft guidelines, or in a separate text, that excluding reservations could also have an indirect or direct modifying effect on other parts of a treaty.

15. Draft guideline 4.3.8 concerning objections with intermediate effect was satisfactory, but greater emphasis should be placed on the exceptional nature of those objections by stressing in the commentary that the underlying objective must be to safeguard the balance between the rights and the obligations flowing from the treaty (what was known as the “package deal”). The Commission must take care not to encourage a practice that was still quite rare but would cause difficulties if it became more widely used.

16. Due attention should be paid to Mr. Gaja’s suggestion that the reserving State be allowed to have the last word, in a sense. He had nothing against that idea, since he shared Mr. Gaja’s concerns that, by drawing up a draft guideline on reservations with intermediate effect, the Commission might inadvertently encourage States to adopt such a practice, and that would certainly give rise to difficulties, because the fact that the reserving State had the last word might have a deterrent effect. If the option could be restricted and adequately explained in the commentary, he would be in favour of elaborating a draft guideline, as proposed by the Special Rapporteur.

17. He agreed with draft guideline 4.3.9 concerning the exclusion of the “super-maximum” effect of an objection to a valid reservation. The question, however, was whether the result would be that it had minimum or maximum effect. If the draft guideline made it clear that such objections would have minimum effect unless it was expressly stated that they had maximum effect, he would be in favour of draft guideline 4.3.9 as proposed by the Special Rapporteur.

18. As for draft guidelines 4.4.1 and 4.4.2 on the effects of a reservation on extraconventional obligations, he was of the opinion that, as such, a reservation and the

¹¹⁵ See footnotes 89 and 90 above.

¹¹⁶ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Thesis, University of Uppsala (Sweden), The Hague, T.M.C. Asser Instituut, 1988, p. 178.

combined effect of a reservation and an objection had no effect on the provisions of another treaty or on customary international law. He realized, however, that declarations of States which appeared at first sight to be reservations or objections could, in reality, have two or more facets, seeking also to produce an interpretative or other effect on another treaty or on a rule of customary international law. That would be the case, for example, when a reserving State justified its reservation by reference to what it regarded as a rule of customary international law. It would then not only be formulating a reservation but also expressing *opinio juris* on a rule of customary international law. The phrase “as such” should therefore be added to both draft guidelines. The first part of draft guideline 4.4.2 would then read: “A reservation to a treaty provision which reflects a customary norm does not, as such, affect the binding nature of the customary norm.” Draft guideline 4.4.1 could be amended in a similar fashion.

19. He wondered if draft guideline 4.4.3 on *jus cogens* was really necessary in view of the contents of draft guideline 4.4.2 on customary law. He nonetheless shared Mr. Gaja’s opinion that draft guideline 4.4.3 was not a mere repetition of draft guideline 3.1.9.

20. In conclusion, he was in favour of referring all the draft guidelines to the Drafting Committee.

21. Mr. McRAE said that the Special Rapporteur had shown that the basic principle that a State could not be bound by something that it had not accepted was central to the topic and that the relevant rules were derived from that principle. He therefore had no substantive objections to the approach adopted by the Special Rapporteur in the fifteenth report or to the draft guidelines that he proposed.

22. He did have some queries regarding objections with intermediate effect, which formed the subject of draft guideline 4.3.8. The basic idea, as he understood it, was that the effect of an objection could extend to treaty provisions other than those to which the reservation strictly referred, in order to safeguard the “consensual balance” of the treaty, because the provision to which the reservation related was linked to other provisions of the treaty. In other words, if provision A did not apply in treaty relations between the parties and if provision B was somehow related to provision A, then provision B would not apply either.

23. Assuming that that was the exact meaning of draft guideline 4.3.8, two points required clarification. First, must the objecting State or organization explicitly declare that such a related provision did not apply, or could that simply be inferred from the objection? Although the reference to the expression of intention by the objecting State or organization in draft guideline 4.3.8 seemed to suggest that it could be inferred, it was unclear why the author of the objection should not be under the onus of specifying the provisions which, in its opinion, did not apply between itself and the reserving State or organization.

24. The second point in need of clarification followed from the first: if the related provisions could be inferred from the objection, what was the nature of the requisite link between the provision to which the reservation referred and the related provisions?

