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## **RESERVATIONS TO TREATIES**

### STATEMENT OF THE CHAIRMAN OF THE DRAFTING COMMITTEE

**Mr. James Kateka**

Mr. Chairman,

I have the pleasure to present the first report of the Drafting Committee for the present session. The first report is devoted to the topic of “Reservation to Treaties”. As you will recall the Drafting Committee met beginning with Tuesday following the opening of the session. The first three meetings of the Drafting Committee focussed entirely on 15 guidelines which were before the Committee as of last year. I am pleased to report that the Committee completed consideration of all 15 guidelines and the report of the Drafting Committee is contained in document A/CN.4/L.630.

Before introducing the report, I wish to thank Mr. Pellet, the Special Rapporteur of the topic, for his guidance. I would also like to thank the members of the Drafting Committee for their continuous and effective participation.

#### Explanatory Note

Mr. Chairman,

I would like to draw your attention first to a new section which will be placed at the beginning of the guidelines and is entitled “Explanatory Note”. In considering the model clauses related to draft guideline 2.5.9, the Drafting Committee concluded that it would be useful to retain these model clauses but was uncertain as to where they should be placed. One option was to place them in the text of the Guide to practice, either just below the relevant draft guideline or in a footnote. Another option was to have the model clauses in an annex to the Guide to practice. Yet another option, supported by the argument that the model clauses needed necessarily an

accompanying text explaining the circumstances in which they could be used, was to place them within the text of the commentary accompanying the relevant guideline.

The problem with the last option was that it was not user-friendly since eventually the commentaries to the Guide to Practice would disappear and would be placed somewhere in the yearbooks. There was also no reason to place them in the footnote which would undermine the basic objective of drawing the attention of the users to them. The Committee also took note of the statement of the Special Rapporteur that he intended to submit more model clauses for future guidelines. Eventually, the Drafting Committee came to the conclusion that the best and most practical solution would be to retain the model clauses in the guidelines to which they related and to place an explanatory note at the beginning of the Guide to practice, explaining the function of the proposed model clauses. In addition, a footnote would accompany model clauses referring the reader to the relevant commentary which would explained circumstances in which it would be appropriate to use a particular model clauses. This section of the Explanatory note would also be used to explain other issues in relation to the Guide to practice which arise in the future. In fact it would serve as a general introduction to the Guide.

#### Draft guideline 2.5.1

I will now draw your attention Draft guideline 2.5.1 (“Withdrawal of reservations”). The Drafting Committee made no changes to this guideline as originally proposed by the Special Rapporteur. The wording is almost identical with the wording of article 22 para. 1 of the Vienna Convention of 1986 on the Law of Treaties between States and international organisations or between international organisations.

The phrase “unless the treaty otherwise provides” is also found in the Vienna Convention and was thus maintained although it is understood that all draft guidelines have a purely residual character, that is to say that they may be followed in the absence of any other treaty provisions.

#### Draft guideline 2.5.2

This draft guideline is entitled “Form of withdrawal” and, like the previous guideline, was provisionally adopted by the Drafting Committee as proposed by the Special Rapporteur without any modification. The wording is again identical to the wording of article 24 para. 4 of the Vienna Conventions. On the basis of the debate, which had taken place in the Plenary, the Drafting Committee considered if some mention to “implicit” withdrawals should be made. Such “withdrawals” resulted from internal legislation, which was the basis of the reservation, becoming obsolete, or from developments in general international law. In the same vein, a view was recalled according to which a State announcing its intention to withdraw a reservation, should be bound by this announcement and act accordingly even before the formal withdrawal of the reservation.

The Committee decided, however, that for the sake of legal certainty and security of treaty relations as well as of consistency with the Vienna Conventions such “implicit” withdrawals should not be admitted.

#### Draft guideline 2.5.3

Draft guideline 2.5.3 brings some new elements to treaty law in light of recent practice. It is entitled “Periodic review of the usefulness of reservations”. It had received almost unanimous support in the Plenary. Also, several observations had been made with regard to the use of the term “internal legislation” as applied to international organisations. The possibility to mention explicitly treaty-monitoring bodies in this draft guideline was also recalled. The view had also been expressed that developments in internal legislation was not the only reason why reservations should be reconsidered: development in international law or other factors could also play a role.

The Drafting Committee carefully considered all these views. It decided that the words “in particular” should be inserted before the words “in relation” in the second paragraph in order to indicate exactly that these developments were a factor among others.

The Drafting Committee replaced the words “internal legislation” with “internal law” in order to be equally applicable to international organizations. The term “rules of international organization” used in the context of article 46 of the 1986 Vienna Convention (and its commentary) was also recalled, but it was suggested that this reference had its place in the commentary.

