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Reservations to treaties

Statement of the Chairman of the Drafting Committee
Mr. Chusei Yamada

4 June 2007

Mr. Chairman

I have the honour, today, to introduce the first report of the Drafting Committee for the fifty-ninth session of the Commission. This report, which deals with the topic "Reservations to treaties", is contained in document A/CN.4/L.705.

At its 2891st meeting, on 11 July 2006, the Commission decided to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee. These draft guidelines fall into 4 general clusters, namely (a) Draft guidelines dealing with elements concerning various ways of addressing the definition of the object and purpose of the treaty (3.1.5, 3.1.6); (b) Draft guidelines concerning different kinds of reservations which would assist in elucidating the notion of incompatibility with the object and purpose of the treaty (3.1.7 to 3.1.13); (c) Draft guidelines concerning the competence to assess the validity of reservations (3.2, 3.2.1 to 3.2.4); and (d) Draft guidelines concerning consequences of the invalidity of a reservation (3.3 and 3.3.1). The Drafting Committee has thus far only managed to complete the draft guidelines relating to the first two clusters. It considered these draft guidelines in 8 meetings on 8, 9, 10, 11, 14, 22 and 25 May 2007.

Before I introduce the Drafting Committee's report, let me pay tribute to the Special Rapporteur, Mr. Alain Pellet, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions in the work of the Committee. This year's meetings have been one of the liveliest which I ever attended.

Mr. Chairman

I shall now turn to the report. You have before you 9 Draft guidelines dealing with the first two clusters that I have mentioned earlier.

The first cluster contains two guidelines, namely 3.1.5 and 3.1.6.

Draft guideline 3.1.5

The Drafting Committee had before it three alternative texts for draft guideline 3.1.5. The first two alternatives were entitled "Definition of the object and purpose of the treaty", based on the proposals made by the Special Rapporteur in his tenth report (A/CN.4/558/Add.1) and in document A/CN.4/572. The third alternative was also based on a proposal by Special Rapporteur in document A/CN.4/572 and was entitled "Incompatibility of a reservation with the object and purpose of the treaty". The preponderant view in the Drafting Committee was to proceed on the basis of this third alternative on account mainly that it was in line with the language of the Vienna Conventions.

The text of the third alternative was nevertheless a subject of a lengthy discussion.

It was pointed out that “serious impact” on “essential rules, rights or obligations” “indispensable to the general architecture of the treaty” practically established a three-tiered threshold requiring “seriousness”, “essentiality” and “indispensability”. This was considered by some members to be a high threshold. It was eventually agreed that the formulation could be compressed by using the notion of “essential element”. The commentary will clarify that “essential element” transcends a treaty provision and would contextually embrace a rule, a right or an obligation, as well as the consideration of the terms of the treaty as a whole. As a policy matter, the notion of “indispensability” was tempered by the use of the word “necessary”.

Secondly, it was considered that “general architecture” raised difficulties as to the actual scope and meaning. In the final analysis, “general thrust” was found to be closest to the original French formulation “économie générale” to denote the overall utility of the treaty. In using the expression “general thrust”, the Drafting Committee was mindful of its legal impreciseness and is an expression that may be reviewed on second reading.

Thirdly, on the concern whether a treaty had a *raison d’être*, there were some members who sought the deletion of this reference. It was considered to be too general and demanding. Moreover, it was not clear whether it would be possible to point to one aspect of a treaty as its *raison d’être*. The Commentary will reflect the view objecting to the inclusion of

the reference to the *raison d'être.* It was, however, conceded that "depriving a treaty of its *raison d'être*" was too demanding a requirement. Hence, the phrase "…in such a way that the reservation impairs the *raison d'être* of the treaty."

Draft guideline 3.1.6

Draft guideline 3.1.6 is entitled "Determination of the object and purpose of the treaty", as originally proposed.

The Drafting Committee had before it the proposal submitted by the Special Rapporteur in the tenth report.

In the ensuing discussions in the Drafting Committee, several changes were made to the text. Structurally, the two paragraphs consisting of the original guideline were collapsed into one paragraph. However, it should be noted that the first sentence is a simplified version of the original paragraph 1. The reference to the "preamble and annexes" which was at the beginning of paragraph 2 has been deleted it being understood that these are covered by the context of the treaty referred to in the first sentence and an appropriate clarification will be offered in the commentary. The rest of what appeared as paragraph 2 is now captured as the second sentence, where the "title of the treaty" has been moved to the beginning of the sentence, while the "articles that determine its basic structure" has been deleted. This matter will be addressed in the commentary.

An effort has been made to move away from the formal structure and language of article 31 of the Vienna Convention, thus accentuating the focus

on guidelines, while also being faithful to the Commission's practice of avoiding to reproduce texts of conventional articles in separate guidelines.

