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Sixteenth report on reservations to treaties

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Status of reservations, acceptances of and objections to reservations and interpretative declarations in the case of succession of States

Addendum¹

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¹ This addendum completes the sixteenth report on reservations to treaties (A/CN.4/626) by addressing successively two remaining questions related to the succession of States: acceptances of reservations and interpretative declarations.



II. Status of acceptances of and objections to reservations in the case of succession of States

F. Acceptances of reservations

139. In the context of the succession of States, the acceptance of reservations is problematic only in so far as it relates to the status of express acceptances formulated by the predecessor State. On the one hand, there is no reason to question the successor State's capacity to formulate an express acceptance of a reservation formulated, prior to the date of succession to a treaty,² by a State or international organization that is a party or a contracting party: the successor State can, of course, exercise this capacity, pursuant to guideline 2.8.3,³ as any State is entitled to do at any time. In the Special Rapporteur's view, this point may be clarified in the commentary without the need for a specific draft guideline on the matter. On the other hand, the status of tacit acceptance by a predecessor State which did not object to a reservation in a timely manner prior to the date of the succession of States is governed by draft guidelines 5.14⁴ and 5.15,⁵ proposed below.

140. As with reservations and objections, the question of the status of express acceptances formulated by a predecessor State calls for an approach that varies, at least in part, according to whether succession to the treaty occurs through notification by the successor State or *ipso jure*.

141. As has been noted repeatedly in this sixteenth report, in the case of newly independent States, succession occurs through notification of succession.⁶ In this context, article 20, paragraph 1, of the 1978 Vienna Convention, reproduced in the first paragraph of draft guideline 5.1, proposed below,⁷ establishes the presumption in favour of the newly independent State's maintenance of the predecessor State's reservations unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as the reservation of the predecessor State. In the Special Rapporteur's view, while there appears to be no practice regarding express acceptances of reservations in connection with the succession of States, the presumption in favour of the maintenance of reservations should logically be transposed to express acceptances.

142. An analogy also seems appropriate in the case of the need to recognize the newly independent State's capacity to express its intention not to maintain an express acceptance formulated by the predecessor State in respect of a reservation. That capacity does not constitute a derogation from the general rule regarding the final nature of acceptance of a reservation, set forth in guideline 2.8.12:⁸ the voluntary nature of succession to the treaty by the newly independent State justifies

² A successor State's express acceptance of a reservation formulated after the date of succession to the treaty, however, falls under the general regime of acceptances and need not be dealt with in the context of the succession of States to treaties.

³ For the commentary on this guideline, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, pp. 232-235.

⁴ See A/CN.4/626, para. 129.

⁵ *Ibid.*, para. 134.

⁶ *Ibid.*, see, inter alia, draft guidelines 5.1 and 5.2 and paras. 40 and 51.

⁷ *Ibid.*, para. 35.

⁸ For the commentary on this guideline, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, pp. 252-253.

this apparent derogation, just as it justifies the newly independent State's capacity to formulate new reservations when making its notification of succession to the treaty,⁹ recognized in article 20, paragraph 2, of the 1978 Vienna Convention, or the capacity of such a State to formulate objections to reservations that were formulated prior to the date of the notification of succession as recognized in draft guideline 5.14, proposed below.¹⁰

143. However, the question of the time period within which the newly independent State may express its intention not to maintain an express acceptance by the predecessor State remains to be addressed. With respect to the non-maintenance of a reservation made by the predecessor State, article 20, paragraph 1, of the 1978 Vienna Convention requires that the newly independent State must express its intention to that effect when making its notification of succession to the treaty. Does the same requirement apply with respect to the non-maintenance of an express acceptance? In this case, logic suggests that by analogy, the approach taken with regard to a newly independent State's formulation of an objection to a reservation formulated prior to the date of the notification of succession¹¹ should be followed. In fact, it appears that the potential effects of non-maintenance of an express acceptance can be likened, to a great extent, to the formulation of a new objection. In that regard, draft guideline 5.14¹² on objections formulated by a successor State simply refers to "the conditions laid down in the relevant guidelines of the Guide to Practice", including the temporal requirement set forth in article 20, paragraph 5, of the 1969 Vienna Convention and reproduced in guideline 2.6.13.¹³ In the case of a newly independent State's objection to a reservation formulated prior to the date of the notification of succession, application of the general rule suggests that the newly independent State has 12 months as from the date of the notification of succession to formulate such an objection. However, while we cannot simply refer to the general rules in addressing the issue of the successor State's maintenance or non-maintenance of an express acceptance of a reservation made by the predecessor State (an issue that arises only in the context of the succession of States), there is no reason not to take, *mutatis mutandis*, the same approach. Consequently, the wording of draft guideline 5.16, on the newly independent State's maintenance of express acceptances formulated by the predecessor State, should be based on the rule applicable to the formulation by the successor State of an objection, and the 12-month time period within which the newly independent State may express its intention not to maintain an express acceptance formulated by the predecessor State should be retained.