25. In paragraph 71 [361], the Special Rapporteur said that the effect of the objection should be allowed to extend to provisions of the treaty that had a “specific” link with the provisions to which the reservation referred, yet draft guideline 4.3.8 spoke of a provision of the treaty “which has a sufficiently close link” with the provision or provisions to which the reservation referred.

26. The phrase “sufficiently close link” did not provide enough guidance on the nature of the link required and seemed to express a different concept than did the “specific link” mentioned in paragraph 71 [361] of the report. The Drafting Committee could certainly handle that question, but it would be helpful if the Special Rapporteur could explain his thinking and say what obligation the objecting State was to be under to specify the related provisions that would not apply in the treaty relations between itself and the reserving State. Once that point had been clarified, it would doubtless be necessary to recast the draft guideline in order to indicate the nature of the requisite link.

27. Draft guidelines 4.3.1 and 4.3.4 essentially said the same thing, but under different headings. Draft guideline 4.3.4 reproduced article 20, paragraph 4 (b), of the Vienna Convention, whereas draft guideline 4.3.1 reproduced only part of that text but included the rest through a cross reference to draft guideline 4.3.4. That was also a matter which could be considered by the Drafting Committee.

28. Turning lastly to draft directive 4.4.3, he acknowledged the logic of including a provision on *jus cogens*, since some draft guidelines concerned the absence of effect of reservations on other treaties or customary international law. In the past, that issue had been a contentious one within the Commission, however, some members having argued that a reservation to a *jus cogens* provision might itself be contrary to *jus cogens*. That point would need careful treatment in the commentary. He was nevertheless in favour of deleting the phrase “which are bound by that norm” at the end of draft guideline 4.4.3, because it seemed to imply that some States or international organizations might not be bound by certain rules of *jus cogens*.

29. He was in favour of sending all the draft guidelines submitted in the fifteenth report to the Drafting Committee.

30. Ms. JACOBSSON said that with the Special Rapporteur’s fifteenth report, the Commission had reached the centre of gravity of the topic of reservations to treaties.

31. Newer Commission members who had not followed the debates on the topic from the start must accept the results that had already been achieved. That was true, for example, in respect of the role of treaty monitoring bodies, a subject that had triggered lively debates within the Commission before and after the adoption of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties¹¹⁷ in 1997. She agreed with the Special Rapporteur that the Commission and the treaty monitoring bodies had found middle ground and it had thus been possible to draw up a series of

¹¹⁷ See footnote 108 above.

guidelines on the competence of treaty monitoring bodies to assess the permissibility of reservations. Those guidelines had been adopted at the previous session¹¹⁸ and were reasonable, generally acceptable and, it was to be hoped, useful to States.

32. Turning to the fifteenth report, she noted that reservations with “super-maximum” effect formed the subject of draft guideline 4.3.9, which provided that: “The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation.”

33. In order to fully understand the implications of that provision, one had to remember that in English, the term “permissibility” (in French “*validité substantielle*”) had been retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions.¹¹⁹ She was not sure she understood the ramifications of draft guideline 4.3.9 as now worded. Could it open the door to an *a contrario* reading, namely that it was acceptable to sever the reservation from the obligation to be bound by the treaty in its entirety if the reservation did not meet the conditions for permissibility? That would allow for a situation where the reserving State would not benefit from its reservation, but would be bound by the treaty in its entirety. Alternatively, perhaps the Special Rapporteur was leaving open the question of whether such an interpretation was acceptable.

34. She found it puzzling that the example given in paragraph 75 [365] was one of what an objecting State considered to be an invalid reservation. How should that be interpreted, in view of the Special Rapporteur’s very clear statement that it was unacceptable for a reserving State to be able to benefit from a valid reservation if it was contrary to the object and purpose of the treaty? What was even more confusing was the lack of references to recent State practice on the severability of reservations, such as in the context of the Convention on the Elimination of All Forms of Discrimination against Women, to which a number of non-Nordic States had submitted reservations. It would be most unfortunate if the proposed draft guideline sought to disregard the long-standing practice of a growing number of States with regard to human rights treaties, consisting in severing reservations deemed to be contrary to the object and purpose of the treaty and, in such cases, in applying the treaty in its entirety to the reserving State.

