

## **Reservations to Treaties**

### **Statement of the Chairman of the Drafting Committee**

**Mr. Pedro Comissário Afonso**

**3 June 2008**

Monsieur le Président,

J'ai l'honneur de vous présenter le premier rapport du Comité de Rédaction sur les Réserves aux Traités. Le rapport du Comité de Rédaction se trouve dans le document A/CN.4/L. 723.

A ses 2917<sup>ème</sup>, 2919<sup>ème</sup> et 2020<sup>ème</sup> séances les 10, 15 et 16 mai 2007 la Commission a décidé de renvoyer les projets de directives 2.6.3 à 2.6.6, 2.6.7. à 2.6.15 et 2.7.1 à 2.7.9 au Comité de rédaction et de revoir la rédaction du projet de directive 2.1.6 à la lumière de la discussion.

A sa 2940<sup>ème</sup> séance le 20 juillet 2007 elle a décidé de renvoyer le projet de directive 2.8, 2.8.1 à 2.8.12 au Comité de rédaction. Et à sa 2967<sup>ème</sup> séance le 27 mai 2008 elle a également décidé de renvoyer un nouveau projet de directive 2.1.9 au Comité de rédaction.

En tout, le Comité de rédaction a été saisi de 38 projets de directives, à savoir : 37 nouveaux projets de directives, un projet de directive déjà adopté et devant être revu.

Ces nouveaux projets de directives peuvent se diviser en quatre catégories :

1. Des directives relatives à la formulation des objections (2.6.3 à 2.6.15)
2. Des directives relatives au retrait et à la modification des objections aux réserves (2.7.1 à 2.7.9)

3. Des directives traitant de l'acceptation des réserves (2.8 à 2.8.12)
4. Un projet de directive relatif à la motivation des réserves (2.1.9)

En outre, nous rappelons que le Comité de rédaction devrait aussi considérer depuis l'année dernière sept projets de directives appartenant à deux catégories :

1. Projets de directives concernant la compétence pour apprécier la validité des réserves (3.2, 3.2.1 à 3.2.4) et
2. Projets de directives concernant les conséquences de la non validité d'une réserve (3.3. et 3.3.1)

Le Comité de rédaction a examiné jusqu'à présent quelques projets de directives relevant des objections et notamment ceux des deux premières catégories. Cependant son travail continue.

Le Comité a eu jusqu'à présent sept réunions sur ce sujet, les 6, 7, 9, 14, 16 et 28 mai 2008. Avant de présenter le rapport du Comité de rédaction je voudrais exprimer mon appréciation au Rapporteur spécial, M. Alain Pellet, dont le savoir, l'expérience et la coopération ont beaucoup facilité le travail du Comité. Je voudrais également remercier les membres du Comité pour leur participation active et leur précieuse contribution au travail du Comité.

Les deux premiers projets de directives que le Comité a commencé à examiner étaient le projet de directive 2.6.3, intitulé « Faculté de faire des objections » et le projet de directive 2.6.4 intitulé « Faculté de s'opposer à l'entrée en vigueur du traité vis-à-vis de l'auteur de la réserve ».

Au cours de la discussion le Comité de rédaction a constaté que ces deux projets de directives posaient des questions complexes relevant de la validité des objections. Il a par conséquent décidé de garder en suspens les deux projets de directives et les examiner

éventuellement l'année prochaine lorsque la Commission aura achevé l'examen des questions de validité.

Mr. Chairman,

I shall now turn to the report. You have before you {21} draft guidelines:

Draft guideline 2.1.6

The Drafting Committee had the mandate to revise, if need be, draft guideline 2.1.6 entitled "Procedure for communication of reservations" and which had been adopted in 2005.

Indeed after the adoption of draft guideline 2.6.13 "Time period for formulating an objection" it was appropriate to revisit draft guideline 2.1.6. You may recall that the third main paragraph of that guideline dealt with the date when the period during which an objection to a reservation may be raised.