Two other stylistic changes were made: in the second paragraph the word “special” replaced the word “particular” and the word “retaining” was added before the words “the reservation”. Also the word “careful” in the second line of the second paragraph was deleted since it did not have any *raison d’être* after the addition of the words “in particular” further on.

With regard to the treaty monitoring bodies, it was agreed that despite their special role, they should not be singled out in this context since other legislative bodies (i.e. General Assembly of the United Nations, Assembly of the Council of Europe) made often similar recommendations for the withdrawal of reservations. But it was decided that this issue should be addressed in more detail in the commentary.

Finally the character of all draft guidelines as recommendations was again stressed in the context of this guideline in order to dispel any worry that with the perspective of this periodic review States could think that reservations could be made easily without due thought.

#### Draft guideline 2.5.4 (2.5.5)

Draft guideline 2.5.4 deals with the persons competent to formulate the withdrawal of a reservation at the international level. It was originally proposed by the Special Rapporteur as guideline 2.5.5 and was drafted in two alternatives, one short and one long.

Since the Plenary had preferred the longer version, and taking into account the pedagogic function of the Guide to practice, the Drafting Committee retained the longer version.

The draft guideline had also to be aligned to the drafting of guidelines 2.1.3 (Formulation of a reservation at the international level) to which it corresponds. Consequently, the title was changed to “Formulation of the withdrawal of a reservation at the international level” to correspond to the title of draft guideline 2.1.3. The brackets were also removed from sub-paragraph (c) of paragraph 2, which corresponds to sub-paragraph (d) of paragraph 2 of draft guideline 2.1.3.

#### Draft guideline 2.5.5 [2.5.5. bis, 2.5.5 ter]

Draft guideline 2.5.5 is a merger of guidelines 2.5.5 bis and 2.5.5 ter as originally proposed by the Special Rapporteur. It corresponds to draft guideline 2.1.4 (“Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations”). The Drafting Committee aligned the wording in the first paragraph (former guideline 2.5.5 bis) to that of draft guideline 2.1.4 and substituted the words “internal law of ... international organization” with the words “or the relevant rules of each international organization”. The reason for this change which appears inconsistent with guideline 2.5.3 was deliberate. In the view of the Drafting Committee, the words “internal law” in guideline 2.5.3 had a broader and a more general meaning, whereas in this guideline 2.5.5 the “rules of the organization” referred to a more specific issue, that of the competence to withdraw reservations. Consequently this difference in terminology was justified.

Another question was raised with regard to the effect of a withdrawal of a reservation resulting in the benefit of reduced obligations for all the parties to a treaty. It was pointed out, however, that this problem was more related to draft guideline 2.5.7 and only a mention thereof could be made in the commentary. Finally, the title of the guideline 2.5.5 is the title of former guideline 2.1.4.

#### Draft guideline 2.5.6

Draft guideline 2.5.6 was also proposed by the Special Rapporteur in two versions, one shorter and one longer. The Drafting Committee preferred to retain the shorter version which refers to draft guidelines 2.1.5, 2.1.6 and 2.1.7 dealing with the communication of reservations and the functions of depositaries [already adopted last year].

You will recall that the procedure determined for the communication of reservations (draft guideline 2.1.6) including the use of electronic mail or facsimile are equally applicable to the withdrawal of reservations. Finally, the title of this draft guideline is “Communication of withdrawal of a reservation”.

Draft guideline 2.5.7 [2.5.7, 2.5.8]

Draft guideline 2.5.7 is entitled “Effect of withdrawal of a reservation” and is again the result of the merger of two guidelines, 2.5.7 and 2.5.8, as originally proposed by the Special Rapporteur. This merger was necessary since this draft guideline as originally proposed would not be applicable when one objecting State or international organization had opposed the entry into force of the treaty between itself and reserving State or international organization. Now as drafted, the first paragraph of the new draft guideline 2.5.7 corresponds to the text of former draft guideline 2.5.7 whereas the second paragraph corresponds to the text of former draft guideline 2.5.8.

Taking into account observations made in the Plenary, the Drafting Committee replaced the words “of the treaty” in the first line with the words “of the provisions on which the reservation had been made”. The commentary should explain that the plural “provisions” may also include only one provision. It should also refer to the reservation defined in draft guideline 1.1.1 pertaining to the treaty as a whole with respect to certain specific aspects on their applicability to the State or to the international organization which formulates the reservation.

The Drafting Committee retained the words “whether they had accepted or objected to the reservation” at the end of the first paragraph which made it clear that there were two separate cases covered by the guideline. Finally, for the sake of clarity it was thought better to add the words “by reason of that reservation” at the end of the second paragraph.

Draft guideline 2.5.8 [2.5.9]

Draft guideline 2.5.8 is in fact former guideline 2.5.9 as originally proposed by the Special Rapporteur. It is entitled “Effective date of withdrawal of a reservation” and follows closely article 22, para. 3 of the Vienna Conventions. The Drafting Committee adopted this draft guideline only with a minor drafting modification. Thus

in the French version the word “autrement” was added in the first line to align it with the text of the provision in the Vienna Conventions.