35. Mr. Gaja’s comments on draft guideline 4.3.8 had been very interesting, all the more so in the light of Mr. McRae’s statement. She was unable to comment at that juncture, but thought that the issues must be discussed in greater depth. As far as *jus cogens* was concerned, it would be wise to retain draft guideline 4.4.2, but she agreed with Sir Michael and Mr. McRae that the words “which are bound by that norm” must be deleted. In

conclusion, she suggested that the draft guidelines under consideration should be sent to the Drafting Committee.

36. Mr. AL-MARRI congratulated the Special Rapporteur for the entire set of reports he had submitted to the Commission. Those reports and the Commission’s comments thereon had enabled the latter to make a substantial contribution to the study of the topic of reservations to treaties. The reports demonstrated that reservations could be objected to by another party and that interpretative declarations could be formulated in the context of procedures for clarifying the meaning of a treaty or of some of its provisions. Countries signing a treaty interacted with one another and with the author of the reservations. Reservations that were contrary to the object and purpose of the treaty were devoid of legal effect, however. The Special Rapporteur, who had emphasized that point in relation to the permissibility or impermissibility of reservations, had succeeded in dispelling certain ambiguities and in highlighting the importance of that area of treaty law.

37. The draft guidelines under consideration were well balanced and intended to increase the transparency of the reservations regime without falling into the pitfalls of the Vienna Convention, under which reservations or modifications were permissible if there was no opposition. The Commission had adopted guiding principles designed to safeguard the object of treaties.

38. Most of the draft guidelines, especially those contained in the report before the Commission, were perfectly acceptable and he had no objection to them. He hoped that their consideration on first reading would be completed by the end of the next session.

39. Mr. DUGARD said that he agreed with draft guideline 4.3.9 on reservations which met the conditions for permissibility. Nevertheless, careful attention must be paid to the issue of reservations with “super-maximum” effect, since they raised the question of how a State should respond to another State that was the author of a reservation stipulating, as was more and more often the case, that its constitution took precedence over the treaty to which it was a party. The other States parties to the treaty were not necessarily familiar with the provisions of the reserving State’s constitution, or might be unaware of how it was interpreted by that State’s courts. They therefore would not know what stance to adopt in such a situation, for until any possible conflict between the treaty and the constitution, or between the treaty and the interpretation of the constitution, had been resolved, it would be impossible to know if the reservation was incompatible with the object and purpose of the treaty.

40. In the final version of the commentary to draft guideline 4.3.9, the Special Rapporteur should draw attention to the serious difficulties caused by that kind of reservation which, unfortunately, was becoming increasingly common, especially in relation to human rights treaties. He completely agreed with Ms. Jacobsson’s views about reservations to human rights instruments: the issue must be kept in mind, because those were the reservations that were the most harmful. The Special Rapporteur would recall that in 1997, the Commission had embarked on a wide-ranging debate on the admissibility of General

¹¹⁸ *Yearbook ... 2009*, vol. II (Part Two), chap. V, sect. C.2, guidelines 3.2.1, 3.2.2, 3.2.3 and 3.2.4.

¹¹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 144, para. (7) of the general commentary to section 3 (Validity of reservations and interpretative declarations) of the Guide to Practice.

Comment No. 24 of the Human Rights Committee¹²⁰ on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto or in relation to declarations under article 41 of the Covenant. Draft guidelines 4.4.2 and 4.4.3 answered many of the concerns expressed during that debate.

41. Like other members of the Commission and for the same reasons, he suggested that the last words of draft guideline 4.4.3 (“which are bound by that norm”) should be deleted.

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR

42. Mr. PELLET (Special Rapporteur), introducing the first part of his sixteenth report on reservations to treaties (A/CN.4/626 and Add.1), said that in 2009 the Secretariat had issued a memorandum of reservations to treaties in the context of succession of States.¹²¹ That excellent document had helped to expedite the drafting of his sixteenth report on the status of reservations and objections in the case of succession of States.