The Drafting Committee considered an option presented by the Special Rapporteur and consisting mainly in deleting this paragraph which, in view of draft guideline 2.6.13 had become obsolete. This option included also the deletion of the last phrase of the previous paragraph ("or, as the case may be, upon its receipt by the depositary") since any communication relating to a reservation can only be considered as having been made upon its receipt by the State or organization.

A simplified and more concise version of this paragraph was finally adopted by the Drafting Committee expressing the same idea. This is the current second paragraph of guideline 2.1.6. The Drafting Committee agreed that the old paragraph 3 was superfluous and should be deleted. The commentary will be amended accordingly.

### Draft guideline 2.1.9

Draft guideline 2.1.9 was referred to the Drafting Committee last week after consideration by the Plenary of the note by the Special Rapporteur on that draft guideline (Document A/CN.4/586).

This draft guideline had not given rise to any debate in the Plenary and seemed to enjoy unanimous support. As it was originally proposed by the Special Rapporteur, it merely repeated *mutatis mutandis* the corresponding draft guideline 2.6.10 concerning statement of reasons for objections.

The Drafting Committee examined first the issue of whether the reasons should be part of the very text of the reservation or could be submitted later on a separate text. During the discussion, it was pointed out that the draft guideline had the character of a recommendation and consequently, even if it would be desirable to have the statement of reasons simultaneously with the text of the reservation, it would not be necessary to include this in the text of the guideline. It was also doubtful if a clear distinction could be made between the reservation proper and its reasons whenever they were found in the same text. Moreover the statement of reasons was part of the “dialogue réservataire”. The commentary could duly clarify this issue.

The second question discussed was whether the term “motives or motivation” should be used rather than the word “reasons” in all language versions.

The view was expressed that “motives” might have a wider meaning than “reasons”. However, in the end, the Committee decided to keep the current terminology as is. (“Motifs” in French and “Reasons” in English).

The Committee also decided to have in guideline 2.1.9 the exact wording, *mutatis mutandis*, of draft guideline 2.6.10 which it had adopted earlier and which I will present shortly.

The title of the guideline also remained as proposed by the Special Rapporteur “Statement of reasons”.

#### Draft guideline 2.6.5

Draft guideline 2.6.5 gave rise to a very complex and difficult debate in the Drafting Committee. The debate focused on the question of who may be the author of an objection. While there was no disagreement over the fact that contracting States and organizations may make objections, there were two schools of thought over the question of whether States and international organizations entitled to become a party to a treaty may make objections. Some members were of the view that any State or international organization entitled to become a party to a treaty could formulate objections and this idea was reflected in the original drafting as proposed by the Special Rapporteur and that the exclusion of objections made by non-contracting Parties could not be reconciled with the definition of objections as already adopted in guideline 2.6.1. Other members however felt that States or international organizations entitled to become parties to a treaty could not have the same rights as contracting parties and, therefore, could not formulate objections in the full meaning of this term. According to this view, these States could make declarations which would become objections only when the State or international organization author of the declaration becomes a contracting party to the treaty. This school of thought questioned the legal effects of such declarations. They thought that they could not be equivalent to that of objections made by contracting parties.

Both schools invoked the Vienna Convention to reinforce their arguments. For the first one the Vienna Convention was silent on that point. The fact that in accordance with Article 23(1) a reservation and an objection are communicated to States entitled to

become parties to a treaty strengthens the position that full objections may be formulated by that category of States and international organizations.

For the second one the silence of the Vienna Convention was an indication that the drafters did not mean to give the category of States or international organizations the right to make objections exactly as the contracting parties. Moreover, the supporters of this second school considered that a careful reading of Article 20 (5) of the Vienna Convention may show that objections may be formulated only by contracting parties. It followed that necessarily, any declaration by this category of States and international organizations purporting to object could not have the same legal effects as a full objection.

The current drafting of the guideline reflects the fact that the positions of these two schools of thought remained irreconcilable.