This draft guideline is accompanied by model clauses. The Drafting Committee had an extensive debate on the exact placement and function of such model clauses to which I referred at the beginning of my statement. The Committee, as I explained, decided to retain the model clauses in the guideline and refer to their functions in the explanatory note at the beginning of the guidelines.

As it was agreed, the model clauses will also be accompanied by a footnote referring the user to the commentaries where the appropriate use of model clauses will be explained. The Drafting Committee placed the general heading “Model Clauses” immediately below draft guideline 2.5.8. Their text follows, preceded by the letters A, B and C.

The Drafting Committee did not make any changes to the model clauses themselves except moving the bracket before the word “depository” to include more appropriately also the words “to” or “by”.

Draft guideline 2.5.9 [2.5.10]

Draft guideline 2.5.9 is entitled “Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation” and the text is essentially as proposed by the Special Rapporteur. The Drafting Committee considered a proposal to replace the terms “the situation of the withdrawing State” by the words “the content of the obligations of the other contracting States or international organizations”. It was argued that this substitution was justified since it was not possible to determine unilaterally the effect of the withdrawal of a reservation. Consequently, if the reserving State or organization would be allowed to do so, the other contracting Parties should be protected from any change (for the worse) of their obligations as a result of this unilateral determination of the effect of the withdrawal.

In this context, the view was also expressed that the obligations mentioned should be rather the ones of the withdrawing State than those of the other contracting

States or international organizations. These two views were not necessarily the same since it could be argued that the obligations of the other contracting Parties are almost always affected by the withdrawal of a reservation. In order to further clarify the guideline it was suggested that the words “in relation to the withdrawing State” should be added at the end of sub-paragraph (b).

According to the first view, however, there could be situations when the withdrawal of a reservation (concerning, for example, the legal co-operation in the field of political and civil rights) did not really affect the obligations of the other contracting Parties even if it had a retroactive effect. In the course of the debate it was felt that if the content of obligations was mentioned, the content of rights could be included as well. It was then pointed out that the initial word “situation” covered both rights and obligations. Finally it was agreed that the best formulation to signal that the withdrawing State does not disadvantage the other contracting parties was the wording adopted, namely “add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations”. In the final analysis the withdrawing State or international organization should not be able to put itself in an advantageous position vis-à-vis other contracting parties.

There were no other changes (from the original wording) in this draft guideline. The Drafting Committee decided to retain the term “withdrawing State” on the understanding that in the commentary it could be explained that this term meant the State (or organization) withdrawing a reservation and not a State (or organization) withdrawing from a treaty.

#### Draft guideline 2.5.10 [2.5.11]

Draft guideline 2.5.10 is entitled “Partial withdrawal of a reservation” and corresponds to guideline 2.5.11 as proposed by the Special Rapporteur. The Drafting Committee, taking into account comments made in the Plenary, decided to reverse the two paragraphs of this draft guideline for logical reasons; that is to deal with definition before procedure.

The Drafting Committee replaced the words “the modification of that reservation by the reserving State or international organization for the purpose of

limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty” by the words “limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty”. The Committee found the word “modification” misleading since it might indicate also an “extension” of the reservation. It was therefore preferable to clearly set out what the partial withdrawal of a reservation does: it limits the legal effect of the reservation.

There was also a discussion on the term “achieves a more complete application of the provisions of the treaty” which was finally adopted since it reflects better the idea that the partial withdrawal of a reservation achieves a more complete application of the provisions of the treaty by its very existence. As a consequence of this change of terms, the word “withdrawing” had to be added before the words “State or international organization”. The title of the draft guideline remained unchanged.

Draft guideline 2.5.11 [2.5.12]

Draft guideline 2.5.11 is entitled “Effect of a partial withdrawal of a reservation” and corresponds to guideline 2.5.12 as originally proposed by the Special Rapporteur. The guideline was modified to take into account two observations made during the debate in the Plenary: the first referred to the possibility that an objection to a reservation which is partially withdrawn continues to have its effects to the extent that the objection does not apply exclusively to that part of the reservation which has been withdrawn. Consequently the second sentence of the draft guideline was modified accordingly.

The second observation referred to the possibility of partial withdrawal of a reservation having a discriminating effect. In such a case an objection could be made to the reservation resulting from the partial withdrawal. A last sentence was added therefore stating exactly this possibility.

The first sentence of the draft guideline remains unchanged – only the terms “effects” was changed into singular “effect”, since the plural was unnecessary.

Mr. Chairman,

This concludes my presentation of the report of the Drafting Committee. The Drafting Committee recommends to the Commission the adoption of the draft guidelines which are before you.

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