43. According to the general plan for the Guide to Practice that he had proposed in his second report,¹²² the question of reservations in relation to succession of States would constitute the fifth and final part of the Guide to Practice (which was why the draft guidelines in the sixteenth report began with the number 5). That part should prove useful, because the Vienna rules on the subject were rare and fairly laconic. There was nothing on the subject in the 1969 and 1986 Vienna Conventions. The only universal treaty rules that could be used as a basis for studying the status of reservations and related declarations in the context of succession of States were in article 20 of the Vienna Convention on succession of States in respect of treaties (hereinafter “the 1978 Vienna Convention”). That provision related solely to “newly independent” States which, in the language of the Convention, meant States formed as a result of decolonization. The provision was also incomplete, in that it left open several important questions, especially whether third States could enter an objection when a newly independent State maintained a reservation. Above all, article 20 was silent with regard to succession to objections and acceptances themselves. A methodological problem therefore arose: whether the rules and principles set forth in the 1978 Vienna Convention should be deemed to be established despite the Convention’s relative lack of success (it had not been ratified by many States). He thought they should. First, as indicated in paragraphs 6 and 7 of the sixteenth report, he was obviously not calling into question the definition of succession of States given in the Convention (“the replacement of one State by another in the responsibility for the international relations of territory”), which was now widely accepted and reproduced in several other instruments. Secondly, he was using the same vocabulary and the same definitions of the forms of succession as did the Convention. Thirdly, he started from the premise that it was the succession of States and not the direct

expression of its consent to be bound which conferred on the successor State the status of contracting State or State party to a treaty. Fourthly, as he explained in paragraph 8 of the sixteenth report, he was concerned only with cases where the predecessor State had expressed its consent to be bound and was therefore either a contracting State or a State party to the treaty in question (otherwise, the issue of succession would not arise).

44. One of the two vital questions posed by the succession of States was the status of reservations to treaties, the key issue being the status of objections. Article 20 of the 1978 Vienna Convention dealt with the status of reservations in the case of a newly independent State. Like many of the Vienna rules on reservations, that provision originally stemmed from a proposal by Sir Humphrey Waldock, who at the time had been the Commission’s Special Rapporteur on succession of States in respect of treaties.¹²³ Sir Humphrey’s proposals were thus the origin of the principle of succession to reservations, in other words, the principle of continuity contained in article 20, paragraph 1. The principle had been retained in the Convention and at the United Nations Conference on Succession of States in Respect of Treaties held in Vienna, despite rather insistent attempts to call it into question by a surprisingly wide range of States (attempts described in paragraphs 11 to 15 of the sixteenth report).¹²⁴ Despite some fairly sharp theoretical criticism, he was personally convinced of the merits of the presumption of continuity, both for the reasons put forward by the Commission in its commentary of 1974¹²⁵—including that, in any case, the successor State could always abandon the reservation—and for a similar but more down-to-earth reason, namely that a newly independent State would normally have far more pressing concerns than pondering the status to be given to the reservations of its predecessor State.

45. Still, the presumption was not immutable: according to article 20, paragraph 1, of the 1978 Vienna Convention, it could be reversed by the successor State merely by expressing a contrary intention or formulating a “reservation which relates to the same subject matter”, with no need to worry about the latter reservation’s compatibility with the reservation of the predecessor State that it was intended to withdraw.

46. Of course, that presupposed that the newly independent State could formulate reservations, which it was certainly empowered to do under article 20, paragraphs 2 and 3, of the 1978 Vienna Convention, provided that those reservations met the requirements for permissibility set forth in article 19. It was also clear that the rules laid down in articles 20 to 23 of the 1969 Vienna Convention applied to reservations of the successor State.

¹²³ See the third report on the succession of States in the context of treaties, in *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add. 1, pp. 46–52 (article 9 and the commentary thereto).

¹²⁴ See also *Official Records of the United Nations Conference on Succession of States in respect of Treaties, First Session, Vienna, 4 April–6 May 1977, vol. I, Summary records of the plenary meeting and of the meetings of the Committee of the Whole (A/CONF.80/16*, United Nations publication, Sales No. E.78.V.8), 27th meeting, paras. 59–95, 28th meeting, paras. 1–42, and 35th meeting, paras. 16–23.

¹²⁵ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 222 *et seq.*; see in particular paragraphs (17)–(19) of the commentary to article 19.

¹²⁰ See footnote 83 above.

¹²¹ See footnote 12 above.

¹²² *Yearbook... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 48–49.

47. As was explained in paragraphs 26 *et seq.* of the sixteenth report, when one thought about it carefully, the solution rested on less-than-Cartesian logic. It did not fit in with the type of succession to treaties that seemed to be appropriate to the factor triggering the process, namely notification of succession by the successor State. Even though the solution was not very logical, however, it was wise, consistent with practice (itself quite varied, as indicated in paragraph 29 of the sixteenth report) and had to be accepted for practical reasons.