144. A newly independent State's expression of its intention on this matter may be conveyed either through its explicit withdrawal of the express acceptance formulated by the predecessor State, or through its formulation of an objection to

⁹ See also draft guideline 5.1, para. 2, proposed in this report (A/CN.4/626, para. 35).

¹⁰ *Ibid.*, para. 129.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ This guideline reads: "Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later". For the commentary, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213-217.

the reservation which had been expressly accepted by the predecessor State and the content of which would be incompatible, in whole or in part, with this acceptance.

145. In light of these considerations, a draft guideline 5.16 *bis*, worded as follows, might be included in the Guide to Practice:

5.16 *bis* Maintenance by a newly independent State of express acceptances formulated by the predecessor State

When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or contracting international organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

146. In the case of successor States other than newly independent States, however, this question calls for different approaches depending on whether succession occurs *ipso jure* or through notification. As we have seen in this report, the first situation arises, in cases involving the uniting or separation of States, with respect to treaties which, on the date of the succession of States, were in force for the predecessor State and remain in force for the successor State.¹⁴ Draft guideline 5.15, proposed above,¹⁵ provides that in such a situation, the successor State may not formulate an objection to a reservation to which the predecessor State did not object in a timely manner. A fortiori, such a successor State may not call into question an express acceptance formulated by the predecessor State.

147. The situation is, however, different where succession to a treaty by States emerging from a uniting or separation of States occurs only through a notification to that effect — as in the case of treaties which, on the date of the succession of States, were not in force for the predecessor State but to which it was a contracting State. In this situation — as has, moreover, been said of the formulation of new reservations¹⁶ and new objections¹⁷ — these other successor States must be recognized as having the same capacity as newly independent States under draft guideline 5.16 *bis* above.

148. Draft guideline 5.17 might therefore read:

5.17 Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State

A successor State, other than a newly independent State, for which a treaty remains in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting international organization.

When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession

¹⁴ See A/CN.4/626, para. 49.

¹⁵ *Ibid.*, para. 134.

¹⁶ See art. 20, para. 2, of the 1978 Vienna Convention and para. 2 of draft guideline 5.1, proposed in this report (A/CN.4/626, para. 35).

¹⁷ See para. 1 of draft guideline 5.14, proposed in this report (*ibid.*, para. 129).

of States, was not in force for the predecessor State but to which the predecessor State was a contracting party, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting international organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

149. A related issue concerns the effects *ratione temporis* of a successor State's non-maintenance of an express acceptance of a reservation by the predecessor State. On this point, there is no reason not to follow the approach taken in draft guideline 5.7, proposed above,¹⁸ concerning the timing of the effects of a successor State's non-maintenance of a reservation formulated by the predecessor State.

150. It is therefore necessary to propose a draft guideline 5.18 with the following wording:

5.18 Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

The non-maintenance [, in accordance with guidelines 5.16 and 5.17, paragraph 2,] by the successor State of the predecessor State's express acceptance of a reservation formulated by a contracting State or by a contracting international organization shall take effect for a contracting State or for a contracting international organization when that State or that organization has received the notification thereof.

III. Interpretative declarations

151. The succession of States to treaties may also raise questions with regard to interpretative declarations, on which the 1978 Vienna Convention is as silent as the 1969 and 1986 Conventions.