It constitutes in a way a fragile and delicate compromise which may not be entirely satisfactory for either school but it might allow nevertheless an honourable solution.

The initial drafting was relatively simple with one single paragraph composed of two short sub-paragraphs. The current drafting resulted in two paragraphs. The first paragraph states the indisputable fact that any contracting State or contracting international organization may make an objection to a reservation.

The new second paragraph deals with the question of States or international organizations entitled to become a party to a treaty. The wording of this paragraph reflects the compromise. It states that any State or international organization that is entitled to become a party to a treaty may make a declaration by which it purports to object to a reservation. However, the exact nature of such a declaration is not specified. Suffice it to say that for the adherents of the use of the term “objection” in all cases it undoubtedly constitutes an objection. The second sentence tries to give some clarity in an otherwise somewhat blurred situation by stating that such a declaration becomes an

objection within the meaning of paragraph 1 of the draft guideline at the moment the State or international organization expresses its consent to be bound by the treaty.

As a consequence of the compromise reflected in the content of the guideline, the Drafting Committee decided to change the title to simply “Author”. The Committee thought that the title as modified is clear enough since this guideline is found in the section dealing with objections; at the same time any attempt to specify it more would risk to make the title too long and cumbersome.

#### Draft guideline 2.6.6

Draft guideline 2.6.6 did not give rise to an extensive debate in the Drafting Committee. It was noted that this guideline was similar to two already adopted draft guidelines, namely draft guideline 1.1.7 {1.1.1} (“Reservations formulated jointly”) and 1.2.2 {1.2.1} (“Interpretative declarations formulated jointly”).

Suggestions were therefore made to align it with the wording of those draft guidelines. The content was not in dispute. But, finally, the Committee opted for the title “Joint formulation” following the example of the title of draft guideline 2.6.5. It is understood that this means joint formulation of objections. In the same spirit, the words “a number of States were replaced by the words “several States”. Moreover the term “nature” after the word “unilateral” was replaced by the word “character” which is now the same on both English and French versions. This of course creates a certain discrepancy with the previously adopted guidelines which should be corrected on second reading of the draft guidelines. The draft guideline is now entitled “Joint formulation”.

#### Draft guideline 2.6.7

The draft guideline was adopted as it was proposed by the Special Rapporteur. It is entitled “Written form” and addresses the question of the form in which an objection needs to be formulated. It did not give rise to any particular debate as was also the case in the Plenary.

#### Draft guideline 2.6.8

Draft guideline 2.6.8 deals with objections intending to preclude the entry into force of the treaty as between the author of the objection and the author of the reservation. The view was expressed that this draft guideline should eventually be revisited once the Commission had examined the consequences of invalid reservations. Moreover, it was felt that the wording of this draft guideline should be aligned to that of the Vienna Convention. The question was also raised as to the exact meaning of the last phrase (“when it formulates the objection”).

It was pointed out that a State or an international organization could first formulate a “simple objection” and subsequently could declare that it intended to preclude the entry into force of the treaty as between itself and the reserving State or international organization. This theory was based on the silence on that issue of the Vienna Convention. The view was also expressed that one of the purposes of the Guide to Practice was to complete and elucidate the Vienna Convention. Some suggestions were made also concerning a possible link between this guideline and guideline 2.6.13 on time period for formulating an objection .

In this connection it was noted that if the intervening period between the formulation of such an objection and the expression of the consent to be bound by the objecting State or international organization is very long, it might raise practical problems of uncertainty and legal insecurity. From this perspective it was felt that a certain time frame should be indicated in the guideline which could replace the phrase



“when it formulates the objection”. After a thorough discussion, the Drafting Committee was of the view that this intention should be definitely expressed before the treaty would otherwise enter into force between the reserving State or international organization and the State or international organization objecting to the reservation.

Lastly, the Drafting Committee decided to align the wording of the guideline with that of article 20 (4) (b) of the Vienna Convention. The word “oppose” found originally in the title and the text was replaced by the word “preclude” and the word “clearly” in the third line was replaced by the word “definitely” as in the Vienna Convention.