48. There was therefore no compelling reason to depart from the substance of article 20 of the 1978 Vienna Convention, even though it could not be incorporated verbatim in draft guideline 5.1 (Newly independent States), because it referred to other provisions of the 1978 Vienna Convention that had no counterpart in the Guide to Practice. To do so would be fairly pointless anyway, since, as he had already said, the whole of Part 5 of the Guide to Practice was based on the assumption that in matters of succession, the rules of the 1978 Vienna Convention were to be respected.

49. As pointed out at the start of his introduction, article 20 of the 1978 Vienna Convention concerned only States that had newly gained their independence as a result of decolonization. It was interesting to see that the drafters of the Convention had been aware of that gap but had not filled it. It was now up to the Commission to do so by means of the Guide to Practice, whose purpose was to clarify and supplement the Vienna rules on reservations.

50. The principle of maintaining the predecessor State's reservations in the case of newly independent States was all the more necessary in the case of the uniting or separation of States, for at least two reasons. First, whereas a clean break was the rule in the case of decolonization, the principle of succession in the most literal sense of the term applied in the event of the separation or uniting of States. Secondly, the prevailing practice, especially in the context of succession to the former Yugoslavia, tended more towards continuity and therefore towards the maintenance of reservations, as shown in paragraphs 41 to 46 of the sixteenth report.

51. It seemed reasonable to embody that practice in paragraph 1 of draft guideline 5.2 (Uniting or separation of States) which, in the case of the separation or uniting of States, was the counterpart to draft guideline 5.1 for newly independent States, it being understood that the principle of maintenance or of continuity was not immutable and must yield to an express or implied contrary intention of the successor State.

52. Despite that element of flexibility, the principle of continuity could not be fully applied to the uniting of States if one of the two predecessor States had been a party to the treaty, and the other, only a contracting State. In that rather special case, the unified State became a party to the treaty as the successor to the State party, and there was no reason to preserve the reservation of the contracting predecessor State which, by definition, was no longer bound by the treaty. That was the rather special eventuality covered by draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States), found in paragraph 58 of the sixteenth report.

53. Draft guideline 5.2 reinforced that exception by beginning with the phrase "Subject to the provisions of guideline 5.3".

54. In his opinion, although the presumption of continuity did not seem, in principle, to give rise to any objections in respect of either newly independent States or other successor States (in the case of separation or uniting), the transposition to those cases of the other principle applicable to the succession to reservations of newly independent States seemed much more problematic. He did not think it could be contended in those other cases that successor States might freely formulate new reservations. In those cases, succession was not a matter of choice—which newly independent States could make by notification of succession—it was automatic and came about *ipso facto*. In those circumstances, it seemed difficult to say that a successor State might avoid its obligations or alleviate them by formulating reservations. For the sake of intellectual honesty, he drew attention to an extremely interesting article, published in 1975,¹²⁶ in which Mr. Gaja had taken the opposite view and had argued that partial withdrawal from the treaty would achieve the same result and make it possible to avoid automatic continuity. He regretted to say that he disagreed; apart from the fact that partial withdrawal was not the same as a reservation (and would therefore lie outside the scope of the Guide to Practice), it was not always feasible—far from it. The possibility likewise did not appear to be confirmed by the scant practice available, to which reference was made in paragraph 50 of the sixteenth report.

55. It would seem, then, that with regard to situations where succession occurred *ipso facto*, paragraph 2 of draft guideline 5.2 should establish the principle that a successor State might not formulate a new reservation at the time of succession. On the other hand, the position was different when, instead of being automatic, succession occurred through notification of succession, as was the case of reservations made by a successor State to a treaty that had not been in force in respect of the predecessor State (which was only a contracting State at the time of succession). In that situation, there was no reason not to transpose the solution applying to newly independent States and to give successor States the freedom to formulate new reservations. Paragraphs 2 and 3 of the draft guideline were intended to embody those rules, which might appear to be extremely complex but which were ultimately just simply logical.

The meeting rose at 11.40 a.m.

3047th MEETING

Wednesday, 19 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki,

¹²⁶ G. Gaja, "Reservations to treaties and the newly independent States", *The Italian Yearbook of International Law*, vol. I (1975) pp. 52–68, especially pp. 64–65.