Some members felt that the reference to the "subsequent practice of the parties" should be addressed in the commentary because subordinating reservations to such practice would cause complications that have a bearing on the equality of the parties. Some other members however felt that such inequality was a remote possibility and in practice parties to a treaty take into account such subsequent practice. In the final analysis, it was considered that "where appropriate" was sufficiently flexible to allow the inclusion of subsequent practice in the text.

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The second cluster of guidelines contains guidelines 3.1.7 to 3.1.13. These guidelines are intended to constitute examples of the type of reservations which could be interpreted as incompatible with the object and purpose of the treaty. In that sense they are a contribution to the understanding and a further refinement of the notion "object and purpose of the treaty".

Draft guideline 3.1.7

Draft guideline 3.1.7 is entitled "Vague or general reservations". The Drafting Committee retained the title as originally proposed with a slight change in inserting "or" between "vague" and "general." It is anticipated that the terms "vague" and "general" will be explained in the commentary.

During the course of the discussions in the Drafting Committee it was suggested that the draft guideline should be framed in positive terms and placed elsewhere in Part II dealing with questions of form. However, it was soon recognized that vague or general wording in a reservation may be used deliberately to avoid the object and purpose of the treaty. Accordingly, it was viewed necessary to link the formulation to aspects concerning compatibility with the object and purpose of the treaty, thus bringing the draft guideline within the realm of the present Part.

It should be noted that “shall” has been used instead of “should”. The inclusion of “in particular” seeks to accommodate the possibility of determination for other purposes such as “effect” and “meaning”, which while essential, are not the subject matter of consideration of the guideline. The term “worded” rather than “formulated” was viewed as important in laying emphasis on the content of the reservation.

Draft guideline 3.1.8

The draft guideline is entitled “Reservations to a provision reflecting a customary norm” instead of “Reservations to a provision that sets forth a customary norm”, as originally proposed. The change was consequent upon changes in the text of the draft guideline.

In the discussions in the Drafting Committee, the members sought to respond to some views expressed regarding the formulation of paragraph. 1, which has now been inverted to focus on the treaty provision which would be subject of a reservation than on the customary nature of the norm. The word “reflects” a customary norm rather than “set forth” is intended, as

stated in the *dictum* in the *Nicaragua case,* to accentuate, without taking any position on the form nor the substance, the independent existence of a customary norm irrespective of its codification or embodiment in a treaty provision. The commentary will address the time element by noting that treaty provision reflects a customary norm at the time when the reservation is made.

In addition to providing for the proposition that there is no obstacle to formulating a reservation to a treaty provision that reflects a customary norm, the Drafting Committee thought it useful to add a positive element, namely that the customary character of a treaty provision is a factor that is pertinent in the assessment of the validity of the reservation.

The logical consequence of the proposition in paragraph 1 in relation to a customary norm is adumbrated in paragraph 2. The formulation that "that customary norm which shall continue to apply as such" replacing "customary norm in question in relations", has been used for the sake of providing clarity to the text and seeks to emphasize the continuing effect of the customary norm irrespective of a reservation to a treaty provision. The phrase "which are bound by that norm" at the end of the paragraph only seeks to emphasize that the customary norm continues to apply in relations between the reserving State or international organization and others bound by it, including in situations where a reservation relates to a dispute settlement provision of the treaty in question.

Draft guideline 3.1.9

Draft guideline 3.1.9 is entitled “Reservations contrary to a rule of *jus cogens*” instead of “Reservations to provisions setting forth a rule of *jus cogens*” as originally proposed. This change came about as a result of the discussions on the substance of the draft guideline which reflected the doctrinal difficulties on the subject, as well as the inconclusiveness of the debate in plenary. The first issue was whether it was necessary to have a different guideline on *jus cogens* in the light of the preceding draft guideline 3.1.8 which deals with a customary norm and provides a solution which logically, but not necessarily ideologically, is equally applicable to *jus cogens*. The view was expressed that such a guideline was not only necessary because of the distinct characteristics of a *jus cogens* norm but also in the light of the recent judgment of the International Court of Justice in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro.*

These aspects were compounded by another issue which was not addressed by the guideline as formulated, namely an instance where a treaty itself had nothing to do with a *jus cogens* norm but related to a reservation that is made to that treaty and such a reservation bears on a *jus cogens* norm. It was stressed that making a reservation did not necessarily mean a breach of an obligation and an alteration of an obligation should not affect the peremptory norm.

Subsequently, the Drafting Committee decided to address the matter from the perspective of the reservation itself, namely that the reservation cannot, by its legal effects, affect a treaty in a way contrary to a *jus cogens*. Consequently, it was decided to track a little bit more closely the definition

of reservation under the Vienna Convention but in a more simplified version. Thus the draft guideline now reads “A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law”.