#### Draft guideline 2.6.9

Draft guideline 2.6.9 is entitled “Procedure for the formulation of objection” and was adopted as proposed by the Special Rapporteur without giving rise to any particular discussion.

#### Draft guideline 2.6.10

This draft guideline was adopted without giving rise to a long debate. The Committee decided simply to replace the expressions “whenever possible” (in the English version) with the term “to the extent possible”. This draft guideline is entitled “Statement of reasons”.

#### Draft guideline 2.6.11

Draft guideline 2.6.11 was extensively discussed in the Drafting Committee. The main issue focused on its relationship with the new guideline 2.6.5. It should be noted, before presenting the parameters of this debate, that this guideline addresses a situation where a State or international organization has made a reservation in accordance with guideline 2.2.1, that is to say upon signing a treaty, and is therefore subject to confirmation. At this point if a State or international organization makes an objection to

such a reservation, such an objection does not itself require confirmation once the reservation it objects to, has been confirmed.

Taking into consideration the compromise reflected in the current drafting of draft guideline 2.6.5, it was felt that guideline 2.6.11 should also encompass a similar compromise. From this point of view the initial drafting as proposed by the Special Rapporteur could not be retained. While it covered the case of an objection it left open the case of declarations made by States or international organizations entitled to become parties to a treaty and by which they purport to object to a reservation that certain members, but not all, define as being objections. The debate focused mainly on the necessity of adding something more which would cover this latter case. Some members of the Drafting Committee thought that any addition might not be necessary, since in any case, the declarations referred to in guideline 2.6.5, para 2 were subsequently transformed into objections. Some other members however were of the view that a paragraph was still needed in order to make clear that declarations referred to in paragraph 2 of draft guideline 2.6.5 (and ultimately transformed into objections) did not require confirmation either. In case that such declarations were not transformed into objections since the State or international organization which had made them did not become party to a treaty the question did not arise at all. For these members they remained purely and simply mere declarations of intention.

The Drafting Committee considered the possibility of combining both cases in one paragraph. However this exercise proved to be difficult. Consequently the best way was felt to be to add a second paragraph to the original guideline. This second paragraph essentially repeats the text of the first paragraph replacing however the term “objection” with the term “declaration formulated under draft guideline 2.6.8. (para.2).”

The first paragraph remained almost as it was originally proposed. The English text is slightly changed to make it clearer (Instead of the words “prior to confirmation of the reservation” we now find the words “before a reservation has been confirmed”).

The title of the draft guideline remained the same as originally proposed and reads “Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation”:

Draft guideline 2.6.12

In view of the adoption of draft guidelines 2.6.5 and 2.6.11, the Drafting Committee considered that draft guideline 2.6.12 entitled “Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty” did not have any more any *raison d’être*. Indeed the second paragraph of draft guideline 2.6.5 covered already this category including the non-requirement of confirmation. As a consequence of this deletion the draft guidelines 2.6.13, 2.6.14 and 2.6.15 have been renumbered. Their former numbers are in brackets.

Draft guideline 2.6.12 [2.6.13]

Draft guideline 2.6.12 is entitled “Time period for formulating an objection”

Paragraph 5 of article 20 of the Vienna Conventions partially and indirectly addresses the time period for formulating an objection to a reservation. Accordingly, the present draft guideline, which follows closely the text of paragraph 5 did not pose particular problems in the Drafting Committee. Only in the English text was the phrase “...after it is notified...” changed to “...after it was notified...” to ensure full consistency with paragraph 5.

As a consequence of the adoption of this guideline it was necessary to remove any duplication between this draft guideline and draft guideline 2.1.6, already adopted by the Commission. To remove any possible confusion, the Drafting Committee thus deleted the third paragraph of 2.1.6 as I said earlier and it also adjusted the second paragraph of that draft guideline.