152. At the Vienna Conference, the delegation of the Federal Republic of Germany proposed an amendment that would have expanded the scope of article 20, the only provision of the 1978 Convention in which the status of reservations is mentioned.¹⁹ The amendment would have preceded the rules concerning reservations, as proposed by the International Law Commission, with a statement that "[...] any statement or instrument made in respect to the treaty in connexion with its conclusion or signature by the predecessor State, shall remain effective for the newly independent State".²⁰ The delegation of the Federal Republic of Germany later withdrew this proposed amendment, to which, for various reasons, several delegations had objected.²¹

¹⁸ Ibid., para. 85.

¹⁹ Ibid., para. 4.

²⁰ A/CONF.80/16, 28th meeting; and A/CONF.80/14, para. 118 (b) (reproduced in *Documents of the Conference* (A/CONF.80/16/Add.2)).

²¹ A/CONF.80/16, 27th meeting, para. 73 (Algeria, which considered that the proposed amendment seemed to affect the principle of self-determination); para. 78 (Poland, which believed that the proposed amendment was not sufficiently clear); para. 87 (Madagascar, which was of the view that the wording of the proposed amendment was "much too broad in scope"); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the proposed amendment "very strong and inflexible").

153. Although the text of the Convention is silent on this matter, two questions arise: the first concerns the status of interpretative declarations formulated by the predecessor State, while the second is whether the successor State has the capacity to formulate its own interpretative declarations at the time of succeeding to the treaty, or thereafter. In either case, it must be borne in mind that according to guideline 2.4.3, “[w]ithout prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated at any time”.²²

154. Practice provides no answer to the question of the status of interpretative declarations in the context of the succession of States to a treaty. Furthermore, interpretative declarations are extremely diverse, both in their intrinsic nature and in their potential effects. It is, moreover, these factors which explain, at least in part, the lack of detail in the rules governing interpretative declarations in the Guide to Practice. Under these conditions, the Commission will doubtless opt for prudence and pragmatism.

155. In this spirit, the Commission might simply suggest that States should, to the extent possible, clarify their position on the status of any interpretative declarations formulated by the predecessor State. Furthermore, it should be recognized that there are situations in which, in the absence of an explicit position taken by the successor State, the latter’s conduct might answer the question of whether it subscribes to an interpretative declaration formulated by the predecessor State; in such cases, this conduct would suffice to establish the status of the predecessor State’s interpretative declarations.

156. A draft guideline on this issue, if formulated in general terms, might cover all types of succession. The Commission might therefore include in the Guide to Practice the following draft guideline 5.19:

5.19 Clarification of the status of interpretative declarations formulated by the predecessor State

A successor State should, to the extent possible, clarify its position concerning the status of interpretative declarations formulated by the predecessor State.

The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

157. Draft guideline 5.19 is formulated as a recommendation. On several occasions, the Commission has taken the view that such an approach was appropriate in the context of a Guide to Practice that was not intended to become a convention.²³ This is all the more true in the case at hand since, in the absence of express treaty provisions, States have broad discretion as to whether and when to make such declarations.

158. The second question that arises with respect to interpretative declarations concerns the successor State’s capacity to formulate interpretative declarations,

²² Guidelines 1.2.1 and 2.4.7 concern conditional interpretative declarations, which appear to be subject to the legal regime applicable to reservations: guideline 2.4.6 concerns the late formulation of an interpretative declaration where a treaty provides that an interpretative declaration may be made only at specified times, in which case this special rule takes precedence over the general rule.

²³ See, inter alia, guidelines 2.1.9, 2.4.0, 2.4.3 bis, 2.6.10 and 2.9.3.

including declarations that the predecessor State did not formulate. There is little doubt that the existence of this capacity follows directly from guideline 2.4.3, which states that an interpretative declaration may, with some exceptions, be formulated at any time.²⁴ Thus, there appears to be no valid reason to deprive any successor State of a capacity that the predecessor State could have exercised at any time. The Special Rapporteur sees no need to devote a draft guideline to this question, which can be clarified in the commentary to guideline 5.19.

²⁴ See also para. 153 *supra*. For the commentary on guideline 2.4.3, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, pp. 499-501.