Draft guideline 3.1.10

Draft guideline 3.1.10 is entitled “Reservations to provisions relating to the non-derogable rights” as originally proposed.

This draft guideline was also a subject of extensive discussion. In the first place, there was a general consensus to change the permissive formulation into a negative formulation to emphasize the exceptional nature of the possibility of a reservation to a non-derogable right, thus changing from “ A State or an international organization may…provided that…” to “…may not…unless… ”.

Secondly, there was a discussion as to whether the reservation should relate to a treaty provision or a treaty as a whole including the regime that it establishes. This was resolved by deleting “treaty provision” and leaving only the reference to “treaty” or replacing “provision” with “treaty” wherever that former term appeared in the text.

Thirdly, as a consequence of the change to a negative formulation there was also a debate whether the latter part of the first sentence of the guideline should be “compatible with the essential rights and obligations arising out of the treaty” or “preserves the essential rights and obligations arising out of the treaty”. It was noted that the two alternatives could be

used interchangeably. However, the former formulation had the advantage of flowing easily and logically with the language of compatibility used in the second sentence.

This was also linked to a discussion on whether “essential rights and obligations” arising out of that treaty in the first sentence was substantially co-terminus with “object and purpose of the provision” in the second sentence. There were some members who saw a disconnect between the two sentences and stressed the need for better coherence. Indeed, there was a view that considered the two sentences as addressing separate issues. This view sought to separate these two sentences into two paragraphs and thus to retain the test of incompatibility with the object and purpose of the treaty in the second sentence. This minority view will be reflected in the commentary.

The majority however felt the guideline was dealing with one issue. Since the guideline, together with other guidelines in this cluster, is already dealing with matters concerning compatibility or incompatibility with the object and purpose of the treaty it was considered appropriate that a deletion of the reference to “object and purpose” in the second sentence would not obscure the intention. In essence, for a derogation to be made to a non-derogable right it has to be compatible with the essential rights and obligations arising out of that treaty. The obligatory term “shall” has been used in preference to “must”.

Draft guideline 3.1.11

Draft guideline 3.1.11 was initially entitled “Reservations relating to the application of domestic law”. The title of the guideline reads now

"Reservations relating to internal law". The draft guideline constitutes another illustration of a reservation which might be incompatible with the object and purpose of the treaty, in this case if it purports to subject the application of the treaty to the integrity of domestic law. It was pointed out that this draft guideline was related to draft guideline 3.1.7 in the sense that very often vague or general reservations referred to unspecified provisions of internal law, including the Constitution. In any event, a reservation could belong to more than one category.

There were two main points that were raised in the Drafting Committee, namely the double negative wording in the latter part of the guideline "only if it is not incompatible with the object and purpose of the treaty" and the appropriateness of expression "domestic law" (droit interne in French).

Concerning the first point, the Drafting Committee opted for a positive wording which rendered the text easily comprehensible and clearer. Thus, the phrase "if it is not incompatible with the object and purpose of the treaty" was changed to read "insofar as it is compatible with the object and purpose of the treaty".

With regard to the second point, the Drafting Committee had a long debate on the choice of terms which could better address both States and international organizations. It was observed that while the expression "droit interne" in French may be used both for States and international organizations, the English equivalent "domestic law" could only be applied in respect of States. Furthermore, it was felt that even with regard to States,

the term “domestic law” was not frequently used in the international setting. The Drafting Committee recalled in the 1986 Vienna Convention the terms “internal law of a State” and “rules of an international organization” are used in article 46. Guided by these precedents, the Drafting Committee decided to use similar terms in the text of the draft guideline.

Another aspect in the discussion was that the guideline had to be more precise. The Drafting Committee was thus of the view that the term “specific provisions” should be used in this context. The term “provision” was later changed to “norm” to broaden the scope to include judge-made or even unwritten rules.

The Committee also decided that it would be better to reproduce the same expression that the Commission had adopted concerning the definition of reservations (draft guideline 1.1.1 “Object of reservations”). Accordingly, it replaced the phrase starting with the “application” with the words “the legal effect of certain provisions of a treaty or of the treaty as a whole” taken from draft guideline 1.1.1.

Finally, the Drafting Committee reflected on whether the title should be modified to correspond to the content of the draft guideline. While it was felt that the words “the application of” could be deleted and the word “domestic” be replaced by the word “internal”, the Committee was of the view that it would be too cumbersome to add in the title the words “of a State or rules of an international organization”. It preferred to keep only the expression “internal law” on the understanding that read together with the

text of the guideline it would be considered to include also rules of international organizations.