Draft guideline 2.6.13 [2.6.14]

This draft guideline was also fully debated on the Drafting Committee. As you recall, the guideline concerns objections to specific potential or future reservations. The original drafting of the guideline as proposed by the Special Rapporteur was very detailed in the sense of actually repeating elements of the definition of objections (draft guideline 2.6.1). The Drafting Committee was of the view that this repetition was unnecessary and cumbersome. It simplified consequently the wording by deleting these elements pertaining to the definition of objections. It also decided to change the beginning of the guideline by substituting “an objection” to the sentence “A State or international organization may formulate an objection ...”. Thus it felt not only that the wording was more concise and elegant but also that it avoided confusion. Indeed, the original wording (“A State or international organization may formulate an objection”) raised issues of contracting States or international organizations and others entitled to become parties. Of course the Committee was aware that this general problem was already resolved in the “compromise” included in draft guideline 2.6.5. It was of the view that such clarification, if need be, should find its place in the commentary to this guideline.

It was also decided to change the title from “Pre-emptive objections to “Conditional objections” since these objections were indeed conditional depending on the actual formulation of a corresponding reservation.

Finally the Committee decided to delete the last phrase (“until the reservation has actually been formulated and notified”). The Committee, after debating this point felt that it was more accurate to state simply that such a conditional objection does not produce the legal effects of an objection without entering into more detailed description. Furthermore such effects, when the reservation would have been formulated and notified, would be the object of another part of the guide to practice dealing with effects of objections.

#### Draft guideline 2.6.14 [2.6.15]

This draft guideline is entitled “Late objections”. The Drafting Committee wondered whether these late objections should be called objections at all or rather communications or declarations made outside the established time period. After some debate the Committee decided to maintain the term “objections” both in the title and the text of the draft guideline, on the understanding that this guideline would eventually have to be revisited after the proper consideration of the effects of objections by the Commission. The term objection as defined in draft guideline 2.6.1 in conjunction with the period during which they could be formulated (as stated in draft guideline 2.6.13). was deemed to cover such late communications or declarations for the time being. It was also pointed out that the term “communications” referred rather to a process than to the objection or declaration itself.

As finally adopted this draft guideline is identical to the one proposed by the Special Rapporteur.

Currently the draft guideline states that such late objections do not produce the legal effects of an objection made within the time period specified in guideline 2.6.13. It leaves open the question of its possible legal effects, if any. Such effects would be considered at a later stage (dealing with effects).

#### Draft guidelines 2.7.1, 2.7.2 and 2.7.3

These three draft guidelines are the first ones in the section 2.7 dealing with withdrawal and modification of objections to reservations. The first one, draft guideline 2.7.1 is entitled “Withdrawal of objections to reservations” and was adopted without much debate as originally proposed by the Special Rapporteur. This draft guideline repeats verbatim Article 22 para. 2 of the Vienna Convention on the Law of Treaties. Draft guideline 2.7.2 is entitled “Form of withdrawal”. Again its wording was not changed from the original proposal and repeats article 23 (1) of the Vienna Convention.

Draft guideline 2.7.3 is entitled “Formulation and communication of the withdrawal of objections to reservations”. It simply states that draft guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations. It should be recalled that guideline 2.5.4 deals with the formulation of the withdrawal of a reservation at the international level, guideline 2.5.5 with the absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations and guideline 2.5.6 with the communication of withdrawal of reservations. Again draft guideline 2.7.3 did not give rise to any substantive debate, did not present any problem and was adopted as proposed by the Special Rapporteur.

#### Draft guideline 2.7.4

This draft guideline did not raise any particular problems. The only issue was whether the withdrawal of an objection has any specific effects which should be mentioned. It was felt however that these effects were sufficiently complex not to be dealt with in this section. The surest way to treat this issue was simply to assimilate the withdrawal of an objection to a reservation with the acceptance of reservation and to specify that in the title.