Draft guideline 3.1.12

Draft guideline 3.1.12 is entitled "Reservations to general human rights treaties". There was no change to it. The draft guideline deals with reservations to general human rights treaties (such as the two covenants on civil and political rights and on economic, social and cultural rights) and not to treaties regarding specific human rights (as, for example, the Convention against Torture). Sometimes it is difficult to make this distinction since there may be treaties constituting "borderline" cases. The guideline, however, is meant to be applied only in relation to general human rights treaties and an analysis of this distinction will appear in the commentary. There is a wide range of practice in this area and the guideline has been drafted in such a flexible way as to allow sufficient leeway for interpretation.

In its discussions, the Drafting Committee considered at length whether the term "indivisibility of the rights" in the original draft could be made more complete by adding other terms used frequently in human rights discourse such as like "impartiality", "non-selectivity". The Committee thought that it should be cautious about using all terms that the human rights bodies had used, in the context of this guideline. It should only use terms which had a certain level of generality and relevance with regard to reservations to human rights treaties without excessively encumbering the wording of the guideline. In the final analysis, the Drafting Committee found a solution inspired by the terms used in the Vienna Declaration and Programme of Action during the World Conference on Human Rights (14-

25 June 1993), paragraph 5 of which provides in part that: "All human rights are universal, indivisible and interdependent and interrelated". It was then felt that the words "interdependence and interrelatedness" had to be added together with "indivisibility" in the draft guideline in order to characterize the rights to which a reservation may be incompatible with the object and purpose of the Treaty.

The Drafting Committee also considered whether the word "right" in the phrase "…the importance that the right …" should be accompanied by the word "provision" in order to broaden the scope of the draft guideline. It was observed that a right may be encompassed in various provisions of a treaty. The term "provision" was found to be more focused and precise. It was thus decided to include both words in the guideline. The phrase "account should be taken" was changed to "account shall be taken", following a corresponding change made to draft guideline 3.1.10. The phrase "rights set out therein" was replaced by the phrase "rights set out in the treaty" in order to make the sentence clearer. The term "general architecture of the treaty" was replaced by the term "general thrust of the treaty" in order to harmonize the wording with that of draft guideline 3.1.5. The term "seriousness" was replaced by the term "gravity" (in English only; this change did not affect the French text).

Draft guideline 3.1.13

Draft guideline 3.1.13 is the last one in this cluster containing guidelines illustrative of reservations incompatible with the object and purpose of the treaty, namely reservations to provisions concerning dispute settlement or the monitoring of the implementation of the treaty. The title of

the draft guideline now reads: "Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty". This came about because the word "clause" in the chapeau was replaced with the word "provision". Some other minor change involved the replacement of the words "its author" in the first line of sub-paragraph (ii) by the words "reserving State or international organization" for the sake of clarity.

The discussion in the Drafting Committee focused on two main points:

(a) In sub-paragraph (i) some members wondered whether, in stating that the provision to which the reservation relates "constitutes the *raison d'être*" of the treaty, the threshold was not placed too high. The view was expressed that there were not many treaties in which the dispute settlement or monitoring mechanism provisions constitute their *raison d'être*. Some members wondered whether a reservation relating to such provisions could be incompatible with the object and purpose of the treaty, bearing in mind the desirability of a more universal participation. It was pointed out, however, that this sub-paragraph was meant to cover exactly this category of treaties (mostly optional protocols) whose main object is a commitment to an obligatory dispute settlement or to a monitoring mechanism for ensuring treaty compliance. Several suggestions were made to replace the word "constitutes" by various other terms such as "is an expression of" [the *raison d'être* of the treaty] "participates", "contributes", "is an integral element of". After a long debate it was felt that the best would be simply to use the words "essential to" which were sufficiently clear, neutral and flexible.

However, the Drafting Committee decided to slightly modify the sub-paragraph by reformulating its beginning in order to start with the words: "The reservation …". The Committee also decided to use a phrase from the definition of reservations (draft guideline 1.1) and the sub-paragraph now reads: "The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its ***raison d'être***".

(b) The other point which the Committee discussed was whether andadditional draft guideline should follow guideline 3.1.13 relating to reservations to provisions for implementation of the treaty: Such were provisions that provided for the implementation of the treaty in internal law and were essential for the effective implementation of the treaty. It was pointed out that such provisions, although not very common, might become more frequent. The Committee, however, was of the view that at this stage there was no need for such an additional guideline. This category of reservations would be covered either by the general draft guideline 3.1.5 or draft guideline 3.1.11 on reservations relating to internal law. The commentary to either of these guidelines should mention this specific category of reservations.

Last year, one member proposed in the Plenary an additional guideline relating to reservations to provisions for implementation of the treaty. The Drafting Committee was provided with the draft text on this subject. This proposal was not formally referred to it by the Plenary. The Drafting Committee did not take an action on this proposal with the understanding that this proposal will be referred to in the commentary.

This completes my introduction of the report of the Drafting Committee and I commend the draft guidelines contained in the report for provisional adoption by the Commission on first reading.

Thank you.