The question was raised whether something about the time of this effect should be mentioned in the guideline but it was pointed out that draft guideline 2.7.5 specifically deals with this matter.

The only changes were of a drafting nature. The words “on reservation” were added to the title after the word “Effect”.

In the text itself the words “or an international organization” were added after the word “State”. The words “earlier against” (in the English version) were considered to be redundant and were deleted.

The title of the guideline now reads “Effect on reservation of withdrawal of an objection”.

#### Draft guideline 2.7.5

This draft guideline did not cause any problems either. It more or less repeats Article 22 (3) (b) of the Vienna Convention. It has been maintained as originally proposed by the Special Rapporteur. Its title is “Effective date of withdrawal of an objection”.

There were some questions raised about its correct placement but the Drafting Committee decided to keep it in its current place.

#### Draft guideline 2.7.6

This draft guideline deals with cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation. The only changes from the original wording of the Special Rapporteur concern the replacement of the words “takes effect” by the words “becomes operative” and the addition of the words “international organization” after the word “State”. As far as the first change is concerned the commentary to this guideline should indicate that fidelity to the Vienna Convention has caused the use of the words “becomes operative” which in fact should be taken as meaning “takes effect”.

#### Draft guideline 2.7.7

This draft guideline is entitled “Partial withdrawal of an objection”. The main issue which was already mentioned during the debate in the Plenary concerned the suitability of keeping the second sentence on the effects of partial withdrawal in this guideline. It had been observed that this sentence was more related to draft guideline 2.7.8. The Drafting Committee agreed with this approach and decided to transfer the sentence to the next guideline. The other minor changes took place in the last sentence:

- a) The word “total” was replaced by the word “complete” before the word “withdrawal”.
- b) The term “takes effect” was again replaced with the term “becomes operative” for reasons of conformity with the Vienna Convention. The commentary again should explain that the meaning of this term is really “takes effect”.

#### Draft guideline 2.7.8

This draft guideline is entitled “Effect of a partial withdrawal of an objection” and remains unchanged with the exception that, as mentioned earlier, the Drafting Committee decided to transfer the second sentence of draft guideline 2.7.7 to draft guideline 2.7.8. The result of this merger is again one sentence – since some elements were repetitive. Otherwise the substance of this guideline remains the same as originally proposed.

#### Draft guideline 2.7.9

This draft guideline was the subject of an extensive debate. The main points of that debate had already their roots in the debate in the Plenary when it became obvious that a number of members of the Commission considered that the wording of this guideline was too categorical and absolute; according to this school of thought, since objections may be made during the 12-month period, nothing prevented States and international organizations from making subsequent objections widening the scope of the previous objection.

According to the other view, it was not possible to widen subsequently the scope of objections. This was the sense of the guideline as originally drafted. The reason was that such a widening could jeopardize the security of treaty relations, especially in case of objections with maximum effect, that is to say those that prevent the entry into force of a treaty between the author of the reservation and the author of the objection. It was pointed out that if such an objection had not been made at the time when the objection was originally formulated, the treaty had already entered into force between the reserving



State or international organization and the objecting State or international organization. It would be therefore quite detrimental to treaty relations to have at a later stage such an objection with maximum effect. The Committee had an interesting debate during which it became obvious that these two schools of thought stemmed from different interpretations of article 23, para. 3 of the Vienna Convention.

The adherents of the absolute prohibition of the widening of the scope of the objections claimed that this article should be read in conjunction with article 20, para. 5. However a common point could be found in the two schools of thought: both agreed that an objection with maximum effect, e.g. affecting treaty relations between the author of the reservation and the author of the objection should not be made subsequently.

The draft guideline was therefore worded in a manner reflecting this consensus. In its current form it states that a State or an international organization which has made an objection to a reservations may widen the scope of that objection during the 12 month-period provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection, that is to say essentially precluding the entry into force of the treaty between the two parties. The title of the draft guideline remained the same: “Prohibition against the widening of the scope of an objection to a reservation”.

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